NEW YORK CITY LAW DEPARTMENT
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Press Release

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For Immediate Release

CITY WINS ANOTHER LONGSTANDING CASE INVOLVING ADULT USE ZONING LAWS, THIS TIME AFFECTING TOPLESS BARS AND STRIP CLUBS

DECISION IS SECOND ADULT USE CASE DECIDED IN LAST TWO WEEKS IN THE CITY'S FAVOR (PREVIOUS ONE INVOLVED ADULT VIDEO STORES, BOOKSTORES AND MOVIE THEATERS); THIS WIN CONTINUES MAYOR MICHAEL R. BLOOMBERG'S EFFORTS TO IMPROVE QUALITY OF LIFE ISSUES IN NEW YORK CITY

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New York, April 16, 2010 – New York City prevailed late yesterday in the second of two major cases (spanning several years) involving efforts by many adult establishments to get around the City's strict zoning laws regarding where they can operate. Yesterday's win comes on the heels of the first win, which was decided in the City's favor late last month.

The *"Ten's Cabaret" Case*

The case decided yesterday*, Ten's Cabaret Inc. v. City of New York,* is an important win that involves a legal challenge to the zoning laws governing topless bars and strip clubs.

New York State Supreme Court Judge Louis York, after a two-week trial in March 2009, found that clubs which purport to operate on a "60/40" basis by limiting adult entertainment to less than 40 percent of their floor area have a predominant ongoing focus on adult entertainment and thus cannot operate at any location where adult establishments are prohibited.

Why is the Decision Important?

This case is significant, because it affirms the City's ability to regulate any bar or cabaret that regularly features topless or nude dancing, no matter the amount of space dedicated to the use. The court rejected the plaintiffs' assertion that 60/40 clubs are properly treated as non-adult establishments, recognizing that notwithstanding their purported 60/40 configuration, these clubs have a predominant adult focus and thus an adverse impact on their neighborhoods. In light of this decision, the City can enforce zoning provisions that require any clubs that regularly feature topless or nude dancing to be located in non-residential neighborhoods and more than 500 feet from any school or place of worship.

Who Enforces the City's Zoning Regulations Limiting the Location of Clubs that Regularly Feature Adult Entertainment?

The provisions of the Zoning Resolution are enforced by the Department of Buildings. (Note: Some aspects are also enforced by the Mayor's Office of Special Enforcement, but, ultimately, the building inspectors who are assigned to work with that office that do the inspections and issue the violations.)

There are approximately 20 clubs in the City operating on a 60/40 basis in residential neighborhoods. As a result of the decision, these clubs will be required either to stop presenting adult entertainment or to

relocate to a location where adult entertainment is permitted – i.e. to a location in a manufacturing or high density commercial zoning district that is more than 500 feet from a place of worship, a school or another adult establishment.

A Brief Case Overview

This matter has an extensive history. In 1995, the City adopted a new law limiting locations where adult uses would be permitted. That law contained a provision which became commonly known as the "60/40 Rule." That rule was interpreted to prohibit an adult establishments in residential and other neighborhoods if more than 40 percent of its stock or floor space was dedicated to adult entertainment or materials.

As described above, many clubs adopted a 60/40 configuration so that they could claim non-adult status while still featuring adult entertainment.

Consequently, in 2001 the City Council modified the definition of adult establishment to include 60/40 clubs that regularly feature topless or nude dancing notwithstanding their 60/40 configuration. After a battle spanning eight years, the court upheld the 2001 change late yesterday in its *Ten's Cabaret* decision.

That the plaintiffs "introduced evidence that some [60/40] topless clubs may not have an ongoing focus on adult activities, does not defeat the pattern established by [the City] of topless clubs having an ongoing focus of adult activities," Judge York ruled in his decision..

City Reaction

"This is about quality of life for New Yorkers and their children. This is the second straight legal victory on this issue. We aren't going to stop here; we will continue to protect residents and visitors from illegal establishments," said John Feinblatt, Chief Advisor to the Mayor for Policy and Strategic Planning.

"The judge correctly recognized the City's ability to regulate all establishments with an adult focus," added Robin Binder, Deputy Chief of the Law Department's Administrative Law Division and the lead attorney on the case. "A topless bar cannot be transformed into a non-adult establishment simply by adding an extra room with a pool table."

Can You Explain the Other Case that the City Recently Won? Is that the *"People Theaters"* Case?

Yes, *Ten's Cabaret* is a separate, companion suit to a case called *For the People Theaters*, which was decided in the City's favor late last month (March 29, 2010). That case related to bookstores, video stores and movie theaters that offer adult materials or entertainment. *For the Peoples Theaters* was considered together with the *Ten's* case by the New York State Court of Appeals (the state's highest court), and both cases were sent back to the trial court at the same time with a direction to conduct a trial on the sham compliance question.

Since *Ten's Cabaret* and *For the People Theaters* were separate cases, there was a separate trial before the same judge in each case.

Last month, the court found for the City, ruling in *For the People Theaters* that video stores which exhibit a predominant adult focus by maintaining peep booths and exhibiting certain other features may be treated as adult establishments notwithstanding their purported 60/40 configuration.

Late yesterday, the court found for the City in the *Ten's Cabaret* case, again regarding 60/40 rules and strip clubs / topless bars.

Detailed Legal Backgrounder For Reporters

As the press have previously show a strong interest in adult entertainment matters, zoning issues, and their impact on New York City, we felt that a more-detailed legal summary might be useful.

The history is deep. The operators of several adult establishments -- including Ten's Cabaret as well as another called the Pussycat Lounge (again, cabarets that feature live entertainment by topless or nude female dancers) and For the People Theaters (again, adult theater and bookstore) – sued the City in the fall of 2002. As noted above, they had challenged the 2001 amendments to zoning provisions that had been enacted in 1995. The 1995 zoning provisions limited where adult establishments such as topless clubs, peep shows and triple-X video stores may be located. Those provisions had been adopted based on the City's findings that these types of establishments have a well-established harmful effect on their areas, including depressing real estate values, increasing criminal activities and adversely affecting tourism.

After prevailing in a challenge brought by the adult use industry to the 1995 law, the City began enforcement proceedings in 1999. Soon, the operators of adult establishments started to engage in sham practices in an effort to avoid complying with the law. The 2001 amendments to the Zoning Resolution were adopted to put a halt to those sham practices. However, as a result of further litigation, enforcement of the 2001 amendments was stayed as to the adult clubs (pending resolution of the *Ten's Cabaret* case in which the decision was issued yesterday) and book and video stores (pending the resolution of the *For the People Theaters* case in which the decision was issued last month).

The 1995 Adult Use law, contains the aforementioned provision, commonly called the "60/40 Rule." The "60/40 Rule" has been interpreted to prohibit the operation of a business in residential and other neighborhoods if more than 40 percent of its material or floor space was dedicated to adult content. The law allows the City to enforce zoning requirements by issuing violations or going to court to seek injunctions closing premises down when necessary. Following court rulings that the 1995 law was constitutional, several establishments began exploiting loopholes in the law to evade enforcement and remain open at prohibited locations. Many establishments created artificial situations to make themselves appear non-adult -- for example, stocking 60 percent of their space with non X-rated material but in such a way that few, if any, customers would buy, such as carrying hundreds of copies of the same children's video and stacking them on the floor so that they were difficult to access. Businesses would also sometimes call themselves "billiard rooms" or "cigar bars" when their clear intention was to provide adult entertainment.

In 2001, the City amended its adult use zoning laws to close these loopholes and allow the City to regulate businesses which were exploiting them. In October 2002, just before the amended law was about to take effect, several adult establishments again sued the City. This time they contended that the City had unfairly amended the 1995 law without doing a "new" study on impacts that "60/40" establishments have on their surrounding communities. (Legal case precedent requires that City zoning restrictions imposed on adult establishments be supported or justified by appropriate studies first. In this case, the City argued that its original studies were sufficient and that more studies were not needed to support the adoption off the amendments.) The amendments closed the loopholes by requiring that establishments conduct their business in such a way that their sale of non-adult material is not a subterfuge.

In April 2005, the Appellate Division, First Department -- citing a previous opinion by the State's highest court, the Court of Appeals (in a case called *Stringfellow's v. City of New York*) -- firmly rejected the plaintiffs' claims that their constitutional rights had been violated. The Court found that the City had acted appropriately in passing the amendments without conducting additional studies. That decision was unanimous (5-0).

Then in December 2005, the state's highest court, the Court of Appeals (by a vote of 4-3), said that new studies on the impacts of 60/40 establishments are not required. The Court did, however, find that the City had to produce evidence at a trial to support its contention that 60/40 establishments are shams and thus subject to the adult use restrictions. The cases were returned to the lower court (New York State Supreme Court), where separate trials were conducted.

Again, the ruling on the *Ten's Cabaret* case involving topless bars and strip clubs was issued yesterday; the ruling in the *For the People Theaters* case, involving adult book and video stores as well as motion picture theaters, was issued last month (March 29th). Both are substantial wins for New York City.

Legal Team

Deputy Chief Robin Binder and Senior Counsel Sheryl Neufeld, with the assistance of Assistant Corporation Counsel Rachel Moston, tried both the *For the People Theaters* and *Ten's Cabaret* cases on behalf of the City. All three attorneys are with the New York City Law Department's Administrative Law Division.

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