

MATTER OF
ENTERTAINMENT PERMIT (BU20253680)
AND
BUSINESS LICENSE (BU20253430)
OF
VM ASSOCIATES, INC.,
DOING BUSINESS AS FLAMINGO GENTLEMAN'S CLUB

...

REPORT AND RECOMMENDATION
OF
HEARING OFFICER

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September 22, 2004

Honorable Mayor and City Council Members
City of Long Beach
333 West Ocean Boulevard
Long Beach, CA 90802

Re: Entertainment Permit number BU20253680 and Business License number BU20253430 issued to V.M. Associates, Inc., a California corporation doing business as Flamingo Gentlemen's Club, 2421 East Artesia Boulevard

REPORT AND RECOMMENDATION OF HEARING OFFICER

At its April 6, 2004, meeting, the Long Beach City Council ordered a hearing with regard to the revocation of the captioned permit and license. The undersigned was appointed to conduct such a hearing. The hearing has been completed. This letter constitutes the report and recommendation of the undersigned to the Council.

In this report:

- The City of Long Beach is referred to as "the City".
- V.M. Associates, Inc., a California corporation doing business as Flamingo Gentlemen's Club, is referred to as "VM".
- The Flamingo Gentlemen's Club, operated by VM and located at 2421 East Artesia Boulevard, Long Beach, is referred to as "the Club".
- Entertainment Permit number BU20253680 is referred to as "the Permit".
- Business License number BU20253430 is referred to as "the License."
- All references to titles, chapters or sections, without an accompanying reference to a specific code, are to the Long Beach Municipal Code.

Accompanying this report is a copy of the exhibits introduced at the hearing. Those introduced on behalf of the City are numbered 1-48. Those introduced on behalf of VM are lettered A-H.

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1. PARTIES AND COUNSEL

The City was represented by the Long Beach City Attorney, through Michelle Gardner, Deputy City Attorney, and Cristyl Meyers, Deputy City Attorney.

VM was represented by Roger Jon Diamond.

2. HEARING DATES

Pursuant to at least one written notice (**Exhibit 1**), the matter was heard at Long Beach City Hall on June 28, 2004, beginning at 9:00 a.m. Inasmuch as the hearing was not completed on that date, by agreement between counsel for both parties it was also conducted on July 21, 2004, and September 7, 2004.

At the conclusion of the hearing, the parties asked that each be permitted to submit a closing brief. The request was granted: Briefs would be due on September 14, 2004. A brief was submitted on behalf of VM by Roger Jon Diamond. It accompanies this report. The City did not submit a brief.

The matter was deemed closed on September 14, 2004.

3. VM'S CHALLENGE TO THE APPOINTMENT OF THE HEARING OFFICER

A. The Appointment Process.

The City's hearing officer selection protocol, as embodied in City Council resolutions numbered C-22376 and C-27713, is as follows:

- A potential hearing officer must have practiced law in California for at least five years and have at least five years' experience in civil trial or civil appellate practice.
- The list of qualified attorneys is compiled by the Long Beach Bar Association and submitted to the City. There is no requirement that those placed on the list be limited to Long Beach Bar Association members. The list is updated each two years.
- From the list of qualified attorneys, the City Clerk selects, by lot, the name of the hearing officer.
- Before accepting an assignment, the selected hearing officer must ascertain whether he or she has a conflict of interest with regard to the matter.

- Once having served, the hearing officer may not serve again until all attorneys on the list have been given the opportunity to handle a case.
- The hearing officer is paid \$150.00 per hour for his or her services, which is significantly below the usual hourly rate for a qualified attorney.

In response to the order of the Long Beach City Council that a hearing be held with regard to the captioned matter, the City Clerk randomly chose the names of three persons from the list of potential hearing officers, the list having been compiled in accordance with City Council resolution C-22376. The names were submitted to the City Attorney who, in turn, submitted them to counsel for VM to make a choice (Exhibit 1). The latter rejected all three names, stating that the selection process for the entire list of potential hearing officers is flawed (Exhibit C and Exhibit 6). Notwithstanding an additional attempt by the City Attorney to elicit a hearing officer choice from counsel for VM (Exhibit 3), he refused to do so.

The undersigned was then selected, by lot, by the City Clerk from the three potential hearing officers on the list submitted to counsel for VM (Exhibit 5).

B. VM's Challenge to the Appointment.

The first order of business on June 28, 2004, the first day of the hearing, consisted of VM's counsel's challenge to the hearing officer selection process, as follows:

- Potential hearing officers are limited to members of the Long Beach Bar Association, a local and private organization.
- The City unilaterally selected the three nominees to hear this matter from its list.
- Hearing officers are paid by the City for their efforts.

Counsel for VM cited the California Supreme Court case entitled *Haas v. County of San Bernardino* (2002) 27 C.4th 1017, 45 P.3d 280, 119 C.R.2d 341, in which the hearing officer selection process was successfully challenged by him.

Basically, the court in *Haas* held that a temporary hearing officer has a pecuniary interest requiring his or her disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the gov-

ernment's good will. However, if the government exercises its power in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to it, due process in the selection process is satisfied.

The selection process dictated by City Council resolutions numbered C-22376 and C-27713 does not result in giving the hearing officer chosen a pecuniary interest in that:

- The City does not unilaterally select him or her.
- A hearing officer cannot participate again for a significant period of time.
- The hearing officer's income from future adjudicative work for the City does not depend whatsoever on the City's good will based on favorable decisions in previous matters.
- The rate of remuneration paid by the City to a lawyer meeting the qualifications imposed by the City is significantly below the prevailing rate charged by such a lawyer.

Accordingly, the undersigned refused to recuse himself.

4. STATEMENT OF THE ISSUES

The issues in this matter are as follows:

- Did VM violate the conditions imposed upon the License and Permit?
- If so, should the violations result in no action being taken with regard to the Permit and License, the suspension of the Permit and License, or the revocation of the Permit and License?

Counsel for VM asked that the scope of this hearing include a determination of whether the City violated VM's First Amendment rights by failing to timely issue an entertainment permit to include nude dancing in 1997. VM contends that had the City properly and timely acted upon VM's 1997 application, subsequent changes in the California Penal Code and the resulting changes in the Long Beach Municipal Code would not have affected the right of VM to offer full nude dancing because it would have been "grandfathered" as such an establishment. This issue and related issues were the subject of 1999 litigation entitled *V & M (sic) Associates, Inc., v. City of Long Beach*. Some of the pleadings from this lawsuit were introduced by the City as Exhibits 32-44.

Counsel for VM also asked that the scope of the hearing include a determination of whether the City's prohibition against nude entertainment is valid in light of the fact that its zoning ordinances permit nude entertainment.

The undersigned ruled that the scope of the hearing is limited to the Permit and License as they now exist and VM's conduct under the Permit and License. It does not include the examination of any issues, First Amendment or otherwise, raised by VM's 1997 application for an entertainment permit and the rights VM might have as a result of the City's conduct in response to that application. Additionally, it does not include an examination of the regulatory schemes adopted by the city that deal with nude entertainment.

5. SUMMARY OF RELEVANT EVIDENCE INTRODUCED BY THE CITY

September 22, 1997: The City issued a business license to VM (Exhibit 23) for an enterprise that would not serve alcohol. However, as noted on the application form (Exhibit 23), an entertainment permit would be required for adult entertainment and additional parking will be required before such a permit could be approved.

March 10, 1999: VM initiated a lawsuit in the Superior Court against the City, alleging that the City failed to issue an entertainment permit. It was eventually dismissed by the court on November 27, 2000. Daniel S. Murphy, a Principal Deputy Long Beach City Attorney at the time of the lawsuit, outlined the litigation. Some of the pleadings were introduced as Exhibits 32-44. However, no evidence was presented by either party by which it can be determined whether this lawsuit resolved any issues between VM and the City concerning the City's conduct prior to the issuance of the License and the Permit.

April 6, 1999: The City issued a business license to VM for adult entertainment at the Club, without the sale of alcoholic beverages to patrons. It was renewed annually by VM, although VM had not opened for business through November 26, 2002 (Exhibit 25).

October 9, 2002: VM applied for an Alcoholic Beverage License for the sale of wine and beer to be consumed on the premises (Exhibit 12). On January 23, 2003, a license was issued (Exhibit 10). With the issuance of this license, the April 6, 1999, City business license for adult entertainment, without the sale of alcoholic beverages, was no longer valid (Exhibit 10).

December 3, 2002, revised on December 12, 2002: VM applied for an Adult Entertainment Permit (Exhibits 26 and 31). The City found the application delinquent for various reasons and notified VM of the delinquencies (Exhibits 27, 28 and 29). The delinquencies were corrected by VM.

February 5, 2003: Unaware of the conditions to be imposed upon the VM Adult Entertainment Permit, in a memorandum to the Manager of the City's Commercial Services Bureau, the Chief of Police objected to its issuance (Exhibit 10).

February 6, 2003: The City issued the Permit, allowing the service of alcohol, prohibiting dancing (Exhibit 22), and subject to certain conditions consistent with the limitations imposed by Long Beach City Ordinance No. C-7591 (Exhibit 11). Among the conditions of the Permit, as agreed to by VM, are the following (Exhibit 30):

- No entertainer or employee may engage in a showing of the human female genitals, pubic hair, anus, cleft of the buttocks, or vulva with less than a fully opaque covering, or the female breasts with less than a fully opaque covering over any part of the nipple or areola.
- No entertainer or employee shall have intentional physical contact with any patron.
- No person shall perform any entertainment except upon a stage which is separated by a distance of at least six feet from the nearest area occupied by patrons.
- No patron shall be permitted within six feet of the stage when it is occupied by an entertainer.
- No person under the age of eighteen years of age may be within the premises.
- At least one permitted, authorized security guard shall be on duty within the premises at all times while the establishment is open for business.
- A door person shall be present who shall check the photo identification of all persons entering the premises to ensure that no one under the age of eighteen is permitted therein.

July 25, 2003, through August 6, 2003: In response to a complaint telephoned to the Long Beach Police Department (Exhibit 19), Long Beach Police Detective Victor L. Feria visited the Club and observed the following:

- On July 25, 2003, the disc jockey announced that this was the last day upon which the Club would be serving alcoholic beverages.
- A female on the stage was dancing topless (July 25, 2003), in violation of a condition of the Permit.
- The performance on stage by a female included one performance to music while wearing a bikini and a second performance completely nude. This routine was followed by a total of eight females (July 26, 2003). Such performances are in violation of a condition of the Permit.
- The same routine was followed by six females (August 6, 2003), in violation of a condition of the Permit.
- On each of the visits, lap dances were being performed by dancers with patrons, in violation of a condition of the Permit.

These observations are summarized in Long Beach Police Department Incident Information report dated August 6, 2003 (Exhibit 13). Long Beach Police Detective Victor Feria also testified concerning these observations.

September 3 and 4, 2003: Long Beach Police detectives and officers visited the Club and observed the following, all in violation of conditions of the Permit:

- A female was dancing nude on the stage.
- Patron seats were less than six feet from the stage.
- A number of females danced topless, then nude, on the stage.
- Two female employees were lap dancing with a patron.

These observations are summarized in a Long Beach Police Department Incident Information report dated September 12, 2003 (Exhibit 15). Long Beach Police Detective Jose Serenil and Long Beach Police Sergeant Americo Fernandez also testified concerning the incidents in the report.

December 18, 2003: The Long Beach Police Department's Night Vice Team visited the Club and observed the following, all in violation of the conditions of the Permit:

- Five females were dancing on the stage while nude.

- Lap dances were being performed with patrons.
- Patrons were permitted to walk up to the stage.
- No security guard was on duty.
- No prospective patrons' identifications were being checked before entering the Club.

These observations are summarized in a December 19, 2003, memorandum from Long Beach Police Detective Manny Sereniol (Exhibit 17). Long Beach Police Sergeant Gary McAulay also testified concerning the observations in the memorandum.

December 19, 2003: Undercover Long Beach Police vice officers visited the Club during daylight hours and observed the following, in violation of conditions of the Permit:

- A female was performing a lap dance on a patron.
- Females on the stage were first dancing topless, then dancing nude.
- A female was walking off the stage and exposing her genitals.
- Patrons were within six feet of the stage.

These observations are summarized in a December 19, 2003, memorandum by Chris Anderson, a Long Beach Police Department vice squad detective (Exhibit 9). Detective Anderson also testified concerning these observations.

February 6 and 7, 2004: In response to a complaint from a Los Angeles Police Department vice sergeant (Exhibit 17), Long Beach Police detectives David M. Demasi and Jose Serenil visited the Club and observed the following:

- Two females were dancing nude on the stage (February 6, 2004), in violation of a condition of the Permit.
- One female was dancing nude on the stage (February 7, 2004), in violation of a condition of the Permit.
- A Long Beach Police Officer determined that one female dancer was sixteen years old and was determined to be a wanted person. She was transported to the Long Beach Youth Services Booking facility.

- A second female dancer provided false identification to a Long Beach Police Officer. She appeared to be a minor and was transported to the Long Beach Youth Services Booking facility. It was later determined that she was also sixteen years old.
- One of the juveniles stated to a Long Beach Police officer that the VM representative hiring her did not ask for any identification.
- One of the juveniles stated that her job at Club was to dance on stage and remove her clothing. While on stage, patrons would give her money. While off stage, she gave lap dances to patrons in exchange for payments from \$10.00 to \$20.00 per dance.

These observations are summarized in a February 2, 2004, Long Beach Police Department Incident Information report (Exhibit 14). Long Beach Police Detective Jose Serenil also testified concerning the incidents in the report.

February 13, 2004: In a memorandum to the City's Director of Financial Management, the Chief of Police requests that the License and the Permit be revoked (Exhibit 8).

September 7, 2004: VM is at least advertising that it continues to offer totally nude entertainment (Exhibit 48).

6. SUMMARY OF RELEVANT EVIDENCE INTRODUCED BY VM

David Moses, the manager of the Club, testified as follows concerning two dancers determined by officers of the Long Beach Police Department to be under eighteen years of age on February 7, 2004 (Exhibit 14):

- He has been a club manager for approximately ten years.
- When each of the dancers was interviewed, one provided a California Identification Card (Exhibit G) and the other provided a California Driver License (Exhibit H).
- Each appeared to be at least eighteen years old.
- Each was hired as an independent contractor pursuant to a written agreement.
- In response to an inquiry from Long Beach Police officers at the Club, he produced copies of Exhibit G and Exhibit H, and otherwise fully cooperated with the police officers.

- One of the dancers insisted to the police officers that she was an adult. The other admitted she was not eighteen.
- Under age dancers are far from the norm in his experience.

7. FINDINGS OF FACT

The undersigned makes the following findings of fact:

- The City issued to VM entertainment permit number BU20253680 for the conduct of adult entertainment with conditions. Each of the conditions listed in the permit was initiated by an officer of VM.
- The City issued to VM business license number BU20253430 to operate a bar/tavern/lounge.
- The Permit and the License are presently in effect.
- One of the conditions of the Permit prohibits topless or nude dancing. In violation of this condition: On July 25, 2003, a Long Beach police officer observed a topless dancer on the stage at the Club; on July 26, 2003, a Long Beach police officer observed nude dancers on the stage at the Club; on August 6, 2003, a Long Beach police officer observed nude dancers on the stage at the Club; on September 4, 2003, a Long Beach police officer observed four nude dancers on the stage at the Club; on September 6, 2003, a Long Beach police officer observed six nude dancers on the stage at the Club; On September 12, 2003, Long Beach police officers observed six nude or semi-nude dancers on the stage at the Club; on December 18, 2003, Long Beach police officers observed five nude dancers on the stage at the Club; on December 19, 2003, a Long Beach police officer observed nude dancers on the stage at the Club; on February 6, 2004, Long Beach police officers observed nude dancers on the stage at the Club; on February 4, 2004, Long Beach police officers observed a nude dancer on the stage at the Club.
- One of the conditions of the Permit prohibits intentional physical contact between an entertainer and any patron. In violation of this condition: On July 25 and 26, 2003, a Long Beach police officer observed lap dances being performed by Club dancers with patrons at the Club; on September 4, 2003, a Long Beach police officer observed lap dances being performed by Club dancers with patrons at the Club; on December 18, 2003, Long Beach Police officers observed lap dances being performed by Club dancers with patrons at the Club; on December 19, 2003, a Long Beach police officer observed a lap dance being performed by a Club dancer with a patron at the Club.

- One of the conditions of the Permit prohibits any patron from being within six feet of the stage when it is occupied by an entertainer. In violation of this condition: On September 6, 2003, a Long Beach Police officer observed a patron within six feet of the stage of the Club while it was occupied by an entertainer; on December 18, 2003, Long Beach police officers observed patrons walking up to the stage at the Club while it was occupied by an entertainer; on December 19, 2003, a Long Beach police officer observed patrons within six feet of the stage of the Club while it was occupied by an entertainer.
- One of the conditions of the Permit requires a security guard to be on duty while the Club is open for business. In violation of this condition, on December 18, 2003, Long Beach police officers observed that no security guard was present at the Club.
- One of the conditions of the Permit prohibits any person under the age of eighteen years of age to be within the premises. In violation of this condition, on February 7, 2004, Long Beach police officers determined that two of the dancers at the Club were not eighteen years of age or older. Their finding was challenged by VM, leaving some doubt as to whether they were underage.
- Before the two minor dancers were hired by VM, they provided the Club manager what appeared to be valid documents stating that they were adults.
- The revocation of the License is not properly before the undersigned:

What appears to be the exclusive procedure to suspend or revoke a business license is set forth in §3.80.429.1. It provides that upon the failure of a licensee to comply with any provision of any law, the Director of Financial Management shall notice a hearing at which the licensee is ordered to show cause why the applicable license or licenses should not be revoked. Following the hearing, the Director of Financial Management may revoke or suspend the applicable license or licenses.

If the license or licenses are revoked, §3.80.429.5 provides that the licensee may *appeal* to the City Council. Pursuant to §2.93.050, the Council can certainly appoint a hearing officer to hear the licensee's appeal and make a recommendation to it.

The Council is empowered only to hear an *appeal* of VM from a decision by the Director of Financial Management revoking the License. In the appeal process the Council decides whether the decision of the Director of Financial Management is to be sustained.

The Council is not empowered to initially decide whether the License should be suspended or revoked.

There is no evidence of a review of VM's conduct by the Director of Financial Management, a decision by the director to revoke the License and an appeal to the City Council by VM from the director's decision, all pursuant to §§3.80.429.1 and .5. Nothing was presented at the hearing outlining how the City is permitted to place the matter before the City Council without taking these preliminary steps.

8. RECOMMENDED DECISION

The procedure applicable to the suspension or revocation of the Permit is found in §5.06.020. Among the bases for its suspension or revocation is the failure of VM to comply with the provisions of Chapter 5.72 (§5.72.145, subdivision A), and more specifically, the failure to comply with any condition imposed for the issuance of the Permit (§5.06.020, subdivision A.5).

In contrast to the procedure for the suspension or revocation of the License, the matter of the suspension or revocation of the Permit is properly before the City Council: See §5.06.020, subdivision B. The Council can appoint a hearing officer to hear the matter and make a recommendation to it: See §2.93.050.

...

The Long Beach Municipal Code provides no guidelines for the imposition of revocation in contrast to suspension.

Surprisingly, the City has never suspended any business license or permit in past years. It has only revoked a business license or a business license and permit, according to the testimony of James Goodin, the Business Services Officer in the City's Department of Financial Management.

The request for revocation from the Chief of Police (Exhibit 8) is not based on any claim of underage dancers appearing at the Club. As will become apparent, this is not a significant issue.

The City's evidence with regard to VM's Permit violations can be grouped as to their seriousness as follows:

- First, on two occasions, notwithstanding an effort by VM to screen its dancers, VM may have hired two dancers who were not yet eighteen years old. There exists some doubt as to whether the two dancers were, in fact, minors. Additionally, on one occasion, a security guard could not be located at the Club. If this were the extent of the Permit violations, a suspension of the Permit for a relatively short period of time would be appropriate.

- Second, during the year following the issuance of the Permit, on nine occasions Long Beach police officers observed conduct in the Club that repeatedly violated the same conditions of the Permit. There is no evidence of any effort by VM to change the conduct of its dancers at the Club to conform to the Permit conditions. Such a pattern of behavior certainly supports the revocation of VM's Permit, without consideration of those incidents described in the preceding paragraph.

The undersigned recommends as follows:

Revoke Entertainment Permit number issued to V.M. Associates, Inc., a California corporation doing business as Flamingo Gentlemen's Club, 2421 East Artesia Boulevard.

Take no action with regard to Business License number BU20253430 issued to V.M. Associates, Inc., a California corporation doing business as Flamingo Gentlemen's Club, 2421 East Artesia Boulevard, because the matter is not properly before the Council.

9. COUNCIL ACTION

Pursuant to §2.93.050.B.7, 8 and 9:

- Upon receipt of this report, the Council is to set a time for a hearing to review and consider it. Notice of this hearing shall be sent to all interested parties at least ten days before the hearing.
- After a review of this report, the Council may adopt, reject or modify the recommended decision.
- In its discretion, the Council may take additional evidence at its hearing or refer the case back to the undersigned with instructions to consider additional evidence.
- Notice of the Council's decision shall be served on all interested parties by the City Clerk.

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- The Council's decision takes effect upon the service of the notice of its decision.

Respectfully submitted,



THOMAS A. RAMSEY

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Enclosures as noted