

PUBLIC HEARING
BOARD OF ZONING APPEALS
March 19, 2009

The Austintown Township Board of Zoning Appeals held a Public Hearing on Thursday, March 19, 2009, at the Township Building, 82 Ohltown Road, Austintown, Ohio, for consideration of Appeal Cases 2009-01-A-Continued and 2009-02-A-Continued.

The following Board members were in attendance:

Mr. Robert Satterlee – Chairman
Mr. Joseph Koch – Vice-Chairman
Dr. Thomas Stellars
Mrs. Dawn Owens
Mr. William Glaros

Chair Satterlee opened the public hearing at 7:03 P.M. All testimony in the following cases given under oath or affirmation. Court Reporter in attendance, complete transcript taken of the hearing.

Motion by Mr. Glaros to **APPROVE** the minutes of the March 5, 2009 meeting. Seconded by Dr. Stellars.

Roll call vote: Dr. Stellars - YES; Mr. Glaros – YES; Mrs. Owens – YES; Mr. Koch – YES; Mr. Satterlee – YES.

APPEAL CASE 2009-01-A-Continued

Atty. Sebastian Rucci, 40 The Ledges, Suite 3C, Youngstown, Ohio, 44514, on behalf of Chartur Corporation, dba “The Go Go”, 5455 Clarkins Drive, Austintown, Ohio, 44515, appeals from the decision of the Austintown Township Zoning Inspector and alleges error in the issuance of a letter of violation dated December 14, 2008 referencing Article I-Definitions-Sign, Article XVIII-Signs, Section 1806-Temporary Signs, Section 4-Temporary Accessory Signs, and Article XIX-Sexually Oriented Businesses, Section 1905-Sign Regulations For Sexually Oriented Business, of the Austintown Township Zoning Ordinance, as amended through May 24, 2007, requiring the on-premise sign placed at the northeast entrance of the parking lot near the Clarkins Drive right-of-way be removed and all advertisements attached to a blue Ford commercial truck (License Plate PGJ 8039) be removed from the property and further stating no other portable advertisements will be permitted for the adult cabaret located at 5455 Clarking Drive. If the Board of Appeals affirms the issuance of the letter of violation the applicant requests a variance from the above referenced articles to allow the signage to remain as placed.

Said property is further described as Lot No. 4, Clarkins-Youngstown Plat No. 1, is located on the south side of Clarkins Drive, approximately 478 feet east of the North Niles-Canfield Road-Clarkins Drive intersection; and is zoned as a Business B-2 District in Austintown Township, Mahoning County, State of Ohio.

APPEAL CASE 2009-02-A-Continued

Atty. Sebastian Rucci, 40 The Ledges, Suite 3C, Youngstown, Ohio, 44514, on behalf of Chartur Corporation, dba "The Go Go", 5455 Clarkins Drive, Austintown, Ohio, 44515, appeals from the decision of the Austintown Township Zoning Inspector and alleges error in the issuance of a letter of violation dated December 14, 2008 referencing Article XI-Business B-2 District, Section 1110-Lighting, of the Austintown Township Zoning Ordinance, as amended through May 24, 2007, requiring the use of spotlights directed towards the sky be discontinued at the adult cabaret located at 5455 Clarkins Drive. If the Board of Appeals affirms the issuance of the letter of violation the applicant requests a variance from the above referenced article to allow the use of lighting that is not directed downward towards the business parcel. Said property is further described as Lot No. 4, Clarkins-Youngstown Plat No. 1, is located on the south side of Clarkins Drive, approximately 478 feet east of the North Niles-Canfield Road-Clarkins Drive intersection; and is zoned as a Business B-2 District in Austintown Township, Mahoning County, State of Ohio.

Zoning Inspector Darren Crivelli read the applicant's submitted letter as follows:

SEBASTIAN RUCCI
Attorney and Counselor at Law
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Tel: (330) 707-1182
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Austintown Township Board of Zoning Appeals
90 Westchester Drive
Austintown, OH 44515

Dear Chairman and Members of the Board of Zoning Appeals:

Please consider this letter an appeal by the tenant and landlord of 5455 Clarkins Drive to two separate determinations by Zoning Inspector Darren Crivelli that the search lights are in violation of Art. XI § 1110 because the focus of the lighting is not downward toward the business parcel, and an appeal to the determination in a separate letter that the on-premise sign at the entrance to our parking lot and the commercial truck advertising the business are in violation of Art. XI § 1110 because the focus of the lighting is not downward toward the business parcel, and an appeal to the determination in a separate letter that the on-premise sign at the entrance to our parking lot and the commercial truck

advertising the business are in violation of Art. XIX § 1905. Enclosed is payment of \$300.00 for the combined appeal.

TWO VIOLATION LETTERS FROM TOWNSHIP

The letter from Zoning Inspector Crivelli regarding the search lights (see first two pages of Exhibit 1) states in part that the “spotlights are being **directed from the building towards the sky** and revolving so as to attract attention of the motoring public.” The letter further states that this violates Zoning Art. XI § 1110 and asks “that the use of the spotlights directed towards the sky be discontinued immediately.” The letter from Zoning Inspector Crivelli regarding the signs (see last five pages of Exhibit 1) states in part that the on-premise sign with the words “The Go Go” at the northeast entrance to the property violates Art. XVIII § 1806. Also, the truck at the northwest corner of the parking lot with signs stating “The Go Go * Sports Bar * Nite Club * Cabaret * Comedy Club” violate Art. XIX § 1905 and Art. XVIII § 1806.

RIGHT TO APPEAL TO BOARD OF ZONING APPEALS

Both letters from Zoning Inspector Crivelli states “if you believe there is error in this determination or have grounds to request a variance to allow the use spotlights, you do have the right to file an appeal to the Austintown Township Board of Appeals.” More specifically, Township Zoning Code Art. IV § 408 provides that “Appeals to the Board of Zoning Appeals concerning interpretation or administration of this ordinance may be taken by any person aggrieved or affected by any decision of the Zoning Inspector.”

Ohio Rev. Code § 519.14(A) titled “Powers of township board of zoning appeals” provides that the “township board of zoning appeals may hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official . . .” Ohio Rev. Code § 519.14(B) allows the board of zoning appeals to issue a “variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done.”

Please consider this letter an appeal pursuant to Township Zoning Code Art. IV § 408 and Ohio Rev. Code § 519.14. We are appealing the determination of Zoning Inspector Crivelli because we respectfully believes that the determination that the search lights and signs are in violation of the zoning code is in error. Alternatively, if the board of zoning appeals determines that the determination is not error, we respectfully ask the board to issue a variance to permit the search lights and the signs to continue as presently installed.

BACKGROUND ON SIGNAGE

The location at Route 46 and Interstate 80 now occupied by the GoGo is more

commonly known as 5455 Clarkins Drive. The building was formerly occupied by a restaurant (Pasquale's) and bar (the Blue Room). The building was vacant for about five years until the Township issued the GoGo an occupancy permit on July 31, 2007 to operate an adult cabaret at 5455 Clarkins Drive (see Exhibit 2). The GoGo expended over \$3/4 Million in improvements and opened it's doors twelve months ago on December 26, 2007.

The GoGo is a multi-use adult entertainment facility and includes a cabaret, sports bar, restaurant, night club and comedy club (see interior pictures as Exhibit 3). The interior has over three dozen televisions, state of the art lighting and sound system, a stage, a dance floor, a full service kitchen. The GoGo has adult entertainment, along with dancing, karaoke, digital game competitions etc.

Before opening its doors the GoGo painted the existing satellite dish with the face of a female, and installed signs on the hotel face with the name of the business (see Exhibit 4). The Township cited the business for painting the satellite dish and installing the name on the side of the hotel. These issues are now before the court of appeals. However, during the trial the GoGo agreed to paint the back of the satellite dish to remove its name, and further agreed to remove the fence that was bordering the property, as one of the Township trustees stated in the newspaper that they did not like the painted fence. Also, the signs on the hotel face were removed. Without any signage, customers repeatedly called the club stating that they could not find the business. The GoGo was located at its present location because the Township zoned the property for adult use.

The GoGo has frontage on three roads (I-80, Route 46 and Clarkins Drive) however the entrance door fronts on Clarkins Drive, which is a service entrance roadway to two other businesses. Clarkins Drive has very limited traffic. On the other hand, the combined traffic that travels Route 46 and Interstate 80 is well over 60,000 cars per day. Quite simply, like other business, the GoGo desired signage on Interstate 80 and Route 46. Having 60,000 cars drive past the business is of no moment if noone knows you are at that location. Simply put, the GoGo was located at the northeast corner of Route 46 and Interstate 80, because this area was zoned by the Township for adult use, and because the combined traffic that travels this location is attractive to any business desiring ease of access.

The GoGo approached the Township zoning staff about working out a resolution with at least one sign on the property. After months passed without any resolution, the GoGo located signs on a truck at the edge of its parking lot facing Route 46 with the name of the business on the truck (see last page of Exhibit 1). The signs did not display any nudity. The sign included the names of the multi-uses available at the GoGo, including a cabaret, sports bar, night club, comedy club and restaurant. The GoGo also installed search lights on its roof at substantial expense in an effort to allow customers to find the business.

UNEQUAL APPLICATION OF SIGN ORDINANCE

The Township has objected to the signage from the GoGo on four separate

occasions. Two of the prior objections are now on appeal (two objections remain now before this board). However, the Township has allowed other business to enjoy extensive signage without any objection.

Two other adult businesses in the Township display extensive signage without objection by the Township (see Exhibit 5). The GoGo signs state only the business offered at the location including “night club” and “cabaret.” The Township finds this to be a violation, yet substantially larger signs including a 600 square foot billboard stating “topless” and “nude” and “adult video” are allowed by other adult businesses (Compare GoGo signs in Exhibit 1 with the signs of other businesses in Exhibit 5).

Similarly, the satellite dish with only the face of a female was objectionable, yet the outline of nude female on a billboard is permitted by other businesses (Compare picture of satellite dish in Exhibit 4 with signs of other businesses in Exhibit 5 and 8). All that is necessary to observe the dissimilar treatment is normal vision, a fundamental understanding of the equal protection clause is not required.

ANALYSIS REGARDING SEARCH LIGHTS

The letter from Zoning Inspector Crivelli’s regarding the search lights states that the search lights violate Zoning Ord. Art. XI § 1110 because the “the use of the spotlights [are] directed towards the sky.” The text of Zoning Ord. Art. XI § 1110 is divided into two sentences, the first sentence provides that the lighting of a “business parcel shall not constitute a nuisance nor impair safe movement of traffic on any street or highway.” The second sentence provides that the “focus of all lighting shall be downward, directed towards the business parcel.” The letter from Zoning Inspector Crivelli disregards the first sentence and focuses solely on the second sentence. We respectfully believe that the only logical interpretation of Art. XI § 1110 is that lights which are not directed downward can only be a nuisance if they impair traffic safety.

Other commercial properties in the Township are lighted with lights facing upward, yet they are not cited for violations. Lights at the Comfort Inn adjacent to the GoGo shine upward, the lights also shine upward at the Sleep Inn Motel on Route 46, the Home Savings and St. Elizabeth’s Hospital on Mahoning (see Exhibit 6).

The letter from Zoning Inspector Crivelli states that the “spotlights are being **directed from the building towards the sky** and revolving so as to attract attention of the motoring public.” The search lights are clearly used to attract attention. However, this is the same reason that every business in Austintown spends money on lighting. To light their property to attract attention. The car dealerships on Mahoning Avenue, including Bob and Chuck Eddy’s and Greenwood Chevrolet light up their property with lighting equivalent to that used at a baseball stadium (see last five pages in Exhibit 6) and well above the wattage used by the search lights at the GoGo.

The GoGo is located at Route 46 and I-80, this is arguably the busiest intersection

in the Township. The property has roadway frontage on three streets (Clarkins Drive, Route 46 and I-80). The intersection is heavily lighted by the state highway lights and by surrounding businesses. No residential houses are located adjacent to the property. The lights do not point towards any business and are in fact directed upward away from other properties and from traffic.

It is true, the lights attract attention, however, that is the very purpose of any search lights. The car dealerships on Mahoning Avenue have spend tens of thousand of dollars on lighting to similarly attract attention. The GoGo is located in a zone that specifically permits adult cabarets. Moreover, the renovations at the business have cost upwards of \$3/4 Million, it is unfathomable to deny the permitted business signage as enjoyed by every other business in town. The placement of lights which attract customers is not a nuisance under any definition of the word.

ANALYSIS OF TRUCK AND ENTRANCE SIGN

The letter from Zoning Inspector Crivelli regarding the signs states that the “on-premise sign at the entrance to the parking lot and the commercial truck with said attached advertisements being used to attract attention to the adult cabaret” are in violation of Art. XIX § 1905.1 which provides that signs for a cabaret shall be “wall signs” with a maximum “sign area of 40 square feet.”

The interpretation that the GoGo is an adult use disregards the non adult uses that encompass the GoGo including the sports bar, comedy club, restaurant and night club. These uses are not the adult uses. See Art. XIX § 1901 paragraph 3 which defines “Adult Cabaret” to mean an “commercial establishment that regularly features . . . live entertainment of an erotic nature including exotic dancers, strippers . . .”

The GoGo Night Club has a completely separate and hosts karaoke, and video competitions (Maden and Guitar Hero) on the two dozen plasma TV’s and has drinking at the bar and dancing on the lighted dance floor (see page 1 of Exhibit 3). The dancing and drinking is similar to the dancing and drinking that happens at the Wedge, Odonnel’s and other similar establishments in the Township. Clearly, they are not placed in the adult cabaret category, and neither should the GoGo Nightclub.

Austintown Zoning Ord. Art. XVIII § 1805-3 provides that “Individual business parcels, community shopping centers, plazas, strip plazas, or malls located on a corner lot shall be permitted to place two free standing, ground supported identification signs on a business/industrial parcel, one sign on each street frontage at an entrance.” The GoGo has frontage on three streets (Clarkins Drive, Route 46 and I-80) and the sign regulations permit a sign on each road. The entrance sign with the words “Economy Inn” and “the GoGo” is clearly permitted under Art. XVIII § 1805-3 (“one sign on each street frontage at an entrance.”)

If the satellite dish is considered one sign, it faces Interstate 80, the truck at issue

in this appeal faces Route 46 and the entrance sign at issue in this appeal faces Clarkins Drive. This complies with Art. XVIII § 1805-3 which permits one sign on each street frontage. A short drive through any commercial roadways in the Township confirms that all businesses have at least one sign along their commercial roadways. Some adult business are even allowed four separate entrance signs with only one road frontage (see signs for Club 76 at Exhibit 5).

The satellite dish was installed over a quarter century ago when the hotel was first build. The picture was painted at the request of the GoGo as a marquee. Other businesses in town have used structures as marquees. For example, the car located outside the Quaker State and Lube building is a marquee (see Exhibit 7). Not surprisingly the car was permitted without a permit. It is also noteworthy that the face of the female on the satellite dish is no different than the pictures found at any hair salon in the Township (Compare Exhibit 4 with last two pictures in Exhibit 7).

The letter from Zoning Inspector Crivelli that the GoGo's signs are limited to "wall signs" with a maximum "sign area of 40 square feet." However, as noted above other adult business have signage measuring well over six hundred square feet at multiple locations with only one street frontage (Compare picture of entrance sign found second to last page of Exhibit 1 with the signs in Exhibit 5). The Township's limitation on signage appears to only be applied to the GoGo.

The GoGo has frontage on three streets, yet they are denied a sign. A simple drive by other adult uses confirms the obvious misapplication of the code, other adult uses violate the very issues the GoGo is cited under threat of criminal prosecution. Surely the Austintown zoning code is not that malleable to apply different textual interpretations to different users. The GoGo is only asking for similar treatment, not special treatment.

It is also relevant to point of that on August 21, 2006 the United States Court of Appeals for the Eighth Circuit held in *Passions Video, Inc. v. Nixon*, 458 F.3d 837 (8th Cir 2006) that a similar restriction on the signage for adult oriented business was unconstitutional (the opinion is attached as Exhibit 8 with the authors highlights). The ordinance at issue in *Passions Video* prohibited billboard and exterior advertising for adult cabarets. The Court of Appeals held that this affected the adult "business's speech; it threatens criminal prosecution for the mere inclusion of the name or address of an affected business on billboards within one mile of a state highway. . . The prohibition is directed at speech beyond that which would lead to the stated secondary effects, and is not narrowly tailored to achieve Missouri's stated goal." *Id.* at 842. The Court of Appeals found the statute unconstitutional and prohibited its enforcement.

The Austintown sign regulations are even more restrictive than the regulations found unconstitutional in *Passions Video* which applied only if the adult use was located near a state highway. The absolute prohibition against any form of off-site advertising impedes the free flow of information and far exceeds any legitimate interest used to regulate adult uses. The denial of any signage to the GoGo is unconstitutional. Moreover, the unconstitutionality in this instance includes the fact that the regulations are being

administered in an unequal manner.

The letter from Zoning Inspector Crivelli regarding the signs states that the truck is not a temporary structure. However, the truck is located in the parking lot and only lighted at night. The truck signage is no different than the many vehicles that are parked at local businesses in the evening advertising the business. The letter from Zoning Inspector Crivelli states that “In checking the records of the Zoning Office, no zoning permit was issued allowing construction of said sign.” The sign was installed well over a quarter century ago when the hotel was first constructed. The sign was updated when the GoGo lease the building. The Township cited the GoGo for zoning violations over one year ago. It is difficult to understand how, or perhaps why, the sign which was clearly visible during when the satellite dish was cited for violation over one year ago, is now cited for violation.

ALTERNATIVE REQUEST FOR VARIANCE

Ohio Rev. Code § 519.14(B) titled “Powers of township board of zoning appeals” provides that the township board of zoning appeals grant a “such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done.”

In the alternative if this board determines that the text of the zoning regulations are interpreted correctly in Zoning Inspector Crivelli’s letters, we respectfully seek a variance from the same, as the literal enforcement of the zoning ordinance will result in unnecessary hardship by denying the GoGo the ability to attract customers with signage or lighting. As noted above the sign at the entrance was installed over a quarter century ago when the hotel was built. Also as noted above all businesses are permitted at least one sign on each road frontage, and the requested signs for the entrance sign and the truck sign conform to the one sign per street frontage requirement. Extensive signage and lighting is enjoyed by every business in Austintown, except for the GoGo. A variance is not contrary to the terms of the zoning resolution, and a variance is not contrary to the public interest because a literal enforcement of the zoning resolution will result in unnecessary hardship. The attached exhibits confirm that the spirit of the ordinance is not impacted and that extensive use of signage and lighting is enjoyed by every other business in Austintown and the present use of signage and lighting at the GoGo is not contrary to the public interest. Moreover, the request complies with the spirit of the zoning ordinance because it permits signs for multiple uses.

We respectfully believe that enforcing a ban on the lighting is unequal treatment and respectfully ask to continue our business with the existing signage and with the search lights on so that potential customers may find our business. In the alternative if this board disagrees, we resentfully ask for a variance to continue the use of the existing search lights and signage.

Respectfully submitted,

Sebastian Rucci

Zoning Inspector Crivelli referenced two letters of violation dated December 14, 2008 addressed to Mr. Rucci and Mr. Neil regarding signage and spotlight violations with accompanying photographs, the case mailing list, a plat map, and an ortho map.

Chairman Satterlee stated the mailing list of those property owners notified for the cases would be incorporated into the case record.

Atty. Sebastian Rucci, 40 The Ledges, Suite 3C, Youngstown, Ohio 44514 thanked the Board for resetting the hearing due to his illness. He stated he would speak not just as an attorney but also from personal knowledge. Stated that friends of his wanted to open a cabaret business and he studied the issue about twelve years ago with a professor while in law school. They looked for a suitable locations, the first attempt was Brudders, which declined. They then found the current location and confirmed with the previous Zoning Inspector that it was a Business B-2 District and allowed for this type of use. From there they invested money to fix up the building. They made errors in the beginning, which led to litigation with the Austintown Fire Department, which was eventually resolved. In the summer an artist was hired and had taken ten days to paint the satellite dish and \$8,000.00 was spent on the "banner" signs placed on the building. When the Township objected to the signage, they removed the banner signs and litigated that satellite dish sign which is now before the appeals court. He reached out to have a discussion with the previous Zoning Inspector on the signage issue and eventually met with Darren Crivelli to attempt an agreement on a sign for the cabaret after numerous e-mails. His goal was to obtain one sign. When the business first opened there were very few customers for the first eight months which was perhaps due to lack of signage and lighting. Customers stated in e-mails they could not find the business. A small sign was placed at the entrance but was taken by someone. They then put signage on the truck that was parked out front and installed the spotlights. Stated the spotlights were expensive to rent, about \$2,000.00 per weekend. He stated the sign regulations for sexually oriented businesses should not apply to the nightclub-sports bar use as the GOGO is a multi-use facility. Atty. Rucci than submitted the following:

Exhibit 9: A photo of a large semi-trailer across the street from the GOGO with advertising;

Exhibit 10: A photo of a trailer at the former Country Gardens on Mahoning Avenue;

Exhibit 11: A photo of a trailer parked near the Zoning Office;

Exhibit 12: A photo of a bus at the Voodoo Lounge;

Exhibit 13: A photo of a pick-up truck with advertising for Monroe Muffler; and

Exhibit 14: A photo of a pick-up truck with advertising for Midas Muffler.

Mr. Satterlee stated the vehicles in the photos submitted by Atty. Rucci are all commercial vehicles that are road worthy and used by those particular businesses. He

stated Atty. Rucci's truck does not appear to be a usable truck, the signs are screwed on, electrical extension cords are used for the attached spotlights to illuminate the signs, and the truck does not appear to be used in the daily operation of the business. The Midas truck is licensed and is driven on the road. The same with the Voodoo bus which is road worthy and used for business purposes. He questioned if the GOGO truck was licensed or road worthy. He further stated that with the exception of one picture the exhibits are not good examples to show the Township is "picking" on the GOGO.

Atty. Rucci stated the truck was licensed and operational, but did not disagree that the purpose of the truck was their attempt to use it for advertising. He stated a lot of money was spent on the business and it was an attempt to secure advertising. The truck as an advertising device and has had marginal success. It was not acquired to be used for road service.

Mr. Satterlee stated that he has not seen the truck out front during evening drive-bys. Atty. Rucci stated that it was parked at the back of the building after receipt of the letter of violation from the Zoning Inspector and stated he was advised by e-mail that if an appeal was filed there would be a stay in the enforcement process until this is all resolved. Stated his goal was to bring it out front again until an agreement could be reached for a permanent sign. Stated they also began construction on a permanent sign, but removed it after Darren Crivelli advised that it was in public right-of-way and wasn't permitted under the zoning regulations.

Mr. Koch asked the position of the Township regarding the semi-trailer. Zoning Inspector Crivelli stated that as long as it was operable and being used the Township would have no objections. If it appeared not to be used the tires could be marked with chalk and rechecked a week later to see if there was movement. Inspector Crivelli stated his first concern on a complaint of this nature would be if the trailer was being used for storage, which is no longer permitted by the Township, although a number of storage trailers exist that were in use prior to the trailer storage prohibition amendment.

Mr. Satterlee inquired about the differences between signage for commercial business and signage for sexually oriented business. Inspector Crivelli stated there were two separate signage sections and there appears to be a "disconnect" between Atty. Rucci and himself regarding application of the sign ordinance. Atty. Rucci stated there is multiple uses that should be considered. Mr. Satterlee stated the multiple uses all fall under one roof and are all related to the GOGO versus a courtyard type setup that for example had one area for food and another for a cabaret. Mr. Rucci stated he understood Mr. Satterlee's logic and asked that he examine the issue from that perspective and realize the "hardship" and grant a variance to allow for signage that at a minimum has the name of the business and nothing else that would be considered offensive.

Mr. Rucci stated he didn't believe lighting should be a zoning issue as building inspections better regulates it. He stated the lighting was not a nuisance. Mr. Satterlee stated the lights were a distraction, especially the movement of the lighting as one drives on the freeway. Mrs. Owens stated she could see the lights from her residence, which is

four miles south on Rt. 46 and stated the lights are a distraction. Atty. Rucci stated the lights came from China and one is always broken, thus, there is usually one light that is stationary and he would be willing to leave the lights in a stationary position. Mr. Satterlee stated the exhibits provided with the case showed lights directed upwards towards buildings but those are security lights. Mrs. Owens inquired about the angle of the lights and Atty. Rucci explained how they operated. Dr. Stellers stated the search lights are not for security but are being used for signage. Mr. Koch stated the point here is the lights don't affect just the immediate area as he can see them from his residence three miles away and they are distracting.

Dr. Stellers noted that if you apply the sign regulations for business districts the GOGO doesn't meet the entrance requirements for placement of a sign. His only entrance is on Clarkins Drive and stated he had to have been aware of the regulations prior to opening the business.

Atty. Rucci thanked the board for the opportunity to make a presentation and stated he would not take issue with the Board's concerns but asked them to ultimately look at the issue from his perspective as a business owner who needs signage to operate.

No one else present in support of the request.

Zoning Inspector Crivelli provided the following testimony:

Atty. Rucci claims dissimilar treatment of the GOGO as compared to two other SOB-Club 76 and the Babylon. He states two other prior signage objections are on appeal. A judgement entry was entered in Mahoning County Court No 4, Austintown, Ohio on September 2, 2008 by the Honorable Judge David A. D'Apolito regarding Case Nos. 2008CRB 41 and 2008 CRB 222, State of Ohio, Plaintiff vs. Chartur Corporation, Defendant. Judge D'Apolito found Chartur Corporation, aka the GOGO, guilty of two zoning violations relating to the ATZO, specifically, the sign regulations. This conviction does not support Atty. Rucci's claim of **dissimilar treatment or a violation of the equal protection clause**. That argument was rightly disregarded by Judge D'Apolito (Exhibit A: Judgement Entry from Mahoning County Court No 4).

Furthermore, Club 76 and the Babylon predate the current SOB regulations as stipulated in the ATZO. This is evidenced by a ruling by the Honorable Magistrate Judge George J. Limbert of the United States District Court, Northeast District of Ohio, Eastern Division in a judgment entry dated February 28, 2002 in the cases of Ellinos, Inc., dba Club Babylon-Plaintiff vs Austintown Township-Defendant and Leber, Inc. dba Rebel Lounge-Plaintiff vs. Austintown Township-Defendant, wherein Judge Limbert ruled that the defendant's Zoning Ordinance regulating zoning is unconstitutional as applied to SOB's, including the two plaintiffs establishments. The Rebel Lounge now operates as Club 76. Club 76 and the Babylon are construed as non-conforming businesses by the zoning office. Atty. Rucci's argument that these two clubs are permitted more signage than what is permitted for the GOGO is irrelevant as these business and their signage

existed prior to the adoption of the current SOB regulations (Exhibit B: Judgment Entry from United States District Court, Northeast District of Ohio, Eastern Division).

The zoning office does note for the record that Club Babylon does not have a free-standing pylon sign, and if at some point in the future they should make application for a zoning permit to allow for the placement of an on-premise free standing pylon sign, that application will be denied based on **ARTICLE XIX-SEXUALLY ORIENTED BUSINESSES, Section 1905-SIGN REGULATIONS FOR SEXUALLY ORIENTED BUSINESSES-paragraph "1"** (Exhibits C1-4: Four photos from the exterior of Club Babylon).

Also, in a letter issued to Leber Real Estate, Ltd dated September 20, 2007, former Zoning Inspector Michael P. Kurilla, Jr. issued a determination regarding the relocation of an existing adult book store within the building located at 5335 76 Drive. This letter serves as further evidence that even though Club 76 predates the current restrictions; the zoning office is still attempting to enforce the regulations where appropriate for the non-conforming SOB business. There is no disparity in how the three established SOB's are treated and no violation of any equal protection clauses Atty. Rucci may choose to site. In addition, former Zoning Inspector Michael P. Kurilla, Jr. issued a letter to Atty. Martin Yavorcik on October 16, 2007 referencing the sign limitations for SOB's. Atty. Yavorcik never commented on the sign restrictions on behalf of his client the Chartur Corporation dba as the GOGO (Exhibits D – Leber Real Estate Ltd. letter of determination from Michael P. Kurilla, Jr, Austontown Townshioip Zoning Inspector & E – Letter to Austintown Zoning from Atty. Yavorcik requesting certificate of occupancy for the GOGO).

Letters of zoning violation were also issued to two other businesses in December, 2008 and January, 2009 for using vehicles as advertising devices. These letters of violation are further proof that the GOGO is not being singled out by the zoning office for dissimilar treatment (Exhibits F 1-3: Perkins Family Restaurant letter and photograph and Exhibits G 1-3 Tropitan letter and photograph).

Atty. Rucci also states that he is entitled to the same signage that any other business in Austintown would be entitled to that is located on a **corner lot**. Atty. Rucci correctly points out that the GOGO has frontage on I-680, North Niles-Canfield-Niles Road, and Clarkins Drive. As depicted in the satellite photograph, the restaurant is the corner lot, not the property housing the GOGO. In addition and once again, Atty. Rucci ignores the relevant sign regulations for SOB's (Exhibit H: Satellite photograph of the subject area depicting the corner lot as Salsitas Restaurant). Even if the GOGO were a corner lot they do not meet the entrance requirement as Dr. Stellers has already pointed out.

Atty. Rucci states that the car dealerships use lighting equivalent to that used at baseball stadiums and well above the wattage used by the search lights. The car dealerships mentioned have in fact installed drop down lighting fixtures as seen in these exhibits. The focus of the lighting is downward and the lighting is clearly effective in providing well-lit parking lots during the nighttime in order to reduce the potential for theft of

vehicles, vandalism, or other potential criminal activity. According to Atty. Rucci, the GOGO has spent approximately 3/4 million dollars on upgrades, but other than the spotlights which have no value regarding safety, the owners and management of the GOGO clearly want to keep their parking lot as dark as possible, even given the documented secondary negative effects associated with SOB's. They clearly have made no effort to light their parking lot during evening hours. It would appear they don't wish to provide a safe environment for their employees who are mostly young women and/or they condone any potential criminal activity being conducted within the extremely dark parking lot during evening and late-night business hours (Exhibits I 1-10: Photos of Greenwood Chevy Hummer depicting drop down light fixtures).

Atty. Rucci also provides pictures of other business that have employed ground-mounted lighting that is directed towards landscaping or buildings. At no location he photographed do any of the lights project beyond the walls of given building or a landscaped area. The lighting appears to be for security and aesthetic purposes. The lighting is all contained within the buildings photographed.

Atty. Rucci alleges that the zoning office disregards the non-adult uses including a sports bar, comedy club, and restaurant. Exhibit 2 in his application for appeal is a Certificate of Occupancy issued by than Austintown Township Zoning Inspector Michael P. Kurilla, Jr. for the operation of an adult cabaret in conformance with the provisions of Articles XIX-Sexually Oriented Businesses, Sections 1900-1908 of the ATZO, as amended through May 24, 2007. This certificate of occupancy was issued after receipt of a letter dated July 10, 2007 from Atty. Martin E. Yavorcik requesting an occupancy permit to operate an adult cabaret as defined by the ATZO. The letter stated they were only doing minor renovations to the existing floor plan, and the proposed use was a minimum of 500 feet from a church school or residence. No mention was made by Atty Yavorcik of a restaurant, sports bar, or comedy club in his letter of request for an occupancy permit. The floor plan clearly depicts an adult cabaret with a substantial amount of floor space dedicated to separate entrance champagne rooms, private rooms, and lap dance areas. Per the submitted floor plan, the full service kitchen is approximately 10' x 10' - Not much larger than a storage shed placed in a residential back yard. Does this restaurant advertise itself as a family restaurant? Can you make reservations for the restaurant? Are you seated at your table by a host or hostess when arriving? Are their uniformed waiters and waitresses to serve you? Can you order take out food? Is there a drive thru window for take-out? Does the restaurant provide catering services? How expansive is the menu? Is the restaurant open for breakfast or lunch? The "supposed" restaurant use is designed to be used as way to circumvent of the provisions of the ATZO, specifically, Article XIX-Sexually Oriented Businesses, Sections 1900-1908, under which the occupancy permit was issued (Exhibits J: Letter dated July 10, 2007 from Atty. Martin E. Yavorcik to Austintown Zoning requesting a certificate of occupancy and Exhibit K: Interior floor plan of the GOGO drawn by Robert Neill).

The same can also be said of the "comedy club" use. How economically feasible is it to hire the services of a professional comedian, and due to the layout of the floor plan have that comedian perform to an audience of only half the facility, or does the comedian

perform in the lap dance areas or one of the private Champaign rooms only? What comedians have played the GOGO? Are the private rooms and the champagnes rooms closed off during comedic performances? What actually goes on when the doors of the champagne rooms and privates room are closed during “use”? Do you have to pay to utilize a private room? Do you have to pay a charge to see the comedian if you choose to avoid the comedian for other activity in the private rooms? With all due respect to the restaurant and comedy club, Atty. Yavorcik’s letter of request for a certificate of occupancy was 100% accurate in defining the GOGO and its operation as an adult cabaret as defined by the ATZO. The **principle business purpose** of the GOGO is to operate as an adult cabaret and thus is subject to ALL the regulations specified Article XIX-Sexually Oriented Businesses, Sections 1900-1908, not just the regulations Atty. Rucci deems acceptable to the ownership of the GoGo.

Atty. Rucci argues in this appeal and also argued at a Public Hearing held on Monday, March 16, 2009 before the Ohio Dept. of Commerce, Division of Liquor Control regarding the Township’s objection to the renewal of the liquor license, that this business **is a SOB** and is rightfully allowed at this location as a permitted use under the provisions of the ATZO. He than states in the appeal that the dancing and drinking that occur at the GOGO are no different than what happens at the Wedge, Odonnels and other similar establishments in the Township that are not placed in the adult cabaret category, and according to Atty. Rucci “...neither should the GOGO club” be placed in the adult cabaret category as a SOB. Depending on the public hearing and which public board he is addressing, his comments are contradictory and conflicting and I don’t believe the other establishments he mentions by name in his appeal have private champagne rooms and lap dance areas.

The crown jewel of Atty. Rucci’s appeal is the “Passions Case” from the State of Missouri. The Eighth Circuit U.S. Court of Appeals unanimously invalidated Missouri Revised Statute 226.531, which prohibited advertising within one mile of a state highway by any business classified as an "adult cabaret" or "sexually oriented business." Plaintiffs in the lawsuits which brought this issue before the court were Passions Video and Lion's Den, both adult-oriented businesses which would have been affected by the law.

The Eighth Circuit Court analyzed the Missouri law under the criteria set forth in a 1980 case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, which proposed a four-part test to be applied to the government's power to restrict commercial advertising, and found that the law failed the fourth prong of that test.

"To determine whether the regulation on commercial speech is constitutionally valid," wrote Senior Judge Gerald Heaney, presiding over a three-judge panel of the court, "we determine whether: **(1) the affected speech concerns lawful activity and is not misleading, therefore protected by the First Amendment; (2) the government’s asserted interest in regulating the speech is substantial.**

The court had no trouble finding that both the speech and the state met their "burdens" under the first two prongs: The speech was non-obscene and the state has an interest,

according to the court, in "mitigating 'the adverse secondary effects of sexually oriented businesses, [improving] traffic safety, [limiting] harm to minors, and [reducing] prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement projects."

(3) does the regulation directly advance the asserted interest.

The court found that the state met its burden under the third prong, which, according to the court, was to "reduce the adverse secondary effects of sexually oriented businesses by limiting the presence of sexually oriented businesses."

(4) does the regulation restrict no more speech than necessary to serve the asserted interest. The state 'bears the burden of identifying a substantial interest and justifying the challenged restriction."

The court found that the law restricted more speech than was necessary to accomplish the state's goals.

One could argue that it's hard to say that a mile restriction – anything within a mile of a highway – is narrowly tailored to *anything*.

The Austintown Zoning Ordinance specifically, **ARTICLE XIX-SEXUALLY ORIENTED BUSINESSES, Section 1905-SIGN REGULATIONS FOR SEXUALLY ORIENTED BUSINESSES**, reads as follows:

1. All signs shall be "wall signs" as defined in §1801 of the Zoning Resolution, with a maximum allowable sign area of 40 square feet and shall comply with the standards specified in §1804 of the Zoning Resolution.

There is no prohibition against off-premise advertising in the ATZO. The GoGo can advertise on any of the existing billboards in Austintown Township or any other billboard in Mahoning or Trumbull County or within the States of Ohio or State of Penn. Second, the permitted exterior wall signage does not limit the speech "placed" on the wall sign as long as that speech is not obscene. The GOGO can place a reduced version of their female caricature. Third, there are no prohibitions contained in the ordinance prohibiting **reasonable alternative avenues of communications** for the GoGo who can utilize advertising in newspapers of general circulation, magazines, television, cable television, radio, and the internet.

The ATZO is so **narrowly tailored** in its efforts to minimize negative secondary effects, the result is it would pass the forth prong of the Hudson criteria used in the Passions case, and would pass constitutional scrutiny by the Missouri Eighth Circuit U.S. Court of Appeals or any other court of jurisdiction using the Hudson criteria. There is **no complete suppression of speech** contained in the ordinance. While the township need not pursue the least restrictive means to regulate speech, we know we must enact a statute

that is 'reasonable' and 'narrowly tailored' to achieve our desired objective of combating the negative secondary effects associated with SOB's.

In the appeal Atty. Rucci states that a “**Similar**” restriction on signage was found unconstitutional in the Passions case. The Missouri Statue and the ATZO are **not** similar. Atty. Rucci further argues that the AZO regulations are **more restrictive** than the Missouri statute. How? There is no one mile restriction for off-premise advertising and we only limit advertising within the property lines of a SOB.

At a meeting held on October 28, 2008 at the Zoning Office we discussed his options for outdoor off-premise advertising and he was also advised the township was bringing no enforcement against his competitor who was utilizing off-premise advertising (Club 76), nor, would we prohibit the GoGo from leasing on a billboard.

When the limitation was placed on signage for SOB's, it was done with the hope of limiting the negative secondary effects of these types of business to the township, and more specifically, to the abutting and nearby property owners, in this case the restaurant, the motel to the east, the residential property owners on Lou Ida to the north.

Limiting the signage in the fashion that it was limited is clearly very “**narrowly**” tailored to combat negative secondary effects. It only applies within the property lines of the effected SOB, it is not a prohibition of off-premise advertising beyond the property lines.

Once again, the zoning regulations are not being administered in an unequal manner as atty. Rucci states in the appeal. The Babylon does not have a free standing pole sign at their location, and under the current zoning ordinance, they would be denied a zoning permit if they wished to construct one. The freestanding signage for the SOB on 76 Drive is construed as non-conforming as it was in existence prior to the enactment of the current SOB regulations.

Atty. Rucci states the truck signage is no different than the many vehicles that are parked at local businesses in the evening advertising those businesses. This truck cited is not being used for business deliveries or pick-ups during daylight or evening hours, or is it being used to transfer employees of the GOGO from one location to another. The sole purpose of the truck is its use as an advertising device, i.e a sign, in order to violate the sign restrictions placed on SOB's. Furthermore, what other Austintown based business runs extension cords and spotlights to illuminate their parked commercial vehicles at night.

Atty. Rucci states that the sign placed at the entrance was constructed over a quarter of a century ago. In checking the records of the zoning office, there is no permit on file currently or from approximately 25 years ago approving the sign structure. Even if there was a permit allowing the sign, this office would only allow the sign as a non-conforming sign in relation to the GOGO advertisement if the sign contained advertising for a SOB prior to the current regulations, which is not the case as the GOGO is the first SOB at this location. In addition, this office has concerns with the placement of the sign as it appears

to be within public right-of-way. The township would have no opposition to the sign if it advertised the name of the hotel and was placed within the required setback.

Atty. Rucci also states the previous inspector did not cite for the sign while the satellite dish was cited over a year ago. I would suggest that it is possible the sign inserts advertising the GOGO were not installed at the time of the court filing or the Inspector may have been waiting to see how the court ruled on the satellite dish and banner case prior to moving forward with another enforcement action.

In addition to all the information provided, I would like to advise the Board of Appeals that the owner of the GOGO did plead guilty to seven violations of the fire and building codes, and as you are already aware, was convicted of violating the sign ordinance, and recently, the Austintown Township Trustees passed a resolution requesting that the Ohio Department of Commerce division of Liquor Control not renew the liquor permit as Mr. Robert Neill has operated his business in a manner that demonstrates a disregard for the laws, regulations, and ordinances of the State of Ohio. The hotel is not operating, which is a condition of the liquor license and the hotel has paid no excise tax to the Township as required by law. There have also been arrests at the GOGO for underage drinking. I would also like to submit a letter from Phil Moore, Executive Director of the Mahoning County Convention & Visitors Bureau that states the strip club has had a negative economic impact on nearby hotels and four e-mails from township residences expressing their displeasure with this business (Exhibits L1-2: Judgment Entries for Robert Neil's Fire Code violation convictions; Exhibit L-3: Youngstown Vindicator article dated February 21, 2008 reporting Robert Neil's fire and building code violations; Exhibit M1-2: Austintown Township Trustees Resolution objecting to the renewal of the liquor license; Exhibit N: Letter dated March 13, 2009 to Gina Bricker, Assistant Mahoning County Prosecutor from Phil Moore, Executive Director, Mahoning County Convention & Visitors Bureau; Exhibit O: E-mail from Juan Martinez - Salsitas Mexican Restaurant; Exhibit P: E-mail to Lisa Oles, Austintown Township Trustee from Chris Cannel regarding his opposition to the GOGO and the spotlights; Exhibit Q: E-mail to Lisa Oles, Austintown Township Trustee from Andy Pappagallo, Sr. regarding his opposition to the GOGO's signage; and Exhibit R: e-mail to Lisa Oles, Austintown Township Trustee from Andrew Baker regarding his opposition to the GOGO and the spotlights).

In closing, I would request the Austintown Township BZA affirm the two letters of determination dated December 14, 2008 that were issued to the GOGO. If the Board affirms the letters of determination and then wishes to provide relief to the applicant by way of a variance for signage and a variance to maintain the spotlights as currently constructed and placed, then I would request that the Board consult with the applicant to obtain the specific configuration of the spotlights and to set the parameters for on-premise signage and insure the motion to approve a variance in each case is very specific in order to avoid interruptive questions that may arise in the near future. If the Board chooses to overturn the determinations of the two letters issued on December 14, 2008, then the applicant need do nothing more and this office will cease any further enforcement action regarding the spotlights and the commercial truck as presently installed and used.

No one else in attendance to speak against the request.

Atty. Rucci disputed Zoning Inspectors Crivelli's comments regarding unequal treatment and stated Crivelli was not at the trial and when the first sign violation enforcement was issued the adult use had not been established. The floor plan submitted into evidence did not depict the nightclub and is inaccurate as to dimensions of the kitchen as that was an early drawing. Numerous other drawings were submitted to the Building Inspector that more accurately reflect the current business. Mr. Satterlee asked what happens in the nightclub. Atty. Rucci stated dancing, not the patrons, just the dancers and he has bands. A band played there last Friday night. Atty. Rucci maintained that the cabaret and club are separate business. Mr. Satterlee asked if these business are separately managed. Atty. Rucci stated they are all under the management of the GOGO.

Atty. Rucci took offense to the statement that the parking lot is kept dark on purpose. The hotel had a fire and they haven't been able to get the parking lot lighting on and he has no control over the hotel. Stated there is adequate lighting under the canopy. Zoning Inspector Crivelli stated that according to the liquor license, a D5-Hotel and a D6 permitting Sunday sales, the owner of the liquor license is the owner of the GOGO, therefore, there is a disconnect between the owner of the hotel and the owner of the liquor license, which should make the license invalid. Atty. Rucci stated that that was the Township's case on Monday's hearing and that nobody bothered to check with the Ohio Department of Liquor Control who was aware the hotel was owned differently from the cabaret. Atty. Rucci said this was not an issue with the State. They have five to six security guards and there is adequate lighting. Zoning Inspector Crivelli stated that the parking lot is dark and has been every time he has driven through it. Zoning Inspector Crivelli further stated that Atty. Rucci had no idea when the hotel would reopen, the parking lot remains unsafe especially for the young women who work at the GOGO and the 3/4 million dollar investment apparently did not take into account lighting up the parking lot for the safety of the public.

Atty. Rucci stated that his billboard suggestion was denied. Zoning Inspector Crivelli stated that he advised Atty. Rucci to submit a drawing for a billboard taking into account the zoning requirements for billboards, specifically the spacing requirement.

Atty. Rucci thanked the Board for the opportunity to be heard and asked the Board to allow some balance regarding the signage issue. He asked the Board to consider if a sign with a name would really have a secondary effect.

The Board recessed into executive session.

2009-01-A – Atty. Rucci

Motion by Mrs. Owens to affirm the Zoning Inspector's letter of determination dated December 14, 2008 regarding the signage violation. Seconded by Dr. Stellers.

Roll call vote: Dr. Stellers – YES; Mr. Glaros – YES; Mrs. Owens – YES; Mr. Koch – YES; Mr. Satterlee – YES.

Motion by Mrs. Owens to disapprove the variance request for signage. Seconded by Dr. Stellers.

Roll call vote: Dr. Stellers – YES; Mr. Glaros – YES; Mrs. Owens – YES; Mr. Koch – YES; Mr. Satterlee – YES.

2009-02-A – Atty. Rucci

Motion by Mr. Koch to disapprove the variance request for the spotlights. Seconded by Mr. Glaros.

Roll call vote: Dr. Stellers – YES; Mr. Glaros – YES; Mrs. Owens – YES; Mr. Koch – YES; Mr. Satterlee – YES.

Motion by Mrs. Owens to affirm the Zoning Inspector’s letter of determination dated December 14, 2008 regarding the lighting violation. Seconded by Mrs. Glaros.

Roll call vote: Dr. Stellers – YES; Mr. Glaros – YES; Mrs. Owens – YES; Mr. Koch – YES; Mr. Satterlee – YES.

There being nothing further to come before the Board, the meeting was adjourned at 9:10 P.M.

AUSTINTOWN BOARD OF ZONING APPEALS

DARREN L. CRIVELLI, ZONING INSPECTOR

APPROVED: _____
ROBERT SATTERLEE, Chair

DATED: _____