

DERBY BOARD OF ALDERMEN MEETING

DERBY CITY HALL – SEPTEMBER 25, 2008 - 7:00 P.M.

MINUTES

The Honorable Mayor Anthony Staffieri called the regular meeting to order at 7:00 p.m. All rose and pledged allegiance to the flag.

Roll Call

Present: Kenneth J. Hughes, Beverly Moran, Joseph M. Bomba, Scott M. Boulton, James Allaire, Anthony Szewczyk, David M. Lenart, James J. Benanto, Jr.

Absent: Ronald Sill

Also Present: The Honorable Mayor Anthony Staffieri
Keith A. McLiverty, City Treasurer
David L. Kopjanski, Building-Zoning Enforcement Officer
Chief Eugene L. Mascolo, Derby Police Department
Deputy Chief Gerald Narowski, Derby Police Department
Lt. Salvatore Froscono, Derby Police Department
Dr. Steven Tracy, Superintendent, Derby Public Schools
Dennis O'Connell, Executive Director – Parks & Recreation
Jack Walsh, Parks & Recreation Commission
Julia Romano, Board of Apportionment & Taxation
Jim Stadt, Board of Education
Robert Hughes, Derby Police Commission
Rich DiCarlo, Derby Cultural Commission
Laura Wabno, City Clerk
Arthur Bogen, Valley Council of Governments
Joseph T. Coppola, Esq.

ADDITIONS/DELETIONS/CORRECTION TO AGENDA

Mr. Hughes said he would like to add the following items to the agenda:

- New Item 11.5 – Revision of the Ordinance Regarding Vehicles & Traffic – Discussion & Possible Action
- New Item 17.5 – St. Mary's/St. Michael's Walkathon – October 15, 2008 – Derby Greenway – from 9:45 a.m. to 12:30 p.m. – Discussion & Possible Action

A MOTION was made by Mr. Hughes with a second by Mr. Benanto to add the two new items to the agenda and adopt the agenda as amended. **Motion carried.**

PUBLIC PORTION

Mayor Staffieri opened the public portion. He asked that anyone wishing to speak state their name and address and limit their comments to two minutes.

Tom Lionetti, 79 Sunset Drive, Derby, CT – I have two questions – number one I see on the agenda we're talking about this adult bookstore – my question to the board is were they given an application, License to open that place up ever. That's my question.

Mayor Staffieri – That's it, thank you.

Mr. Lionetti – Well that's my question – I want an answer.

Mayor Staffieri – It's not a question and answer period.

Mr. Lionetti – It's not – okay well then I'm not done yet. If the City did give them authorization to open – first of all that would have been the time to knock it down, in my opinion, all right. If Derby don't need this (inaudible) should have knocked it down then. If you gave them an application and if you gave them a License to open up I took it upon myself to go in there yesterday – I saw nothing wrong with it. You can't see anything from the outside. If you chose to do that kind of – you do it. I don't do it but it doesn't hurt anybody. You had the Wild Irish Rose next to the school and you had go-go girls in there for years and that was okay, that was appropriate. This place is out of the way. If you're an adult 21 you can go in, if you don't want to. I have nothing against it now because you had given them the application. If you didn't give them the application (inaudible) put them in there. Thank you.

Keith A. McLiverty, 15 Academy Hill Road, Derby, CT – I'm going to comment on the "Love Shack" – whatever the name of it is. I see this as a prism with three aspects – one is the legal – what's legally responsible and acceptable; what's morally responsible and acceptable; and what's socially responsible and acceptable. And I assume tonight you're going to vet out the legal issue – what's responsible and acceptable. Morally there's nothing to talk about because they opened it so they believe it's morally sound and those that are opposed to it tonight believe it's not morally sound. But there's a social side to this – and I wish that Mr. O'Neill, who is the owner and who does live in town and was a previous law enforcement agent would have some understanding of what this business is going to do to that corner and to this community. One, you have a landmark business there – Crystal Cleaners – people who have been pillars of this community. People are not going there now because of the fear or perception of what they are doing in that parking lot and that's socially wrong. Two, that's a major intersection for anyone traveling through Derby on Route 34 and you're going to hit that light and that's not what our community speaks about. That's not what we're about socially and three you have the school and church there. So the legal issue is going to vet itself out. The attorney for them is going to put on a two hour display tonight – go back to the beginning of time with case law and try and be eloquent and verbose so get ready for that because he does it all over the State. But that's not the issue. The issue is what's socially responsible. And if Mr. O'Neill did what was socially responsible for this community they wouldn't be tenants there. So I would hope he would think long and hard about what he's doing to our community. Thank you.

Rosemary Hughes, 15 Pleasant View Road, Derby, CT – I am also against this "Love Shack" in the town of Derby. This board and administration for the past three years has done some great things for Derby moving it in a positive direction. There is nothing great or positive by having a porn shop in our town. It is only degrading to the City and to the citizens that live there. I don't understand how a business can operate and be opened when it is in violation of an Ordinance in our town and also there is a Cease

and Desist Order against it. So I ask this board to please do everything possible to get the "Love Shack" out of Derby so that we can continue to go in a positive direction and not a negative direction. It is not wanted or welcomed in Derby and it is a disgrace to our fine City. The sooner we get it out of here the better we'll be.

Dan Waleski, 21 Elm Street, Derby, CT – I would also like to speak about the adult store. Mr. McLiverty was quite right – especially a social issue. The Valley, particularly Derby, is a family-oriented City. This sort of thing people don't find appropriate and don't feel it belongs in town. There are other sources of this material that they're purveying so they're not putting anybody out if it should not exist in this area. But location-wise it's not the best place. I do know for a fact that these people had applied for other locations in town and the landlords and owners of those properties just didn't want that kind of business there, so this is kind of almost a last resort for them. But in short this just doesn't fit into our community and it's embarrassing to a lot of people. It may be a legitimate business elsewhere, but it's appropriateness in that location is not what it could be. Something like this could be better off in a commercial area, which we don't have particularly an extensive one. So I think it's very, very controversial and I would like to ask the Board of Aldermen if they would give some serious considerations here and see what arrangements you could make between the City and the owners here and perhaps some better solution could be arrived at than what we have at the moment.

Art Gerckens, 374 Hawthorne Avenue, Derby, CT – I would like to speak on behalf of the Derby Youth Soccer. I thought I would have a little bit more time but apparently not. I wanted to show you – everyone recognizes this picture from our website – this is September 16, 2006 in Derby. It was a grand day – the clouds were out, blue sky – your honor you were there, Board of Aldermen president was there, we had Representatives Gentile, Klarides – you were all there – it was a great day, a spectacular day. The kids were on the field, they were playing soccer; that's what the field was built for. This was our opening day, September 21, 2008, this past Sunday. Beautiful Witek Park unused – Park & Rec signs saying "No Unauthorized Ball Playing," empty parking lot. I have smaller pictures on this side showing the cramped conditions at Bradley School, the state of the field. We were playing in the right field of the baseball field. There was also a touch football game going on with high school people who were very near the youth playing. So I say to you that the conditions are not right for soccer. Again, I hoped I had more time but I did take some time to prepare minutes going back from August 2006 to present day. If anybody would like a copy, I made, of Board of Aldermen minutes that reference Witek Park or Park & Recreation minutes that reference Witek Park please grab a copy. I don't feel it's right that the children aren't allowed to play there. There's five more games left and the games are on Sunday. The fields aren't being used Sunday. Surely you can come up and let these kids play. There's nothing better, speaking as an ex-athlete and I recognize some of you out there, than putting on your game jersey and knowing it's game day. Whether it's a little tee shirt or a high school uniform, there's pride with playing on a professional field. Final point I wanted to make – Park & Rec – Park & Rec are the people we agreed to a good-faith dealing that we would play our practice would be at Bradley School and that our games would be at Witek Park. Somehow that good-faith deal got reneged. And I would like to say that looking at the Park & Rec minutes Mr. Walsh, Ms. Moran I've known you forever, Dennis you've done more for the youth – I mean you've been helping the youth of this town since I was a youth. And this isn't anything against Park & Rec. The problem is Mr. Walsh, no less than ten times in these past twenty-four months, stands and pleads and says we have no authority over Witek Park. So the question I pose to you is anything this

Commission says with all due respect doesn't matter. He cannot tell us he cannot play if he doesn't have the authority. So I look to the Board of Aldermen – you have the authority. Please give this man the authority to make the decisions to run Witek Park. What's the problem? Witek Park got signed over – the day it opened up you should have said Parks & Rec here you go. That's my opinion – I thank you for your time but I do think that there's a lesson to be learned here that the children of this town do matter. That field was built for soccer and yes if you believe an injustice was done you can professionally and respectfully fight City Hall. Thank you for your time and God Bless Derby.

Jack Walsh, Parks & Recreation, City of Derby – I have to address Art's remarks and his statements and the agreements. First of all let me say to build at Witek Park (inaudible) would never have happened there. And it took years and years of public hearings and meetings to get that field and Parks & Rec was very pleased to push for it because it was needed. Now getting to the current situation one of the things that happened when Witek Park was built, and it was a smart move, the City mandated that there would be turf management – professional turf management. Why? Well if you look at the condition of our other fields you can see why. If you go to Ryan Field or Bradley they're about to (inaudible.) There's some grass on it, not totally. Take a look at our practice field at Uluski and you'll find – I wouldn't say there's any grass there – there's something there but it's not grass. So those are our four fields. The one today that still looks – and I liked the term you used Art – professional – is Bradley – or I'm sorry is Witek. Why does Witek look so much better than all the other fields? Well the answer is Ken Hughes was appointed as the Turf Manager and that field has been managed and it has been regulated so that we don't overuse it. All of our fields are grass fields and unless you're superman grass fields are only going to get a certain number of uses per a year and I don't care if you're the New York Giants or the City of Derby Public Works Department, there is only so much use that it can take. Ken is an expert on it and he tells us how many plays we can get on there. Quite honestly I wish we had the same standards for all those other fields as we got at Witek, but we don't, okay. I also need to address the issues of my statements about control because that's important. Parks & Rec has control of fields for scheduling purposes. But if you look at the study that was done – it was a bi-partisan study done a year ago, which involved the Board of Aldermen, Parks & Rec, Board of Education and Tax Board. If you look in there there are recommendations – I have asked the Board of Aldermen every year – to review the City Charter and specifically state what's under control of Parks & Rec and what's under control of every place else. That has never been clarified, okay. (Inaudible) dispute over the Bradley School playground, which we had a year ago. So that needs a lot of clarification. Now getting back to the schedule we met with the soccer group prior to the start of the season and explained to them that we're moving High School soccer because Art you said no one is using the field – the High School soccer team had been moved to Witek Park to reduce the number of events on Ryan Field, which a year ago had over sixty games there in the fall, which is double, triple which it should have. We knew that was a problem – 5 years, 6 years ago when we allowed the High School soccer team on there. They had nowhere else to go. But over time we certainly want to reduce that. And this year we made a decision and we met with the officials who use (inaudible) they said for the fall season – there's more than one season at Witek Park – for the fall season we're going to move the High School program over there and try to reduce the use of Ryan Field until we get that field back up. And you know the High School – you talk about practice – the High School teams practice on the softball field within the Ryan Complex so they don't have a practice field either.

We had a meeting and we left it and the soccer officials were going to go back and I think there were subsequent meetings with Dennis, which I wasn't part of, but I know there was an offer for some of the youth soccer to be played at Witek Park and that offer is still on the books. You can't play them all but some could be played there. Derby Youth Soccer Officials said no – we want them all together. We don't want parents traveling to two different fields. It's too confusing, too many problems so we will stay at Bradley. Now when the schedules came out obviously the parents who didn't understand that thought that they were betrayed. No one was betrayed – everything was done aboveboard and you know I stand by the work that Dennis has done. You have to have the Wisdom of Solomon to schedule all the events for our youth sports and educational sports in this town and keep everyone happy. It's an impossible task. We do the best that we can with it. Are we perfect? No, but I think under the circumstances I think we've done a pretty darn good job.

Mayor Staffieri – Jack could you wrap it.

Mr. Walsh – Okay. The City doesn't have the luxury of fields for schools and fields for the town – we have to make them both work together. If the schools had their own fields we wouldn't have these problems but we do and we do the best that we can with it. So I just want to add that's where we are.

Mayor Staffieri – Thanks for the explanation Jack. Anyone else from the public like to speak?

Mr. Gerckens – I would like to get some additional comment – just 20 seconds...

Mayor Staffieri – If we go around after everybody gets through talking then it's our policy to let someone talk a second time. Anyone else from the public that hasn't spoken yet that would like to speak.

Laura Wabno, City of Derby Town & City Clerk – I was out of the building from August 12th to the present and I would like to raise a question on page 9 of 15 of last month's minutes. It said Public Hearing for Charter Revision – that the public hearing was not held because we never advertised. At no point in time did the Charter Commission or this Board instruct myself or the office to put in a legal notice. I just wanted that on record because I did get phone calls at home asking why we were never instructed to. And on page 14 in my absence I sent up a resolution for a grant, which I have applied for in the last three years from Historic Preservation for a \$7,000 grant and the motion was made that the Mayor is empowered – I would like clarification since I have handled it the last three years and (inaudible) the Mayor's designee. The motion that I have to send up to Hartford states ...

Mayor Staffieri – The Mayor usually signs it right.

Ms. Wabno – You sign it but you empower me to act on your behalf.

Atty. Coppola – Or the town...

Mayor Staffieri - It says or the Town - it says either or.

Ms. Wabno – Yes. But in the motion it only gives you the power. I would like to ask that you make an amendment to that motion otherwise I cannot act on your behalf or the town's behalf.

Mr. Hughes – The motion empowers the Mayor to execute the grant and the grant states "Anthony Staffieri, Mayor or the Town Clerk." So by executing that grant...

Ms. Wabno – But he has to empower me to sign. I can't sign anything now. All the other years I have taken care of it.

Mr. Hughes – But the actual grant says "Anthony Staffieri, Mayor or the Town Clerk." So once he signs off on that then you're his designee.

Ms. Wabno – I just wanted to be clear because I have to send that motion up to Hartford. Thank you.

Mayor Staffieri – Do you see any problems with that Corporation Counsel?

Atty. Coppola – No

Mayor Staffieri asked three times if anyone else from the public would like to speak for the first time before starting the second round. Hearing no one wishing to address the board for the first time Mayor Staffieri invited Mr. Gerckens to address the board again.

Mr. Gerckens – I would just like to say that please don't get me wrong in criticizing Jack Walsh or Dennis or the Board of Parks & Rec. My argument is that it seems abundantly clear to a layperson reading the minutes month after month we do not have authority. So I argued that they still don't have authority and I think that this Board of Aldermen group here you should be challenged to go back and do the right thing and give the man the authority that he seeks and then there's no question as to who is running the thing. With regards to Mr. Hughes as being a field administrator – that's great. The field is in great condition but I do want to point out that sir when you attend these Parks & Rec meetings you are looked at as the President of the Board of Aldermen. You can throw it any way you want – whether you are a field administrator or what when I see your name I think President of the Board of Aldermen and to me it just seems like there's no clear definition here and I think it needs to be defined definitively who is in charge of that field. Thank you again for your time.

Beverly Moran - I would just like to give everybody an update on little Madison. She had a skin graft that took 100% and she's been fitted for Life-Fight pants that she wears. She started school and she's 100% on her way to recovery.

Mayor Staffieri asked three times if anyone else would like to address the board.

Hearing no one else from the public wishing to address the board...

PUBLIC PORTION CLOSED

APPROVE MINUTES OF THE AUGUST 18, 2008 SPECIAL MEETING

A MOTION was made by Mr. Szewczyk with a second by Mr. Allaire to approve the minutes of the August 18, 2008 special meeting as presented.

DISCUSSION ON MOTION

Mr. Bomba said he was happy to see the minutes printed on both sides of the paper, which is a cost saving move.

MOTION CARRIED.

COMMITTEE REPORTS

Without objection the Committee Reports were **TABLED** until the next meeting.

DEPARTMENT REPORTS

Without objection the Department Reports were **TABLED** until the next meeting.

APPROVE BILLS – MIDDLE SCHOOL BUILDING COMMITTEE – BIANCO, GIOLITTO WESTON ARCHITECTS – INVOICE #10 \$63,497.60; FIP CONSTRUCTION, INC. INVOICE #08001.06 - \$495,631.00; NAFIS & YOUNG – INVOICE #414-08 \$2,620.00; IMCO INVOICE DATED 9/16/08 \$4,093.76; CITY OF DERBY DEPARTMENT OF POLICE SERVICES \$779.39; AND PIERZ ASSOCIATES – PER LETTER OF AGREEMENT DATED 12/13/07 \$15,600.00

A MOTION was made by Mr. Hughes with a second by Mr. Bomba to approve payment of the Bianco Giolitto Weston Architects Invoice #10 in the amount of \$63,497.60; FIP Construction, Inc. Invoice #08001.06 in the amount of \$495,631.00; Nafis & Young Invoice #414-08 in the amount of \$2,620.00; IMCO Invoice dated 9/16/08 in the amount of \$4,093.76; the City of Derby Department of Police Services Invoice in the amount of \$779.39 and Pierz Associates Invoice per letter of agreement dated 12/13/07 in the amount of \$15,600.00.

DISCUSSION ON MOTION

Mr. McLiverty said the only thing he would like to point out is the IMCO bill. He noted the board approved the work up to \$4,000.00; however the downspouts that go out the back of the building were broken and they needed to be replaced thus the reason why the slight increase in the IMCO invoice.

MOTION CARRIED.

WAIVER, JIM STADT, BOARD OF EDUCATION MEMBER AND MIDDLE SCHOOL SOFTBALL COACH, DISCUSSION & ACTION

Mr. Hughes stated that the waiver was necessary since Mr. Stadt is a recent member of the Board of Education and also a paid employee of the school system; therefore a waiver is needed from the Board of Aldermen to serve in that capacity.

A MOTION was made by Mr. Lenart with a second by Mr. Szewczyk to approve the waiver for Jim Stadt for the position of Middle School Softball Coach. **Motion carried.**

VALLEY ARTS COUNCIL – LEASE FOR 119 CAROLINE STREET – DISCUSSION & POSSIBLE ACTION

Mayor Staffieri said since Mr. DiCarlo submitted a proposal for use of the building no other proposals have been received. Mayor Staffieri said he feels the proposal from the Cultural Commission would be a good use. Mr. Szewczyk said he feels the Lease Agreement is very thorough. The Mayor noted that the City will receive \$1.00 a year for the use and the Valley Arts Council will be totally responsible for the upkeep of the building. Mr. Hughes noted for the record that the Lease wasn't given to the Arts

Council as a default because no one else came forward. Mr. Hughes said he believes it is a great idea and really the perfect use for that site.

A MOTION was made by Mr. Szewczyk with a second by Mr. Bomba to approve the Lease of 119 Caroline Street between the City of Derby and the Valley Arts Council as presented. **Motion carried.**

REVISION OF THE ORDINANCE REGARDING VEHICLES & TRAFFIC – DISCUSSION & POSSIBLE ACTION

Deputy Chief Narowski informed the board that the current fines for parking need to be amended as do the Ordinances for parking. He said they would like to repeal two Ordinances – 186-9 and 186-10; both Ordinances deal with impounding vehicles and they are from 1957 and no longer followed. Deputy Chief Narowski said Section 186-11.1 will include a new Ordinance and will allow for the doubling of fines and also allow for the impounding of a vehicle should the fine exceed \$250.00. New Section 186-11.2 creates a Violation & Penalties Section for Article I – currently there is no penalty section, which they believed to be an oversight. Also Article VII – Parking for Handicapped – they would like to strike the current section 186-45 and amend it with new language, which would change the Handicap Parking Fine from \$90.00 to \$150.00, which models the current State infraction penalty for this violation.

Mr. Hughes said Corporation Counsel has also reviewed these changes and a draft of this proposal was sent to the Aldermen. Atty. Coppola said he sees no problems with the changes.

A MOTION was made by Mr. Lenart with a second by Mr. Szewczyk to approve the revisions to the Ordinances regarding Vehicles and Traffic as presented. **Motion carried.**

REFUND OF EXCESS TAXES REQUESTED THROUGH 8/11/08 AND 9/16/08 – DISCUSSION & ACTION

A MOTION was made by Mr. Hughes with a second by Mr. Bomba to approve the refund of excess taxes through 8/11/08 in the amount of \$468.02 and through 9/16/08 in the amount of \$4,746.21. **Motion carried.**

EAGLE SCOUT PROJECT, MICHAEL BREault, DERBY GREENWAY – AMERICAN DIABETES WALKATHON – SUNDAY OCTOBER 11, 2008 9:00 A.M. – 1:00 P.M. DISCUSSION & POSSIBLE ACTION

Mr. Hughes informed the board members that he was approached by Michael Breault regarding the walkathon for the American Diabetes Society on the Derby Greenway. He feels this would be a good thing for the Greenway and the City.

Mr. Hughes noted that the Insurance Release has already been received by Atty. Coppola.

A MOTION was made by Mr. Hughes with a second by Mr. Bomba to approve the request from Michael Breault to hold a walkathon on the Derby Greenway on Sunday October 11, 2008 from 9:00 a.m. to 1:00 p.m. as his Eagle Scout Project to benefit the American Diabetes Society. **Motion carried.**

EXECUTIVE SESSION – PENDING LITIGATION:

- a) **GRYCA vs. LAJEUNESSE**
- b) **DESCHEEN vs. DERBY POLICE DEPARTMENT**
- c) **REMOVAL OF PCB's FROM O'SULLIVAN'S ISLAND**

A MOTION was made by Mr. Hughes with a second by Mr. Boulton to go into Executive Session at 7:37 p.m. inviting Mayor Staffieri, Corporation Counsel, Chief Mascolo, Deputy Chief Narowski, and Sheila O'Malley (for item C only) to discuss pending litigation.

Motion carried.

PLEASE NOTE DUE TO THE LARGE NUMBER OF PEOPLE ATTENDING THE MEETING THE EXECUTIVE SESSION TOOK PLACE IN THE MAYOR'S OFFICE.

A MOTION was made by Mr. Hughes with a second by Mr. Boulton to come out of Executive Session and back into Regular Session at 7:58 p.m. **Motion carried.**

GRYCA vs. LAJEUNESSE

A MOTION was made Mr. Hughes with a second by Mr. Lenart to resolve the matter between Gryca vs. Lajeunesse. **Mr. Boulton abstained. Motion carried.**

DESCHEEN vs. DERBY POLICE DEPARTMENT

A MOTION was made Mr. Hughes with a second by Mr. Bomba to resolve the matter between Descheen vs. Derby Police Department. **Mr. Boulton abstained. Motion carried.**

REMOVAL OF PCB's FROM O'SULLIVAN'S ISLAND

Mayor Staffieri asked Arthur Bogen to review the process with the board members. Mr. Bogen told the board members that in 1983, 1984, & 1985 the EPA conducted a removal of drums from the lagoon at O'Sullivan's Island explaining that the lagoon is situated on the far end near Hog Island. He said in doing so some of the drums rotted out and some of the material fell out of the drums, which were stored in piles. Those piles have periodically been marked off and there has been some PCB contamination on the ground in the same area where the drums were removed. Mr. Bogen said they have been working with the EPA for a number of years to try to have the PCB's removed from the island as part of a continuing effort and EPA has agreed to do the removal. He then passed out maps and pictures to the board members to show them the area in question. The proposal is to have the EPA come to the site with their own contractors to remove the materials. Mr. Bogen said this is especially timely because the application they presently have in with the Housatonic Restoration Committee is in the final round – that application would be to put in the walkway and extend the Greenway around the entire peninsula and also install a disabled access fishing pier along the river right near where the existing boat ramp is.

The board had no questions of Mr. Bogen. Mayor Staffieri thanked Mr. Bogen for his presentation to the board.

A MOTION was made by Mr. Hughes with a second by Mr. Bomba to approve for the EPA to provide assistance for the removal of PCB's from O'Sullivan's Island. **Motion carried.**

REQUEST USE OF GREENWAY ON OCTOBER 15, 2008 FROM 9:45 A.M. TO 12:30 P.M. FOR THE ST. MARY/ST. MICHAEL SCHOOL WALKATHON

Mayor Staffieri read the following request into the record:

Dear Ken Hughes, Chairman, Derby Board of Aldermen:

I am requesting the use of the Derby Greenway for our annual St. Mary-St. Michael School walkathon. Our date is set for October 15, 2008 with rain dates of October 16th or 17th. We will use the area from approximately 9:45 a.m. to 12:30 p.m. We will have small groups so as not to take up too much space. Thank you for your attention in this matter.

Donna Doherty, Principal.

A MOTION was made by Mr. Hughes with a second by Mr. Bomba to approve the request from St. Mary-St. Michael School to use the Derby Greenway for their walkathon on October 15, 2008 with rain dates of October 16th or October 17th from 9:45 a.m. to 12:30 p.m. pending the receipt of the insurance release. **Motion carried.**

APPEAL FROM DENIAL OF APPLICATION BY EUGENE L. MASCOLO, CHIEF OF POLICE – CITY OF DERBY FOR AN ADULT ORIENTED PRODUCTS AND ESTABLISHMENTS LICENSE MADE BY BEYOND DISTRIBUTORS, LLC D/B/A LOVE SHACK, DOING BUSINESS AT 1 NEW HAVEN AVENUE, DERBY, CT – DISCUSSION AND ACTION

Atty. Coppola – We're going to begin this appeal process by having the attorney for the applicant, whose application was denied and who was requested to Cease and Desist, I'm going to have him present evidence and testimony for the board. What we have to keep in mind is that this is not open to the public in terms of having comment from the public. We are only left with Mr. Silver's presentation. At the end of the presentation I will just go over the Ordinance that we are asked to review – I'm sorry that the board is asked to review – and then we will have a decision that needs to be made tonight. So without further ado I'll have Atty. Silver present his evidence to the board.

Daniel A. Silver, Esq., Silver & Silver, LLP, One Liberty Square, New Britain, CT 06051 – Mr. Mayor and members of the Board of Aldermen – little bit difficult – we're not in a court, I don't want to make this a court proceeding. I appreciate the compliment by one of the citizens – I'm not sure I'm eloquent, I'm not sure I'm verbose, but I have to do what I have to do and that is present the appeal on behalf of my client. As a way of introduction my name is Dan Silver. I'm an attorney in New Britain with the law firm of Silver and Silver and I'm here this evening representing the applicant for an application for an adult establishment here in Derby. The applicant is Beyond Distributors, LLC d/b/a Love Shack and the principal members of that organization, which is – they're here this evening. Okay – and what I intend to do this evening is to go through what I feel is pertinent as to why the decision of the Chief, which I'm sure was made in good faith, I've had contacts with him and have no problem with him, was an error is a matter of law. Unfortunately this body is not the court; but at the same time you have created a Statute or an Ordinance, which makes you a court from making a determination whether to uphold or overrule the Chief's decision to deny my client a License. Before I get started I have – I think it will go through much quicker – I have a number of documents and I have a book of documents for each one of you, including Corporation Counsel, and I would like to go through those documents with you. Then I

plan to hopefully be brief and put on a couple of witnesses to bring forth why we feel that this is illegal. Basically the legal rationale, so you'll understand where I'm going, is I'm going forward, is that, it is our feeling that as you will see a Zoning Permit was granted by the Building Department to my client. A Building Permit was granted. A Certificate of Occupancy was granted in January. A License Application was submitted and we'll get into that because that's a little bit complicated. And under your Ordinance the Town, excuse me the City, had ninety days from the time that the License was submitted to render a decision. That no decision was rendered within the ninety day period to the contrary processing of that application much of it took place after the ninety day period ended. The other thing is, as you are well aware, I started a federal lawsuit in United States District Court in May of this year challenging the constitutionality of the actions which were taken by the City in the processing of that application alleging to the Federal court that the actions of the City were unconstitutional as applied to my client, and that the court should order that the requirement of a License as applied against my client was unconstitutional. In addition, since we went to court certain Stipulations were entered into, which I will get into during this discussion. And on July 14th the Chief of Police in his wisdom sent out a letter to my client and to myself denying that License on the basis of an Ordinance, which was adopted – amendment to that Ordinance – the original Ordinance from September 2007, which was adopted on May 22nd, which became effective fifteen days later. And we'll get into all of that as I go through my discussion. So before I do it will be much clearer once we refer to some of the documents. So I'm going to ask Frank to help me distribute some of these. Let's see I didn't take one for the secretary. What I would like to do if it's okay is to sit here. It's easier for the court reporter and by the way this is our court reporter – it is not a court reporter that was retained by the City of Derby – so she is here this evening from A+ Reporting at my client's expense. Just to go through some of these documents that we will be getting into the first Exhibit I is a letter to your Building Official. I've gone through these documents with him already today, this evening, and he has concurred that these documents here concur with those documents within in his file. So we don't have to go through an identification process. David is here and we've gone through that so these documents actually reflect that which is in his file. I had served a subpoena on him to bring these this evening so we could just save some time and move through quickly. The first document is a letter, but really an Application for a Certificate of Zoning Compliance, which was written on July 10th, however it was not mailed. That was given to the Building Department the day that I walked into his office for the purpose of seeking a Certificate of Zoning Compliance, which was on July 19th, 2007. The letter itself is self-explanatory. It is just a document, which is making an application telling what my client wishes to do indicating that there's a \$25.00 check, which was the application fee, which was required by the Town for a Certificate of Zoning Compliance. Your Zoning Regulations require that a Certificate of Zoning Compliance be approved before an application for a Building Permit can be applied for or issued. The second document is a letter from my office dated June 30th and I just wanted to make sure that the Building Department was aware of my clients' intention as far as the proposed business and this was just a clarification of the original letter, which was given on July 17th to the Building Department. The next exhibit is the Certificate of Zoning Compliance, which was signed by your Building Official on 7/19/07. I should just indicate that at the time that I made this application for Zoning Compliance on behalf of my client, there were no regulations at that time in the City of Derby which restricted by clients' use. Therefore under the Zoning Regulations at the time I submitted the application his business – proposed business – was a permitted use under your Zoning Regulations and he had no

choice really, in my opinion, than to sign off. This is nothing that he had any discretion about he was just following the Zoning Regulations. The next page is the actual Building Permit. An application was submitted for a Building Permit by my clients' together with their architect some shortly after the issuance of the Certificate of Zoning Compliance; however there were a number of issues that the Building Department had raised and those issues were addressed by the applicant and the architect. And at the conclusion of that process the Building Official approved the Building Permit, which indicated that everything was to code - the plans were to code – and that it met all the zoning requirements of the City of Derby. The next exhibit is a copy of the State Statute – it's §8-2h now we're getting into a little legalese but nonetheless it's a Statute, which indicates that when an application is made for zoning if the zoning is okay at the time the application is made any subsequent change in the law would not affect the application. In other words the use is "Grandfathered In" once the application for zoning has been made. And I put that in for your perusal, which I will refer to later. The next exhibit is a copy of the Adult Oriented Products and Establishments – Licensing Regulation, which was adopted on September 10, 2007. That is an Ordinance, which requires certain types of businesses, and you know about this but for the record, is you've adopted it – it's a Regulation, which defines certain types of business indicating that a License must be obtained if you're going to – if you're otherwise zoned and able to open such a business within the town. The next exhibit is the Certificate of Occupancy, which was issued by the Building Department on January 17, 2008. The Certificate of Occupancy indicates as a matter of law that the Building Department has found that the building has been completed, the work has been completed according to code, that the zoning is correct, and that the building space can be utilized for its proposed purpose. There was an exception – what David did is he approved of the Building Permit and he indicated that it is subject to the conditions of your Licensing Regulation, which is not a part of the building code. Whether that's valid or not – that provision is valid or not – is another story. But he under the Building Code and State law as it applies to the Building Department he issued a Certificate of Occupancy. Is everything correct so far Sir? I'm talking to the Building Official.

David L. Kopjanski, Building Official/Zoning Enforcement Officer – City of Derby – Yes it is.

Atty. Silver – Okay. The next is a letter dated February 7, 2008 to your Chief of Police in which I submitted an application for a License. As we get through with testimony at the time that this was submitted in February, although you passed your Ordinance in September, no License had been created so there was no application that my client could have applied for. And we'll get into those dates as we go through that testimony. I would like to indicate that after discussions with your Corporation Counsel, certain information, which was included in that original application has been whitened out so that certain personal information, and because these are public documents, it was felt that it was not relevant to our discussion and should not be subject to public scrutiny - Social Security numbers and telephone numbers and the like so those were (inaudible) for that purpose. So when you see lines they were filled in for the application – the original application – but were not included within the exhibit which is before you this evening. The last page of that exhibit is a DHL Express receipt, which indicates that this was – the shipment that the application was shipped on February 7 and was received by the Police Department on February 8th at – delivered at 9:38 a.m. on February 8, 2008. The shipment was delivered and received and signed for by the Police Department in the City of Derby. The next exhibit is a letter from the Corporation Counsel dated May 7, which is ninety days after the submission of the application

requesting that the Chief of Police needs our assistance in obtaining criminal background checks – and we'll get into that. But that's just a letter just to show from a time standpoint from our timeline. The next is an application, which has been (inaudible) but it shows the – it's an application which the Chief requested that my clients sign and assist the Police Department in completing the processing of the application, which was originally applied for and received by the Police Department on February 8th. The next is a cover letter – cover letters that went to the F.B.I. for information receiving about the criminal background check, which the Chief had requested, which he had indicated it was a requirement under your Ordinance. He had to check that information. We'll get into the contents of that later. The next exhibit are the minutes of the meeting on September 10, 2007 when the initial Regulation or Ordinance for Licensing was adopted and includes the minutes of that meeting on the September 10, 2007 meeting. I just went through this with the Town Clerk and I've checked her records and mine and this is the correct minutes. So the Town Clerk was also under Subpoena for that purpose – I'll have a couple of brief questions for her but I really don't want to keep her out too long here – that's not my intent. The next is a letter – let me explain this - it has my name on it – this was sent to me electronically and when I copied it electronically my name automatically comes out – somebody sends me information and I send it to my printer it automatically comes out with my name on the top. So this information was sent to me – this was the proposed amendment to your Adult Use Ordinance, which was presented to this body on May 22nd. This was the proposal and the following page is the actual – what was adopted – I have the certified copies of the minutes, which the City Clerk gave to me – we just went through those. This is the same – it's the same wording as to the – what was adopted by this body on May 22nd, 2008 and that amendment in 2008 stated that there is to be a buffer of 250 feet between an adult use establishment and a residential district. I will indicate to you to save time, and so I don't have to question the City Clerk, but she is here, that according to your Charter an Ordinance, which was adopted by this body does not become effective for fifteen days after the passage. Is that correct?

Laura Wabno, Town & City Clerk, City of Derby – Yes, Sir.

Atty. Silver – I'm talking to – for the record – to the City Clerk. Is that correct?

Ms. Wabno – Yes Sir.

Atty. Silver – So that this Ordinance was adopted on May 22nd and would have taken effective approximately either May the 6th or May the 7th. I'm just counting – I don't know if you count the 22nd or if you start the 23rd – but either way it's either you would be effective in the City of Derby on June 6th or the latest June 7th.

Anthony Szewczyk, Alderman – Excuse me, what tab are you working off of just now?

Mayor Staffieri – What tab are you working on.

Atty. Silver – I'm looking – it says page 2 of 2 – it's a copy of the Ordinance. This was on Section 8. Your amendment to the Ordinance was adopted by this body on May 22, 2008 – I do have certified copies if it's necessary – I don't think it is – but I'm certainly willing to put the certified copies in because we have them here if that is the case. But on May 22, 2008 you adopted the amendment creating the buffer of 250 feet between – any questions on that? Okay – so the effective date – that's important – the effective

date of that would have been my (inaudible) is within June the 7th but possibly it could have been June the 6th. I don't know how if she counts the 22nd or we start with the 23rd but either way it's either June 6th or June 7th that is the effective date of that Ordinance. The next exhibit is the federal complaint, which was served – drafted by my office and served upon the City of Derby and that constitutes our constitutional claims as differentiated from State claims – claims of State law dealing with the statutory validity, which I will be discussing this evening of the May 22nd amendments. We also have – are challenging the May 22nd in federal court on our amended complaint dealing with the constitutionality. I'm not here this evening – all our constitutional issues are in federal court. We specifically will be reserving those – hopefully we will not have to go to court, State court over this evening, but if we did, we will be reserving our rights to litigate only the State issues in State court under a United States Supreme Court decision called *Haymon - Haymon vs. the United States* and the *Haymon* decision allows me as a plaintiff to split our cause of action taking our rights to Federal court and reserving any State claims that we have for the State Superior Court in Connecticut. The next exhibit is very important so I'm going to spend a couple of minutes. This is – and I know that it's hard to read – I have a cleaner copy for those – however this was taken from the electronic filing system in the United States District Court and that's why it came out – I wanted to give you a copy not from my file but a copy that was filed and approved by the United States District Court. On June 3, 2008 a Stipulation was entered into by the City of Derby acting through your Counsel, Howd & Ludorf in Hartford, and my clients. The purpose of this Stipulation is as follows the Police Chief – I think it says for itself – it states it for itself and I'll just read it – Whereas the plaintiff Beyond Distributors, LLC has applied for a License under the defendant's Adult Licensing Ordinance on or about February 7, 2008; Whereas the members of Beyond Distributors, LLC, Alfred Ciraldo and Frank Rosa meet all current requirements for issuance of a License as required by – and that is your Statute number or your Ordinance number – of the Adult Licensing Ordinance with the exception that the defendant, Eugene Mascolo as your Police Chief, has not received back from the federal government a background check as required. As a result the City of Derby agree that we otherwise, except for that background check, meet all requirements to be issued a License for this business. This is what was stipulated to in the federal court. And as a result my client was able and allowed to open. The City of Derby stipulated that my client could open his business subject only to an adverse finding of a criminal charge, which would be objectionable under your Ordinance. Now if you look at your Ordinance there are several crimes that would make an applicant ineligible to hold a License. First of all that is unconstitutional as a prior restraint, but nonetheless that's not being challenged in this case before you today - that's another story in federal court. However needless to say that the City of Derby stipulated that subject to a successful background check we met all requirements for that. The last page of that exhibit is a docket sheet, which came off of the same judicial website and if you look at number 15 it says page 3 of 4 you'll see that Judge Bryant – United States District Court Judge Bryant – entered that Stipulation as her order and that Stipulation is approved by Judge Bryant. And we will have indications and we'll have testimony this evening that my client opened his business on June the 3rd – June the 4th, excuse me, opened its doors on June the 4th, 2008 for business. You remember the Ordinance that we're talking about, which is the reason for the rejection did not take effect until June 6th or June 7th. The next exhibit is the letter from your Chief of Police rejecting the License not on the basis of an adverse finding of a criminal record, but to the contrary, he denied that because of the May 22nd Ordinance, which says we're within 250 feet of a residential zone. And the last exhibit that I have is the letter to the Board of Aldermen, care of the City Clerk, appealing the

decision of the Chief of Police. With that I would like to have my clients Mr. Rosa come up and sit over here so the court reporter and everybody could hear him. I have a series of questions for Mr. Rosa.

Q. Would you please state your name?

A. Frank Rosa.

Q. And what's your address?

A. 156 Connecticut Avenue, Norwalk.

Atty. Silver – Please speak so everybody here – I know the acoustics are good because I am hearing handicapped – you can hear very well in this room.

Q. What is your position with Beyond Distributors, LLC – the applicant? Are you a member or an owner?

A. Member of an LLC.

Q. And what is the nature of the business for which you applied for a License?

A. Lingerie, novelties, gifts, videos, novelties.

Q. Are you selling sexually explicit DVD's?

A. Yes

Q. Any books or magazines?

A. Yes

Q. Now are you aware that a Certificate of Zoning Compliance was approved for your business by the Building Department in July of 2007.

A. Yes

Q. And then did you then apply for a Building Permit?

A. Yes

Q. And you've heard the Building Permit is part of the exhibits, which were before the board this evening.

A. Yes

Q. And you've seen that Building Permit.

A. Yes

Q. And you've seen the Certificate of Zoning Compliance.

A. Yes

Q. Do you recall when the Building Permit was issued? I'll call your attention – I know you're nervous – I'm going to show you this document and ask you if you recognize it.

A. Yes – 10/26/07

Q. Okay that was the date that the Building Permit was issued.

A. Yes

Q. When the Building Permit was issued did the Building Official or anybody else indicate to you that the City had enacted a Licensing Ordinance for adult establishments within the City of Derby?

A. Absolutely not

Q. After you obtained the Building Permit did you commence renovations of the building for your use?

A. Yes.

Q. And did you retain a general contractor?

A. We acted as general contractors.

Q. You say "we" who was the other person?

A. Myself and my partner

Q. And your partner's name is?

A. Rich Ciraldo

Q. Okay and did you retain subcontractors?

A. We acted as general contractors

Q. You acted as your own general contractors?

A. Yes

Q. During the fall of 2007 did the Building Department make routine inspections of the work being completed under the Building Permit?

A. Yes

Q. And do you remember who made those inspections?

A. Dave Kopjanski

Q. Anybody else?

A. Um...

Q. You don't remember?

A. I can't recall.

Q. Prior to Thanksgiving in 2007 did anyone...

Mr. Rosa – Fire Marshal

Atty. Silver – Pardon?

Mr. Rosa – Fire Marshal

Atty. Silver – Okay

Q. Prior to Thanksgiving in 2007 did anyone from the City indicate that the Board of Aldermen had adopted a Licensing Regulation, which requires your business to obtain a License?

A. No.

Q. Can you tell the members of this body when the first time you became aware of the fact that this body had enacted an Ordinance, which required the issuance of a License before you could open your business? Was it after Thanksgiving?

A. End of November I was in Dave Kopjanski's office I don't know if I was – I think I was making arrangements for a final inspection – I think that was the case and Dave told me that I had to check on it – someone had to get approved and I had to see the City Clerk for the Ordinance.

Q. What did you do after you learned of the existence of this Licensing Ordinance?

A. After I received it I went across the hall and I contacted you.

Q. And what did I instruct you to do?

A. To get an application.

Q. And where did you go to get an application?

A. Told me to go down to the Police Department so I went to the Police Department.

Q. And what were you told at the Police Department?

A. They had no idea what I was talking about.

Q. And how many times did you call the Police Department seeking an application?

A. Quite a few times (inaudible) City Clerk's Office too. About half a dozen times.

Q. And what was the purpose of those phone calls?

A. To get an application to apply for a License.

Q. And did they supply you with an application?

A. No.

Q. At any time did anybody tell you they were aware that there was an application form out there?

A. No. Nobody ever (inaudible) for that application.

Q. Do you recall that you called my office after January 1st asking for legal advice on how to proceed?

A. Yes.

Q. And what advice did I give you?

A. We had to make our own application.

Q. And did you request that my office make their own application?

A. Yes.

Q. And while my office was preparing a License application for you did the Building Department issue a Certificate of Occupancy?

A. Yes middle of the month I received a CO.

Q. According to the exhibit the Certificate of Occupancy was issued on January 17, 2008 is that correct?

A. Yes that's correct.

Q. Did you submit an application for a License?

A. Yes I did.

Q. Before you submitted an application for a License – the License application that you submitted – did you ever receive an application from the City of Derby?

A. Never.

Q. Who created the form used to make an application for a License?

A. Your office.

Q. Do you recall reviewing the License Regulation or Ordinance as to the number of days that the City had to respond to the application?

A. Yes.

Q. How many days do they have to respond?

A. Ninety days.

Q. And was there any response made within that ninety day period to your application?

A. No.

Q. And with that application did you submit an application – a check for an application fee?

A. Yes and I was told to (inaudible) we submitted fingerprints – so yes we – a check and met all the requirements.

Q. Did you inquire about the City of Derby about getting fingerprints made for this application?

A. The City of Derby?

Atty. Silver – Yes.

Mr. Rosa – (Inaudible.)

Atty. Silver – Pardon?

Mr. Rosa – We had to bring in our own.

Q. Okay is that what you were told?

A. (Inaudible.)

Q. Did you go to the City of Derby to seek – to have your fingerprints taken? Do you recall that?

A. No.

Q. Okay that's fine. Did you go elsewhere other than the City of Derby to have a set of fingerprints taken?

A. Yes.

Q. Why did you have a set of fingerprints taken?

A. It was required by the application.

Q. So as part of the application you submitted a check for \$1,500?

A. Yes.

Q. You signed the application?

A. Yes.

Q. And you submitted a set of fingerprints?

A. Yes.

Q. Did your partner Mr. Ciraldo submit the same fingerprint application?

A. Yes.

Q. Or set of fingerprints, excuse me.

A. Yes.

Q. Do you recall receiving a call from me shortly after May 7, 2008 concerning a letter which I received from the Corporation Counsel's Office dealing with a criminal background check?

A. Yes.

Q. What did I tell you in that phone conversation?

A. You were talking about they wouldn't accept – they need our help with the background check to get another set of prints done.

Q. Did they tell you why they needed your help?

A. I had to sign off on them.

Q. Did you agree to assist the Police Department in doing so?

A. Yes.

Q. And what did you do?

A. I went to the precinct and they took my fingerprints – twice though, I remember going there twice.

Q. And do you remember who you saw when you went there?

A. Lieutenant (inaudible) – I forgot his name.

Q. And what did he ask you to do – the Lieutenant? This is the Lieutenant of the Derby Police Department.

A. Yes – this is the second time I went.

Q. And what did he ask you to do?

A. Took my fingerprints.

Q. So you took a second set of fingerprints.

A. Second time.

Q. And with that second set of fingerprints did they have you sign an application to the Federal Bureau of Investigation for a criminal background check?

A. Yes.

Q. And did you do so?

A. Yes.

Q. And is it fair to say that was a few days after February 7th – excuse me – May 7, 2008?

A. Yes it was after the application went in.

Q. Did you receive back the record check from the Federal Bureau of Investigation?

A. Yes.

Q. Did your partner Mr. Ciraldo receive back the record check from the Federal Bureau of Investigation?

A. Yes.

Q. Do you recall when – approximately when you received back that information?

A. You know better than me.

Q. Was it after you opened the store?
A. Yes.
Q. And did you send forward that information on to the Chief of Police?
A. Yes.
Q. Now Mr. Rosa do you recall agreeing to **(QUESTION WITHDRAWN)**
Q. Do you recall that we started a federal lawsuit the end of May 2008?
A. Yes.
Q. And in that lawsuit, which is an exhibit before this body, we were challenging the constitutionality of the provisions of this Licensing Ordinance – is that correct?
A. Yes.
Q. After we filed the lawsuit do you recall that we were seeking a preliminary injunction?
A. Yes.
Q. And do you recall that I had you come into the office to discuss a proposed Stipulation between Beyond Distributors, LLC the owner of the business and the City of Derby?
A. Yes.
Q. And did you go through the terms of that Stipulation before it was entered in federal court?
A. Yes.
Q. And did you agree to the terms of that Stipulation?
A. Yes.
Q. Do you know when Judge Bryant approved of that Stipulation?
A. June 3rd.
Q. And when did you open the store for business?
A. The next morning June 4th.
Q. June 4th – let me go back a minute – when did you first start stocking the business with inventory?
A. As soon as I got my Certificate of Occupancy – end of January.
Q. You started stocking the business because you were allowed to occupy the premises but you did not open your doors - is that correct?
A. Correct.
Q. So when were you ready to open your business?
A. As soon as the (inaudible) came back are you ready?
Q. When were you ready to have sufficient inventory in your store so that you could open your business?
A. By the end of January.
Q. Of 2008?
A. 2008.
Q. And that inventory remained in the store until after you were allowed to open pursuant to the stipulated order?
A. Yes.
Q. And have you been open since that time?
A. Yes.

Atty. Silver – Mr. Coppola if you have any questions.

Questions from Atty. Coppola

Q. Mr. Rosa I just wanted to confirm you entered into that Stipulation that is described in Exhibit 10 – is that correct?
A. Correct.

Q. And you read that Stipulation before you entered into it?

A. Yes.

Q. And you understood what was contained in that Stipulation?

A. Yes.

Q. And is that acting on behalf of the applicant Beyond Distributors?

A. Yes.

Q. So that your acceptance of that also included your company?

A. Yes.

Atty. Coppola had no further questions.

Atty. Silver – I have a couple of very brief questions for the City Clerk. I'd ask her if she would just...

Q. Would you please give your name for the record?

A. Laura Wabno.

Q. And what is your position with the City of Derby?

A. City/Town Clerk of the City of Derby.

Q. And are you here this evening because my office issued a subpoena for you to be here?

A. Yes Sir.

Q. I'm going to ask you – is that the subpoena that you were served?

A. Well my assistant was served it – I'm out on disability.

Q. Okay it was accepted on your behalf.

A. Yes.

Atty. Silver - Okay I do not have copies of this – I just received this late this afternoon – but I'm going to place it in the record. It is a copy of the subpoena to bring certain documents this evening.* For the purpose of everybody here I issued the subpoena just because that I felt that it was the right thing to do. Not just to ask her that she's here because of the issuance of the subpoena. Not that in any way she wouldn't tell the truth or bring what I asked her, that's not the case. But it's the formal and correct thing to do I felt, that's why I served the subpoena.

Q. As part of that subpoena did I ask you to bring records concerning the hearing on May 22, 2008?

A. Yes Sir from the Board of Aldermen meeting.

Q. I'm going to show you is that the...

A. Yes Sir I certified here it's an original copy on file.

Q. Okay. Now does this package contain everything that was presented to the Board of Aldermen on May 22?

A. It's the original agenda, it's the set of minutes with the additions to it, it's the legal notice that was adopted of the Ordinance, and it's the Certification from the New Haven Register publication.

Q. Okay. There are no other documents that were submitted to the Board of Aldermen for their consideration that are not contained within this...

A. Not within the May 22.

Atty. Silver – Okay – I would like to offer this as an exhibit*. If I could just for the record as part of my exhibit the subpoena I asked the City Clerk to bring tapes of those proceedings on May 22. I'm not going to burden this body of going through a lengthy hearing – it's not necessary. I just want you to know that she informed and I do have

copies of those tapes. I'm not entering those tapes as part of this record, but she was kind enough to make copies of those tapes. I did supply a tape to counsel so you have a tape back – I gave it to Atty. Coppola.

Q. One other thing, the Ordinance which was adopted, the amendment to the Adult Use Ordinance, which was adopted on May 22, is it true that under your Charter that took effect fifteen days after adoption?

A. Fifteen days after publication.

Q. After publication – okay. So – it's not so – let's – I would like to go back and try to get an idea of when that became – can I have that exhibit back please? I want to ask you to look at this part of your exhibit and when was this published?

A. May 27th.

Q. May 27th – so for the record...

A. It tells you right here (inaudible.)

Atty. Silver - Okay so for the record this was published on May 27, 2008, which meant that the Regulation took effect fifteen days from May 27, 2008. I have not done the arithmetic but obviously that was June of 2008. I have no further questions. Thank you very much. It's going much quicker than I anticipated. Next I would like to call the Chief. Good evening Chief. I'm sorry to have to drag you out tonight – I think most people would rather be home watching television – what's going on with the rest of the world – it's probably more important. But nonetheless we're all here this evening.

Q. For the record can you state your name please?

A. Eugene Mascolo.

Q. And what is your occupation?

A. Chief of Police for the City of Derby.

Q. And how long have you been Chief of Police?

A. About two years.

Q. And when did you first learn that the Board of Aldermen had adopted an Ordinance, which required the licensing of adult establishments in Derby?

A. Generally familiar with it around the first of 2008.

Q. So the first of 2008. When did you – is that the first time you learned that you were the licensing authority?

A. Yes.

Q. And did anyone, including the Corporation Counsel, speak to you about preparing a Licensing Application for an adult use establishment in Derby?

A. About mid-January we opened discussions on how to fulfill my responsibilities under the Ordinance.

Q. And when did you become aware of Beyond Distributors, LLC had received a Zoning Permit to open an adult establishment Derby?

A. I can't recall.

Q. Was it before you learned there was a License requirement?

A. No. Once I read the Statute I became generally familiar with some of the non-law enforcement related requirements that were part of the Statute – Ordinance I'm sorry.

Q. So it's your testimony then that you first became aware of the requirements of an adult License sometime in January 2008. Did anyone or any member of your department contact the business owner of Beyond Distributors, LLC to indicate that a License was required?

A. I had two staff members that began to evaluate how we would respond to the Ordinance about mid-January and they opened (inaudible) with Corporation Counsel

and at some point we did begin speaking with I think your office and I'm not quite sure until after we spoke whether or not (inaudible.)

Q. Okay. But you don't recall if that was before the application or after the application?

A. I don't, I don't.

Q. Did you or any member of your staff attend any of the meetings of the Board of Aldermen when they discussed either the adoption of a Licensing Ordinance or the amendment in May of 2007 – excuse me 2008 – the amendment was in 2008. Do you recall receiving an application of a License for an adult establishment from my office?

A. I'm aware that the department received the License.

Q. I submitted as part of an exhibit to the Board of Aldermen it was a letter to you, which enclosed was the application and there was a receipt from the overnight carrier indicating it was received by your department on February 8, 2008. Do you any way contest that it was received on February 8th?

A. No.

Q. Do you recall the timeline of the processing of this application?

A. Generally.

Q. Pardon?

A. Generally.

Q. Generally – can you start – before I do that I did issue you a subpoena?

A. Yes.

Q. And I asked you to bring all your records concerning this application?

A. Yes.

Q. And after reviewing your records does that help you in any way in establishing a timeline of what you did?

A. Sure.

Q. Okay. So with that in mind would you indicate to the board what happened in the timeline of the processing of this application?

A. Around mid-January Corporation Counsel asked us to start looking at our responsibilities under the Ordinance. I asked two members of my staff to begin evaluating how we execute those responsibilities. And the matter of an application became an issue, but in the meantime we received an application from your client and we discussed accepting the application and we moved forward once we received the application from your client. At that point my responsibilities to ensure that the applicant had not been convicted of crimes specified in the Ordinance in any State in the Union became the main sticking point in granting the License. The only way for me to determine whether or not the applicant had been convicted of those types of crimes in States other than Connecticut is to conduct an F.B.I. check. My department does not have access to an F.B.I. check for anything other than criminal matters. The person...

Atty. Silver – Excuse me I'm going to interrupt you. I think it's a little bit more – I didn't understand and I was confused as you recall – perhaps you can indicate the difference between a State check and using the federal records to do a criminal check for criminal purposes because I was confused as well if you recall.

Chief Mascolo – I have access to State criminal records checks for official business. I only have access to F.B.I. criminal records checks for law enforcement purposes. **START OF NEW TAPE** – came back clean. I was not able to get the F.B.I. check until the applicant that requested the criminal records check applied on their own.

Q. Chief do you recall that you spoke to the **(QUESTION WITHDRAWN)**

Q. Are you aware that on May 7, 2008 the Corporation Counsel sent me a letter requesting my clients' assistance in obtaining this criminal background check?

A. Not really.

Q. Did you request that he – at some point did you request that he contact me for that purpose?

A. Right – we had open discussion with the Corporation Counsel's Office and I expressed my concern to him that without the F.B.I. check I couldn't fulfill my responsibility to do the background check on other States so me and my staff determined the best way to reach a resolution was to in some way reach out to your client and ask his assistance in applying himself for the background check and you're telling me that the Corp. Counsel...

Atty. Silver – I'll get to that so that we can complete the circle, so to speak.

Chief Mascolo – Sure.

Q. I'm going to show you what is Exhibit 7, which was submitted to the Board of Aldermen and see if you recognize that letter.

A. I don't recognize it but that's certainly pursuant to what the Corp. Counsel (inaudible.)

Q. Now when you began reviewing your responsibilities in January 2008 under the Ordinance which was adopted did you recognize that you had ninety days from the time of the application to provide a response?

A. Yes.

Q. And is it your testimony that it was not until May 7th that we were requested to assist you in obtaining a background record check on behalf of my clients? Is there any reason sir why it took three months to seek our assistance in getting a background record check?

A. It was an on-going process and it took longer than it should have.

Q. Did anybody at anytime inform you as to the First Amendment law dealing with applications for such the License Application for a First Amendment protected activity?

A. I focused on my responsibility under the Ordinance.

Q. So the answer is "no", no one advised you of that?

A. No.

Q. Did my clients after receiving notice that your department needed their assistance for you to do a background check under your Ordinance comply with your request?

A. They did.

Q. And did they promptly appear at the Derby Police Department for that purpose?

A. They did.

Q. And did they submit and did you have fingerprints taken?

A. They fulfilled whatever responsibilities they needed in order to pursue a background check. I didn't (inaudible.)

Q. Your staff did.

A. My staff took care of whatever requirements were needed to pursue the F.B.I. background check.

Q. And did we discuss the timeline that it would take to get a background check back from the federal government?

A. On the phone I think we discussed that it may be an extended period.

Q. Did I tell you between six and thirteen weeks on average?

A. You were concerned about how long it would take – I don't remember.

Q. Okay. Did I discuss with you my discussions with the Connecticut Department of Public Safety and their opinion as to how long it would take to get that record check back?

A. Yes you did say you had spoken with someone from the Department of Public Safety.

Q. And did I indicate to you how long they expected it would take? You don't recall?

A. I don't recall but there was a discussion over your concern for how long it would take.

Q. That I indicated to you that it would be a lengthy period of time before it would get back?

A. Yes.

Q. Did anybody from the City of Derby including Counsel for the City of Derby contact you concerning the Stipulation, which is part of this package in federal court?

A. Yes.

Q. And in addition to that did you indicate to me on the phone that but for receiving the record check that my client qualified for a License to open an adult establishment?

A. Yes.

Q. That was prior to the Stipulation?

A. The Stipulation was...

Q. Was on June 3rd.

A. Yes I was prior.

Q. And you were consulted before the Stipulation was entered into federal court – is that correct?

A. Consulted about whether or not your client met all other requirements?

Q. Yes. Did you indicate to me on the phone that but for the record check my clients met all of the provisions under the regulation and that you would be happy to issue the License if the record check came back and did not show that conviction of a disqualifying crime?

A. Right – my intent was on the law enforcement side – the State checks, the background checks we had conducted on a law enforcement side your client had met all requirements that I was checking and the only outstanding issue was the F.B.I. check (inaudible.)

Q. And you agreed to the Stipulation that was presented to the federal court?

A. That's the determination that the temporary License should be issued pending a – I'm not familiar with the Stipulation.

Q. Do you recall that the lawyers, attorneys for the City spoke to you about the terms of the Stipulation to be presented to Judge Bryant in United States District Court in Hartford?

A. Yes.

Q. And you had no objection to what was contained in that Stipulation?

A. I don't think I had any problems to object to it but I was aware of it so I made no objection because I didn't think it was my place.

Q. That's fine. Subsequent to the entering of the order you were aware that my client opened his business pursuant to the Stipulation?

A. Yes.

Q. And do you have any reason to believe that my clients **(QUESTION WITHDRAWN)**

Q. Did you subsequently receive from my office a return of the criminal background check from the F.B.I.?

A. I did.

Q. And did either one of my clients have any disqualifying crimes that would otherwise disqualify them from obtaining a License?

A. They did not.

Q. And do you recall when you received back that criminal check from my office?

A. I didn't – the letter is dated 23 June – so on or about 23 June.

Q. And you waited until July 14, 2008 to deny my clients' License. Is that correct?

A. The – your client was Licensed to operate under federal court judgment.

Atty. Silver – That's correct.

Chief Mascolo – So I saw no other action needed on my behalf.

Q. But you did write a letter to my office on July 14th – and I'll show you that letter – is that the letter that you wrote denying the License application?

A. Yes it is.

Q. And what was the reason for the denial of the License application?

A. I have to evaluate the amendment the board made to the Adult Use Ordinance and based on the new amendment the establishment was in violation of the Ordinance.

Q. Do you agree that my client was open and in business prior to the effective dates of that amendment of May 22nd.

A. Yes.

Q. If your processing of the application had been completed within the ninety days of the application date, which would have been May 8, 2008, would my client have been qualified for a License to operate an adult (inaudible?)

A. Yes.

Q. And would you have issued the License on May 8th or May 9th if all of the information that you now have was in your possession on May 8, 2008?

A. I would have.

Q. So that the License would have been issued on May 8, 2008 but for the fact that the department, for whatever reason, failed to commence a proper record check. Is that correct?

A. It is correct.

Atty. Silver – I have nothing further.

Atty. Coppola – I have no questions.

Alderman Szewczyk – I have a question. You know like the distances – yes or no – is it just a Derby Ordinance? Because like apparently I asked a question like 250 feet versus 1500 feet for schools – is that a State law or a City law? If it's a State law...

Atty. Coppola – Mr. Szewczyk...

Alderman Szewczyk – And the business closed...

Atty. Coppola – Mr. Szewczyk you can only ask the Chief the question. If you think you can't answer that...if you have a question for the Chief you can ask him.

Alderman Szewczyk – I know that – that's what I was doing. (Inaudible) was misunderstood. I am asking you Chief. Were you aware that this is strictly a City Ordinance or do you know if it is in fact a State law?

Chief Mascolo – I did not concern myself with anything other than the City Ordinance and my responsibilities under that Ordinance.

Alderman Szewczyk – Thank you.

Atty. Silver – In answer sir of your question I will indicate with my opinion and obviously listen to your Corporation Counsel, there is no State law in the State of Connecticut relating to the locations of adult establishments. All regulations in dealing with the distances or other regulations for adult establishments are set by each municipality and they are all different. I have no further evidence to add. I would like to sum up after you – if you have anything to put on.

Atty. Coppola – I don't have anything to put on. I will mention a Charter section, which is not in evidence, the Chief provided – I'll give you a copy of that. I'll have you do your summation and then I'll basically do a quick summation for the City and I will make reference to a Charter section and I'll have a copy for you.

Atty. Silver – If it please the members of the Board of Aldermen what you heard tonight, quite frankly, was an unfortunate situation. My clients obtained – came into the City of Derby – checked the Zoning Ordinances of the City of Derby and found that his proposed business was legal under the Zoning Regulations of the City of Derby and as such applied for a Zoning Permit, Building Permit and subsequently received his Certificate of Occupancy. So under the zoning laws of the City of Derby at the time he made his application he was a lawful use. I can assure you if the Building Department felt that his particular use was not permitted under the zoning regulations he would not have received his certificate of zoning authority nor would he have received a Building Permit. Subsequent to receiving the Certificate of Zoning Compliance but prior to receiving the Building Permit this body adopted a licensing law. I will indicate that a licensing law per se is not unconstitutional – it is consistent with the First Amendment. Certain provisions of that Ordinance may be unconstitutional but we're not here to discuss the First Amendment aspects. What happened is clear that as a result of the application it came to your knowledge that this business was coming to Derby and this body felt that it was in its best interest to adopt a licensing regulation. I understand that the Zoning Commission also passed a regulation but nonetheless we're not dealing with zoning we are dealing with the Ordinance that was adopted by this body on September 10, 2007 and amended on May 22, 2008. Once that was adopted in September nobody contacted my client to indicate that a License was necessary. No letter came from the City Clerk. The Police Department as you heard – the Police Chief who was responsible for preparing the application and (inaudible) wasn't even aware that there was an Ordinance until January 2008. How can my client be held responsible for not knowing if your own Chief of Police did not know? Somebody was asleep obviously because nobody informed the proper authorities to A. to make an application so my client could make an application and B. notify the Police Department that they had a job to do – they were out of (inaudible.) Nobody knew what was going on. My client according to his testimony made several – at least – according to his testimony a half dozen attempts to get an application and nobody knew what he was talking about. He couldn't apply because there was no application for him to apply. The Certificate of Occupancy was issued in January and there was still no form that had been generated. I will indicate to you that after I submitted my application Mr. Coppola did prepare a form and sent it to me. That was after the application had been submitted. And I indicated to Mr. Coppola that might as well

use my application it's already been submitted and we agreed that as the Chief testified we would use the application that was prepared by my office not the City of Derby. What I did was prepare an application based upon the requirements of your Ordinance – simple. I did the same thing that somebody else in Derby probably should have done but never did. My client then applied for the License on February 7th – it was dated and received by the department on the 8th and under your own terms the City had ninety days to comply. So let's look at that – my clients had the Certificate of Occupancy – he could have opened his business as of the 17th of January. Now we didn't even get into the problems that came over issuing the Certificate of Occupancy but nonetheless there were a number of issues but all of those issues were resolved and the Certificate was issued on January 17th. Therefore he had permission by the zoning folks and the Fire Marshal to occupy the premises. Inventory was ordered assuming that a License would be issued because as you have heard the testimony of the Chief they complied with a License. I told my client that he complied with a License – apply for it – you comply with the law. They can't refuse you a License because you are in compliance with the very Ordinance which was adopted by this body. Then on May 22nd while the application had not yet been processed – as you know on May 7th is when – Atty. Coppola wrote me a letter on May 7th indicating that we assist the Police Department. So I estimate that I probably received that letter either the 9th or the 10th of May and within 48 hours my client was at the Police Station assisting them. As the Chief indicated your Ordinance requires a certain type of background check. That type of background check, which your Ordinance requires can only be applied for by the applicants – it cannot be applied for by the Police Department. But for some reason it took more than ninety days for the Derby Police Department to determine that they couldn't do this background check and they required the assistance of my clients in order to do the work which you folks felt that was the responsibility of the Chief of Police. We assisted and the criminal checks came back fine. The Chief of Police had indicated that but for the background check they met all the requirements and if he had successfully completed the processing of the application within the ninety days as specified in your very Ordinance that he would have issued that License. But he did not issue that License because of the lack of a background check. We then filed a federal lawsuit because of the delay – First Amendment grounds, which is still pending in United States District Court – for which we are seeking damages, loss of rentals, loss of profits and other matters. That matter is being defended by counsel – not the Corporation Counsel – as you know this City is insured and counsel has been supplied by your carrier, however you have a deductible as all towns do. I don't know what the deductible is you probably know – I'm sure you know. But there's usually a pretty hefty – most of the towns I've been involved with there's usually around a \$50,000 deductible, which means you are paying attorney's fees up to your deductible. I don't know what it is – I'm not saying what your deductible is, I don't know – but most of the towns I've been involved with have \$50,000 deductibles. So we are going forward with our federal matter – we have this substantial discovery. In the meantime after we did file the federal suit we entered into this Stipulation the reason being is in the record the matter was sent down for a preliminary injunction. The town obviously felt that they had a problem because the License had not been granted in ninety days and under the First Amendment that is a major no-no so says the United States Supreme Court. That by itself in my opinion is sufficient for us to win in federal court. However, the town indicated and we complied and we said we will not go and seek an order of the court we will open our business – we know my client doesn't have an objectionable record, when it comes back we will get our License. The town we agreed we signed the orders – they were ordered by Judge Bryant – and my client opened on June 4th. Meanwhile

on May 22 unbeknown to the Chief, unbeknown to your lawyers in Hartford unbeknown to me you had adopted an amendment. That amendment didn't take effect until fifteen days after publication. Publication was on May 27th so my client had been opened almost a month before that Ordinance took effect. But it was on the basis of that amendment to the Ordinance that the Chief denied my License. Now unfortunately I need to get to some of the legalities and I'll try to be brief because they're somewhat complicated. Number one our claim is that because we are a non-conforming use – in other words we have this Certificate of Occupancy, we have all of these things were granted prior to, prior to the adoption of these regulations, especially the May 22nd, that we were – our use was Grandfathered in. I know that the minutes of the meeting on May 22nd Atty. Coppola indicated to this board that this body had a right to pass distance requirements per a decision of the Connecticut Supreme Court in the case of VIP of Berlin vs. the Town of Berlin. I know that case very well – I lost it – it was my case. However, the situation with VIP was much different. VIP was not open when the law took effect. It had nothing to do with non-conforming uses in defeating the concept of non-conforming uses. VIP had never been open. VIP applied for a License in 2006 and the law had been adopted in the year 2000. Therefore it is our contention as a matter of law that the May 22nd amendment should not affect my client and this body had no right to adopt and to affect my client because my client was already properly zoned and in business. And if that is not true look at it this way – forget an adult establishment this body can go to any business in town, in any zone in town, to any business that has been opened for ten years, fifteen, twenty years and decide we don't want a bar or we don't want a restaurant in a certain district. Forget the zoning this is the concept under of police powers we don't want this type of business. Or if you had a refuse facility – we don't want a refuse facility – even though that refuse facility had been there for years. You could go in and outlaw and make that facility close. That is what is happening in this case ladies and gentlemen. This is what the decision of the Police Chief means and we will be contesting in the event that this decision is not overturned. Number two we are making a claim for what we call judicial estoppel that this body entered into a Stipulation in a court of law – United States District Court – indicating that subject to obtaining a record background check my client could open his business – that he met all of the requirements at that time of the regulation. Subsequent to that a law went into effect – our claim would be judicial estoppel – that the town now is stopped from making that decision. And the third theory that we are putting forth is a general application that we call a retroactive application of new regulations that unjustly abrogates or otherwise fully vested rights are illegal. In other words you can pass a law, which goes forward in the future and would affect every other adult establishment that may want to come to the City of Derby. That regulation and those foot restrictions are valid according to our Connecticut Supreme Court – valid. Therefore anybody coming after us would be prohibited. On the other hand because we were open at the time of the effective date what you are doing is seeking retroactive applicability of this regulation, which we claim violates Connecticut State law. Those are the three basic legal principles in which I contend to you this evening would indicate that my client should – the decision of the Police Chief should be overturned and a License should be rendered. My client agrees to abide by all of the laws under your licensing regulation. If there's a violation we're going to be forced to close or be suspended and there are many regulations and there are many provisions of that Ordinance which we are subject to and we are not complaining about and hope never to have to appear before this body on one of those type of situations but I don't think so. Remember my clients use is not a place where there is live activity. There is no live activity. There are no preview booths, there

are no dancers. This is an establishment which has clothing, it has novelties, it has gifts, and yes it has sexually explicit DVD's. One of the individuals who spoke at the public hearing said what is the big deal? You have to be 21 to get in, you can't see anything from the street, there's no signage which would be explicit, therefore there is really no harm to the town and this is really a moral objection rather than a legal objection. Now I know its political season – its politics. It's not popular to be in favor of the adult store. But you folks unfortunately – fortunately or unfortunately – have a legal responsibility – you gave it to yourself. Other Ordinances give other people responsibility – you left it to yourself so you're the ones who do – you can't leave it to the board of police Commissioners, you can't leave it to other bodies. You have to make the decision. And I ask you to take all of these things into consideration and do what the right thing is. Not what may be the politically correct and have the courts overturn it and spend many thousands and thousands and thousands of taxpayer dollars having this thing overturned in an economy which you can't afford and let's get this over with and finish once and for all and we'll wrap up two costly lawsuits to the City of Derby and it will still affect every future business to come to the City of Derby in the future. Thank you for your attention.

Atty. Coppola – Thank you very much Atty. Silver. I want to thank you for putting on a good presentation on behalf of your client and making my job easy by having all of these documents bound so I appreciate that. Mayor I'm ready to go forward unless you want to have a break.

Mayor Staffieri – What's the pleasure of the board? Take a break or do you want to go forward? I say let's keep going.

THE BOARD DECIDED TO CONTINUE.

Atty. Coppola – Thank you Mayor, members of the Board of Aldermen I just want to set forth some of our obligations and some of my obligations for the City on behalf of the Board of Aldermen. According to the document that's contained in the package under tab 9 there's a copy of the federal complaint regarding Beyond Distributors and the City of Derby – Eugene Mascolo as the Police Chief but only as his figurehead for the City not individually – in his individual capacity. So I start with this just to explain what the Board of Aldermen's obligations are to the City and to the Ordinances. We passed an Ordinance – the City passed an Ordinance back in September '07, which became known as the “Adult Oriented Products & Establishments – Licensing” Ordinance. The federal case is now going to challenge whether or not that Ordinance is constitutional. Until we have a ruling on that as far as the City is concerned, as far as the Board of Aldermen is concerned, you have an Ordinance that is in effect. The second important part of the explanation of what your duties are is we have amended that Ordinance. The board amended the Ordinance on May 22, 2008 – the amendment now is regarding the location and restriction of the operation of this type of business within the boundaries of the City of Derby. Once again that Ordinance is in effect until we have a ruling – whether it is federal court or state court – that it's unconstitutional or unenforceable. So to begin those are our duties as the Board of Aldermen. And when I say our I'm including myself on your behalf but I'm also meaning that as the Corporation Counsel for the City of Derby. Until the Ordinance is ineffective my job is to see that I assist whatever department it is that's going to enforce the Ordinance and I assist the Board of Aldermen in enforcing these Ordinances. So with that said I'm going to first – I'm sorry – the second thing I wanted to bring forward since

the court case was the first item was under tab 12 – tab 12 is a letter directed to the Board of Aldermen from Atty. Dan Silver that indicates that he is going to appeal Chief Mascolo's decision on July 14, 2008. So although Mr. Silver has presented evidence and discussion about things that have occurred with an application process and so on from some time period prior to July 14th I'm going to direct that you review the letter, that you understand that he is appealing Chief Mascolo's decision. Chief Mascolo's decision is under tab 11. Tab 11 July 14, 2008 Chief Mascolo based on a memo received by Dave Kopjanski is acting the authority that the Board of Aldermen has given him, which is the control of these establishments whether licensing them or revoking the License – and that is key. So he's acting underneath the authority based on a memo that Mr. Kopjanski delivered, which is attached to it. Mr. Kopjanski verified – I'm now looking at the memo it's dated June 25, 2008 he now verified that the location of Beyond Distributor is within 175 feet from a residential property and within 1200 feet from St. Michael-St. Mary School. That finding goes back to our regulation. The regulation so that I'm reading into the record of what we're talking about when it was amended – when the Ordinance was amended to include the following – let me just read that regulation and then I'll go into the date – 53-43 Location Restriction – In order to protect and preserve the health, safety and welfare of the City's citizens and to maintain property values and ensure sanitary and safe public places no application for adult-oriented establishment shall be granted if the business is located within 250 feet of a residential zone nor if located within 1,500 feet of a public or private school. That regulation I would advise the board probably would not have much enforceability prior to that case that Atty. Silver mentioned, which he was very familiar with, which is the VIP of Berlin vs. Berlin. That matter had something to do with so many feet of a VIP establishment. Atty. Silver had explained to you the difference between our scenario and their scenario, however for our Ordinance we were concentrating on location of this business. Now whether or not that's enforceable under state law or federal law we're not really the board to decide that. Until it's been decided that is what our regulation is, that is what our Ordinance is. Now I'll get into a little bit about the date as far as when it was passed. There is a misunderstanding as to this fifteen day rule. So I'm going to hand out Section 22 of our Ordinances – I'm sorry Section 23 of our Ordinances – correct of our Charter, our Charter. Now just as any Ordinance that is passed by the City if you're a resident or if you're a business going to operate (inaudible) our Ordinances or our Charter you're deemed to know that that is the law of our Town. The Charter, which has been passed and amended – I have followed the Charter back into the '20's – I don't know when this – I think it's from the original inception of the City – but let me clarify this discussion about fifteen days. It reads every vote, resolution, order or ordinance having passed said Board of Aldermen, shall within five days, be sent to the Mayor, who shall within fifteen days after its receipt either approve it, and so on. The key about the fifteen days is that the Mayor has fifteen days to approve it. Even though the notification in the paper said fifteen days after publication that is something that is beyond what the Charter really reads. It has happened before but the key is we cannot amend the Charter without going through a whole process. So the Charter in this case would rule. With regard to the fifteen days the Ordinance, and I do have a certified copy, I don't recall if it was included in the package and I apologize, but it was passed by the Board of Aldermen on May 22, 2008 and it was approved by the Mayor on that same date. So inline with (inaudible) of the Charter its effective date in terms of a legal argument before the board is May 22nd. Now whether or not that argument is right or is supplemented by the publication, which had language that's different, again that's not really a power that you have to review. It's something for a court system to review. So that's a clarification about this fifteen day item. Now I want

to just explain what gives the City the authority to pass these two Ordinances and that's basically under Connecticut General Statutes. It's the Statute section that's 7-148 – it defines the municipal power. And section C. briefly just reads any municipality shall have the power to do any of the following in addition to all powers granted to a municipality on the Constitution and so on. One of the powers that this municipality has is under Section – for the record let me just make sure you get the right citation – it would be Connecticut General Statute 7-148 c.7.a.2 – the regulatory powers of a municipality reads “shall regulate the mode of any using of any buildings when such regulation shall be shall expedited for the purpose of promoting the safety, health, morals, and general welfare of the inhabitants of the municipality.” Going down to letter h – “to regulate and prohibit the carrying on within the municipality of any trade, manufacturing, business or profession which or may be so carried on as to become prejudicial to public health, conducive to fraud, cheating, dangers or dangerous to, or constituting an unreasonable annoyance to those living or owing property in the vicinity.” Those are language that we traditionally in the legal world call upon as our “Policing Powers.” Municipalities have policing powers – these ordinances are not zoning ordinances. They are your Policing Power Ordinances as far as regulating a certain activity in a certain area – that is key. When Mr. Kopjanski issues his zoning compliances and his Certificate of Occupancy's that would have nothing to do with the type of business that's in there. If you look at the tabbed items I believe that retail is allowed in that zone so that it's a retail business – it would be allowed. A CO and a certificate of zoning compliance would issue. You did hear Mr. Silver discuss non-conforming use. Traditionally non-conforming use is attached to zoning laws – this is not an issue of a non-conforming use. It's actually a business that we have decided as a City to regulate where it's located. So that's a brief explanation as far as when it is the City's position through my office as Corporation Counsel that the effective date of that amendment is May 22nd. So now I'll call your attention to the Stipulation. The Stipulation is under tab 10 and it's dated June 3, 2008. Again because it's such a thorough presentation of evidence with Mr. Silver I really had no question of his client or the applicant or any other because it's all right here but the question that I did ask is just the verification that the applicant was well aware of this Stipulation – so I'll call your attention to number 3 – all other provisions of §53-30 et. Seq. of the Adult Licensing Ordinance remain in full force and effect. Number 7 – the defendants retain – defendants meaning the City of Derby and of course underneath this Ordinance we utilize the Chief of Police as our directive – the defendants retain their full rights and authority to enforce all other parts of its Adult Licensing Ordinance at any time in the future. So although there is some drama as to the Stipulation the Stipulation does acknowledge an enforceability of our regulation. It does acknowledge some authority that we may have under the Ordinance and as the City Attorney I'm going to argue that our authority under the amendment took effect on May 22nd when the Mayor signed it. That has to be my position because I'm acting on behalf of the residents of the City, on behalf of you, and on behalf of the taxpayers of the City of Derby – so that has to be my position. Finally I want to wrap up with a little – well with all due respect to Atty. Silver I appreciate that he's explaining to you that we are in litigation – that litigation is costly. We didn't choose to be involved in the litigation – we are a part of the litigation. That should not affect what I think your obligations are, which is again going to tab 12 is deciding the appeal of the Chief's July 14, 2008 decision. The Chief has to act with the authority that's given to him in the Ordinance. The Chief was advised of whether it was prior to the day of or an hour before that this board issued a modified version or an addition to I should say of the Adult Ordinance regarding the 250 feet rule. He was advised of it – he was informed that this establishment was within

the 250 feet zone area plus with 1200 feet of a private school so I ask that you limit your review on what was given to you, which is the appeal of his letter. I don't think it's appropriate for us to decide whether the federal case will ultimately result in some action – some judgment against the City. I think it's more that we're in focus with what was given the task before the board. That is basically my position on behalf of the City as the City attorney. I'll leave it up to the Mayor as to whether or not to have Dan Silver refute some of what I have said to you and I thank you.

Mayor Staffieri – Thank you Atty. Coppola. You've done a...

Atty. Coppola – If I can I'll have him speak and then there might be questions of the board – if you don't mind Mayor.

Atty. Silver – (Inaudible) any comments then I'm not going to say any more. I've listened to Atty. Coppola – obviously the town is well represented. My arguments – obviously we may have a difference of opinion over the action – the effective date of the Ordinance – but as far as I'm concerned that's really irrelevant. The issue here is whether or not the City of Derby has a right to overrule because of your powers under the Police Powers of the Connecticut General Statutes a non-conforming use we are a non-conforming use. The Connecticut Supreme Court in the VIP case never addressed the issue of a – if somebody was a non-conforming use. Under the zoning we were a non-conforming use – we have our Certificate of Occupancy – we have our Certificate of Zoning approval. The State Statute – excuse me the Supreme Court has given non-conforming uses as they've said it's a constitutional proportion – there is no constitutional provisions but there are cases we've referred to the importance of continuation of non-conforming uses as a constitutional proportion. If this body takes a position that after the issuance of a Certificate of Zoning Compliance, after the issuance of Certificate of Occupancy – you can – after your Stipulation in federal court – maybe you should not have stipulated in federal court – maybe you should not have – but the fact of the matter is you did. You indicated to the court that it is our position that but for the record check my client meets all the conditions. So at that point in time it was the position of the City on June 3, 2008 it was the position of the City of Derby that we met all the requirements of this licensing law except for the background check. If this town wants to sustain the Chief – obviously this is an important issue – it's going to be litigated – we'll be back up to the Supreme Court – it's not necessary ladies and gentlemen – look what we have. There's no live entertainment. You have something which it affects for the future. This is – I suggest that the Chief's decision but legally, practically and every other way the overturn and the License be granted. We are still subject to the provisions of the Ordinance. If we step one iota outside of that Ordinance – trust me the Chief of Police will be on our doorstep and will be suspending or revoking our License. We understand that and we're willing to accept those rules and conditions. And on that grounds the City of Derby is well protected both now and especially in the future in the event that the City of Derby obviously in your legislation does not wish to have future adult businesses in town those regulations would clearly apply to every other adult business which may want to seek Derby. Derby is no longer a friend to adult businesses as a result of this regulation. But my client is Grandfathered in. For whatever reason there were no laws prohibiting that at the time we applied and that is the key and for those reasons I suggest and urge you to overrule the decision of the Chief and grant the License. Thank you. I'm finished.

Mayor Staffieri – Thank you Mr. Silver. Mr. Coppola do you have anything? Any questions from the board?

Alderman Hughes – Joe is it safe to say that up to June 6th that the business in question was operating under a temporary License.

Atty. Coppola – I don't think up to June 6th. If I understand it would be from June 3rd to June – again operating June 4th.

Alderman Hughes – Under a temporary License.

Atty. Coppola – Yes on June 4th. Although you say June 6th the Stipulation was June 3rd and he testified he opened June 4th.

Alderman Hughes – Okay. But it is considered a temporary License.

Atty. Coppola – It's considered a stipulated approval. When you say temporary License we're using some reference of License that comes out of the Ordinance. It's actually a stipulated approval allowing them to operate.

Alderman Szewczyk – Mr. Kopjanski their business (inaudible) as far as use goes retail correct?

Mr. Kopjanski – Correct.

Alderman Szewczyk – Then it is not a non-conforming use – it's a specific use that some people have a problem with.

Mr. Kopjanski – Under our zoning regulations it is a retail use (inaudible) conforms to the requirements of the B-2 Zone.

Alderman Szewczyk – Correct. So it is not a non-conforming use – correct.

Mr. Kopjanski – That's correct.

Alderman Szewczyk – Okay.

Mayor Staffieri – Any other comments or questions.

Alderman Lenart – So we let them open with a conditional License.

Atty. Coppola – No. They were open under the agreement set forth in tab 10. License – there's a reference to the License in the (inaudible.) This was a Stipulation that the City entered into. So your calling it temporary License – I'm just calling it a Stipulation to allow them to operate until certain things are met and in this case there was discussion about the federal background checks. It says the Stipulation is limited to the Plaintiff being able to open its proposed business without the Defendants having first review the Federal background check as required – and then it cites the Ordinance. And the board please – I invite you to ask any questions of Atty. Silver too – I know you're directing them to me.

Alderman Szewczyk – Basically what Mr. Silver says – well I admit it I had the mistaken impression that it was a State statute as far as the distances go – you know like the 2500, 1500 fine – it is what it is. Alright everything being what it is if our case relied solely on that would not that in fact make our case ipso facto?

Atty. Coppola – Well I'm arguing on behalf of the City but to review if whether its within 250 feet I don't know how to explain it otherwise.

? – Excuse me Mr. Coppola could you speak a little louder the reporter is having trouble hearing you.

Alderman Hughes – Mr. Mayor I think we made a decision as a board to create and establish this Ordinance. I think we owe to ourselves to stand behind the Chief and enact it and that's my opinion – you guys can throw your two cents in.

Alderman Bomba – I agree with that opinion.

Alderman Hughes – I think that this decision was made by us back on May 22nd.

Alderman Bomba – Absolutely stand by what we discussed and what was passed and absolutely stand by it.

Alderman Hughes – I mean how can we pass an Ordinance and our Chief enforces it and we don't stand behind him.

Alderman Bomba – Exactly.

Mayor Staffieri – This issue was made for these distances by us the City Fathers that it was not appropriate for it to be in a residential zone and to be near a school and a church and this is what we were all in 100 percent agreement. I myself I stay fast to my convictions and decisions – yourselves – you're all independent thinking people.

Alderman Szewczyk – I'm in favor of that myself. All I'm saying is you know the Chief is basically in well after the fact is when the ruling – our ruling, which I totally agree with – became official. So if there are any in operation how can we change the rules? It's like they're Grandfathered in.

Atty. Coppola – You're making a conclusion that is probably more appropriate for court. What I was saying is when it passed if you read the Ordinance in its entirety what I explained to you is that the Chief does have revocation powers. That Ordinance would not have passed but for some guidance that issued out of the Connecticut Supreme Court case of VIP vs. Berlin. But you're making – I'm just explaining our position – you can obviously explain to the board your position, which is some kind of Grandfather argument.

Alderman Szewczyk – Well to make a long story short if this was a court I would say we would lose. Like if we stick with our position.

Atty. Coppola – I don't know.

A MOTION made by Mr. Hughes with a second by Mr. Bomba to uphold the appeal from denial of application by Eugene L. Mascolo, Chief of Police – City of Derby for an adult oriented products and establishment's License made by Beyond Distributors, LLC d/b/a Love Shack, doing business at 1 New Haven Avenue, Derby, CT.

ROLL CALL VOTE

Mr. Lenart – YES

Mr. Bomba – YES

Mr. Szewczyk – Abstain

Mrs. Moran – YES

Mr. Hughes – YES

Mr. Allaire – YES

Mr. Boulton – YES

Mr. Benanto – YES

7 YES; 1 ABSTAIN

MOTION CARRIED.

A MOTION was made by Mr. Allaire with a second by Mrs. Moran to adjourn the meeting at 9:55 p.m. **Motion carried.**

Respectfully submitted,

Patty Finn
Recording Secretary

***Attached to Minutes**

THESE MINUTES ARE SUBJECT TO APPROVAL OF THE BOARD OF ALDERMEN AT THEIR NEXT REGULARLY SCHEDULED MEETING