

TOWN OF SOUTHLINGTON
ZONING BOARD OF APPEALS
TUESDAY, MARCH 23, 2010

Chairman Joseph LaPorte called the Public Hearing and Regular meeting of the Southington Zoning Board of Appeals to order at 7:00 o'clock, p.m. in the auditorium of the DePaolo Middle School with the following members in attendance:

Robert Salka, Edward Kuklinski, Paul Bedard and Patricia Potter

Alternates: Robert Sherman
Ronald Bohigian

Others: Frank Vinci, Zoning Enforcement
Officer

Mary F. Savage-Dunham, Town Planner
Joseph DePaolo, Ass't Town Attorney

Absent: Michael Milo, Alternate
Joseph LaRosa, Alternate

The Pledge of Allegiance to the American Flag was recited by everyone in attendance.

A quorum was determined.

Mr. Salka stated on the advice of the Town Attorney, he was going to recuse himself on this particular vote and Bob Sherman will sit in for me.

(Mr. Salka left the bench and sat in the audience.)

JOSEPH LAPORTE, Chairman, presiding:

Public Hearing Items:

A. Appeal #5762, Application of Lisa Barnes to appeal the decision of the Zoning Enforcement Officer concerning the issuance of a Certificate of Zoning Compliance under Section 15-03 of the Zoning Regulations, 228 Queen Street, property of BLR Realty Company, 325 (+/-) feet north of the intersection with Lazy Lane in a B zone.

THE CHAIR: Before we get started, I want both parties to stay on the topic which is the Appeal 5762, Section 15-03.

MR. VINCI: Mr. Chairman, you have to speak into the microphone. Bring it close to you. Everybody who is going to speak tonight, bring the microphone close to you so they can hear out in the audience.

THE CHAIR: Did everybody out there hear me? No? Okay.

Before we get started, I want both parties to stay on the topic which is the Appeal 5762, Section 15-03.

Now, I'm going to recognize the Assistant Town Attorney.

ATTORNEY JOSEPH DEPAOLO: Thank you, Mr. Chairman. Mr. Chairman, just some brief comments before we start. Essentially what is before the ZBA this evening to decide is an appeal from the ruling of the zoning enforcement officer which is January 28th, 2010.

If we go back to January 28th, 2010, a couple of things happened that are the subject of this appeal. The first is that an inventory was taken at the VIP store on Queen Street and that inventory was taken by Ms. Dunham and Mr. Vinci. Based on that inventory a

certificate of zoning compliance was issued by the zoning enforcement officers in town.

As a result of that certificate being issued, VIP was given a CO and they were allowed to open for business.

Now, on January 28th of this year, when this inventory was done, 228 Queen Street, LLC, which is the owner of the VIP store basically, had to meet two criteria to be entitled to the certificate of zoning compliance. The first criteria that they had to meet was a requirement in their actual permit application and in that permit application they represented to the town that their VHS and DVD rentals and sales as well as the magazines they were selling, they told us that they fit the definition of sexually oriented items in Section 2-19 of our regulations and they told the town that they would keep those items below 5 percent of their total inventory.

The second criteria that they had to meet comes from the regulation itself. And, if you look at Section 2-19 of our zoning regulations, a business that is selling these types of items for it not to be regulated as a sexually oriented business, the total inventory of items that we consider to be sexually oriented under our regulations, must be less than 10 percent of the total store inventory.

So, if on January 28th, 228 Queen Street, LLC met those two criteria, under our regulations, they would be entitled to the certificate of zoning compliance.

The appeal here focuses on whether that certificate of zoning compliance was issued corrected and therefore the issue that you're going to need to decide is whether the inventory that was conducted by our zoning enforcement officers was correct.

Because under the inventory that they did, they concluded that, in fact, 228 Queen, LLC met both of

those criteria and was entitled to the certificate of zoning compliance.

What I've also done is I've provided you with a letter and in that letter I've outlined my recommendation to you regarding how we should approach this hearing. As usual, I have too many pieces of paper in front of me - okay.

We have to give both parties an opportunity here to present their cases and to be heard. So, what I recommend to the ZBA is that we first all Ms. Dunham and Mr. Vinci to present us with the details of the inventory that was conducted on January 28th, 2010.

Obviously, members of the ZBA can ask them any questions that you wish to clarify what was done and I think that will establish the starting point for this hearing.

Once that is completed, we will turn the hearing over to the appellant and the appellant will be given the opportunity to call any witnesses that they choose. They are also allowed, obviously, to call our town staff as witnesses, if they wish.

We will give Mr. Silver an opportunity to cross examine any witnesses that are called in the appellant's case in chief.

Once the appellant has completed, is done with their case, we will give the appellee, Mr. Silver's client an opportunity to do the same. To call witnesses, to present any evidence that they feel that we should consider.

At that point, once the two parties are done with their case, we will open the floor to public comment. And, we will allow members of the public to speak for the appeal. And, we will allow you to speak against the appeal. And, we'll take people speaking for first

and then people speaking against, second, as we do in any other ZBA meeting.

Once public comment has concluded, we will give the parties a chance to do a summary or a rebuttal and I've been asked to switch Section G and H on my letter, which I think is what we should do. The appellant would be given the last word. The appellee will make their closing first. After their done with their rebuttal and their summary, then I'll just make a few closing comments as to the issue and what needs to be decided and then you can decide, take a vote, on the case.

I understand that parties may have an issue with the procedure that I've outlined and it's my understanding that the members of the ZBA have received two separate communications directly from the appellant and it appears there is a March 5th, 2010 letter and there is also a March 21st, 2010 letter. And, it is my understanding that these letters were sent directly to the members at their residences and so I would like at least to enter these as part of the record just so the parties know and if a court has to look at this later, so they understand exactly what has been communicated to the board.

If I may enter those two letters into evidence. And, I think if the parties have any objection to this format, I think this would be the time to raise that.

Yes, Mr. McCarthy?

ATTORNEY MCCARTHY: A couple of questions about the format. I notice that Mr. Silver is going to be given an opportunity to examine witnesses. How is Mr. Silver's client a party to this matter? This is an appeal that's being taken to the ZBA by Ms. Barnes. I don't see how Mr. DeMartino is a party to this matter.

And, the second question regarding structures, I'd like to ask you, Mr. DePaolo, who you represent in this matter? Is it the zoning enforcement officer, is it

the planning & zoning commission or is it the zoning board of appeals?

Because I think you are in a conflict unless you state for the record who you are representing out of all these different parties.

ATTORNEY DEPAOLO: I am representing the ZBA in this matter. Okay?

ATTORNEY MCCARTHY: So not any one on the zoning - the enforcement officer or the planning & zoning -

ATTORNEY DEPAOLO: Correct, correct.

ATTORNEY MCCARTHY: Okay.

ATTORNEY DEPAOLO: Okay? And, as to your issue of conflict, I think it's important and I think it is important to put this on the record, Mr. Sciota, the Town Attorney, felt that he did have a conflict on this case. Okay? Because he did participate in the actual decision when the original zoning permit application came in.

So, I'm sure that that is why it was assigned to me. At the time, I was the Assistant Town Attorney and in Southington, the Assistant Town Attorney is outside counsel. It's usually a local attorney that is on retainer. And, that the town will refer cases to.

One of the categories of the cases that we handle in that office would be cases where there is a conflict where the Town Attorney has a conflict. So, that's why the case ended up with me.

ATTORNEY MCCARTHY: Okay, all right. And, the other question that I raised regarding Mr. DeMartino's participation in this matter?

ATTORNEY DEPAOLO: Yes. And, in my letter to the ZBA, I do cite a case where, that's where the procedure comes from. Okay?

And it says: the principle procedural limitations on the hearing, a hearing of this type, are that there must be due notice of the hearing and at the hearing no one may be deprived of the right to produce relevant evidence or to cross examine witnesses produced by his adversary or to be fairly apprised of the facts upon which the board is asked to act.

ATTORNEY MCCARTHY: And, there is an opportunity during the public hearing section of this meeting for that to be done. But to allow participation during the actual hearing itself, he is not a party. He's not an adversary here.

ATTORNEY DEPAOLO: He is though because he is the permit holder, isn't he? And, he is really the person that stands to lose if your appeal is granted. He's certainly got a stake in this --- in the outcome of this hearing.

ATTORNEY MCCARTHY: Yes, but this hearing is about the decision that was made by the zoning enforcement officer of this town together with Mr. Vinci. And, although it does affect his store, he's just not a party to this appeal.

I mean, I'm not going to continue this because the time is precious here, but I just want to go on the record as stating that I think his opportunity is in the public hearing section, not during the testimonial section of this hearing.

ATTORNEY DEPAOLO: I thank you. And, what we are going to do as objections do come up is we'll note them for the record for each party and we're going to continue on as best we can.

Mr. Silver, I don't know if you have anything that you'd like to ---

ATTORNEY SILVER: Mr. Chairman, Mr. DePaolo, I just want to make a brief comment concerning Mr. McCarthy's comments.

First of all, for the record, my name is Dan Silver and I am a record holder, excuse me, counsel, for the applicant of the zoning permit and the holder of the certificate of occupancy.

It is clear that the rights of my client to participate in this hearing is --- absent that, we would be deprived of due process. This is our permit which has been granted and on the basis of this permit our store is in business. We are open and operating under lawful permits granted by the town.

As a result, a failure to allow my client to participate would be a tragic loss of his due process rights to present his side of this argument to this body.

Thank you.

THE CHAIR: All set?

ATTORNEY DEPAOLO: All set.

THE CHAIR: Okay, the Chair recognizes Town Planner Mary Savage and Town Enforcement Officer Frank Vinci.

MS. SAVAGE-DUNHAM: Thank you, Mr. Chair. I am going to take some time to go through in detail how the inspection process took place on January 28th, 2010. But before I get into that, if the board would bear with me, I'd like to enter some material into the record.

I would like to enter the March 23rd memo to the ZBA which I'll be passing out to you shortly.

I would like to enter Section 11-17 of the zoning regulations of the Town of Southington.

Section 2-19s of the zoning regulations of Southington.

A letter dated November 2, 2009 addressed to Attorney Dan Silver from Attorney Byrne.

A letter dated, I don't see a date --- oh, November 19th, 2009 to Attorney Sciota from Attorney Dan Silver.

A letter dated December 7th, 2009 to Attorney Dan Silver from Attorney Steve Byrne.

A copy of the summary inventory count sheet from the inspection of January 28th, 2010.

And, I have a detailed item quantity list which was provided to staff on January 28th, 2010. If you'd like to attach the summary to the detailed inventory, that's fine.

And, I have a full copy of the zoning permit application and all other material contained within that file, Zoning Permit #12393.

What Mr. Vinci is passing out to you now is a memorandum that Mr. Vinci and I composed together to you and I am going to read it into the record.

(Memo on file in the Town Planner's Office.)

THE CHAIR: The Chair recognizes the appellant.

ATTORNEY MCCARTHY: My name is Vincent McCarthy and I represent Lisa Barnes, the appellant in this matter.

I'd like to make just a brief opening statement that I think has been trimmed back quite a bit by the information that has just been provided to us.

Ms. Barnes will testify as to the reason that she is making this appeal here and feels aggrieved by the decision of the zoning enforcement officer in this case.

She will testify that if this had been --- this facility had been designated as a sexually oriented store under 11-17, it could not have been located near her premises. She will testify as to the reasons why she is concerned about this store, in addition to that.

Pardon me just for a minute to just sort of orient myself. Because you've covered a lot of the information that I was going to give sort of a broad overview of.

But it is our position that under the analysis given by Attorney Byrne, the inventory that was conducted was not accurate and if it had been conducted in an accurate manner, it would have shown that over 10 percent, well over 10 percent of the material was regulated material.

So, if I may, just note the fact that I don't know if the certificate of occupancy has already been introduced. Has it been?

MS. SAVAGE-DUNHAM: I have not introduced it.

MR. MCCARTHY: All right, let me, if I may, introduce the certificate of occupancy.

(Pause)

Since the ZEO has already testified that Attorney Byrne's letters were used as the method of analyzing the materials that were at the store, um, have those letters been introduced, both the December 7th letter and the November 2nd letter?

MS. SAVAGE-DUNHAM: Yes, they have.

MR. MCCARTHY: Both of them have. Okay.

I think what I'd like to do if I may, just being then, okay? So much has been covered already that I might as well just begin at this point.

And, I don't know how you call a witness here. Lisa Barnes is the first witness I would call. I have some questions for her.

ATTORNEY DEPAOLO: She can just identify her name and address and then you can begin your examination.

MS. BARNES: Good evening. My name is Lisa Barnes, 273 Queen Street.

ATTORNEY MCCARTHY: Ms. Barnes, how long have you lived at the address that you live at?

MS. BARNES: I've lived there for eight years.

ATTORNEY MCCARTHY: And, do you have concerns about VIP locating where it is presented located at -

MS. BARNES: I do.

ATTORNEY MCCARTHY: --- 228 Queen Street.

MS. BARNES: I do. I have great concerns. I have concerns for the safety of the forty or less children who live in our complex, not only in regards to the types of materials that he sells, but in regards to the drug paraphernalia, in regards to the weaponry, and some of the other items that are in the store.

ATTORNEY MCCARTHY: Do you have concerns with the proximity of this store to the residential development in which you live.

First, I guess, tell us a little bit about the residential development in which you live?

MS. BARNES: I live in a condo complex that is made up of seventy-five units. Some of them are townhouses; some of them are ranch units. There is also two other condo complexes that are within close proximity of the store. And, um, it's a long road where, you know, once you start up there; the seventeen buildings go straight to the back.

So, part of my concern is that if anyone were to try to do something or run or try to hide, it's a great place to hide because there's a lot of places up there where people would not be found or seen. It's a perfect spot for them to run to.

ATTORNEY MCCARTHY: Do you have any concerns with regard to the material that are sold in the store?

MS. BARNES: I absolutely have a lot of concerns.

ATTORNEY MCCARTHY: Have you been in the store?

MS. BARNES: I've been in the store three times.

ATTORNEY MCCARTHY: And, why did you go in the store?

MS. BARNES: I felt like the first time my need to go into the store was to be able to be informed about what was in the store. Feel like I could be fair in my assessment or my judgment or my testimony without being able to see the items that were in there and be able to - you know, to be fair to Mr. DeMartino as well as to myself.

ATTORNEY MCCARTHY: And, what was your impression of the items in the store?

MS. BARNES: Um, I was a little surprised. Not surprised, I shouldn't say surprised, but I was very overwhelmed by the amount of pornographic material. I was overwhelmed by the amount of drug paraphernalia. And, I was very concerned for some of the weaponry that's being sold there that it is considered cutlery.

ATTORNEY MCCARTHY: Okay. Do you have concerns about the proximity of this store to where you live?

MS. BARNES: I do. It's less than a tenth of a mile from the beginning of my complex.

ATTORNEY MCCARTHY: Is it less than 750 feet from your complex?

MS. BARNES: Yes.

ATTORNEY MCCARTHY: And, how do you know that?

MS. BARNES: I actually tabulated it once I found out what was going in. Driving from driveway to driveway it didn't even; my needle didn't even click over to a tenth of a mile.

ATTORNEY MCCARTHY: Okay, so it is well within 750 feet.

MS. BARNES: It's well within 750 feet of the complex.

ATTORNEY MCCARTHY: And, from a visual presentation point of view, was there any question in your mind that this store was overwhelmingly --- you call it pornographic?

MS. BARNES: It is an overwhelmingly pornographic store, yes.

ATTORNEY MCCARTHY: Have you been with anyone else in the store?

MS. BARNES: Yes, I have. My first trip in, I went in with three other people from the Concerned Citizens Group and um, got part way through the store and because I was with men, I felt very uncomfortable, so I left.

I contacted a female friend of mine and she went back with me. And, I scouted through the store.

And, then the third time I had gone in with several other people to do an accurate count to get some ideas of the numbers of items that were on the shelves to make sure that Ms. Savage-Dunham and Mr. Vinci were accurate in their counting and their assessment of the inventory.

ATTORNEY MCCARTHY: And, did you speak to the people who went in the store, the others who went in the store?

MS. BARNES: Yes.

ATTORNEY MCCARTHY: And, what was their reaction to the visual presentation of the store?

MS. BARNES: As I was, they were very surprised to think that the town would think that this less than ten percent sexually oriented material.

ATTORNEY MCCARTHY: Are you asking the ZBA for due consideration for conserving the public health, safety, convenience, welfare and property values of the Town of Southington?

MS. BARNES: Yes.

ATTORNEY MCCARTHY: In particular, your area of town?

MS. BARNES: Yes. I mean, condos already sell at a lower price. My concern with what this type of a store brings into this town is going to lower the property values where we're living. It's going to increase the risk and the danger to the children in our area. And, I also believe that it is going to provide an undue influence on our town. We already struggle with drug issues and just the numbers in his smoke shop alone, if you divide the numbers in his smoke shop by the number of students in our high school, we have just provided each one of those children with 179 pipes for bongos.

And, if you can sit there and justify that, and make that accessible to them, then I really wonder who we're representing here.

ATTORNEY DEPAOLO: Mr. McCarthy?

ATTORNEY MCCARTHY: I know that that is off topic and I understand that. I didn't ask that question. Okay?

ATTORNEY DEPAOLO: Okay, thank you. It's -

ATTORNEY MCCARTHY: Okay. Thank you.

Do you have anything further to say?

MS. BARNES: Not right now.

ATTORNEY MCCARTHY: Okay, thank you very much.

ATTORNEY DEPAOLO: Mr. McCarthy, I believe that Mr. Silver has the right to cross.

ATTORNEY MCCARTHY: My apologies.

ATTORNEY SILVER: Mr. Chairman, once again, I'm Daniel Silver. I represent the holder of the applicant.

I have just a very few questions.

The first question I have is you noted that you live in a complex, the condo complex across the street.

MS. BARNES: Yes.

ATTORNEY SILVER: Do you own that complex or are you a tenant?

MS. BARNES: I own it.

ATTORNEY SILVER: You own it?

MS. BARNES: Yes, sir.

ATTORNEY SILVER: And, when did you purchase that?

MS. BARNES: I purchased the condo eight years ago.

ATTORNEY SILVER: And, did you count or have counted the inventory to determine whether or not Ms.

Dunham's --- Mrs. Dunham's inventory was correct as far as numbers are concerned?

MS. BARNES: We went in and did a tabulation. Yes.

ATTORNEY SILVER: Pardon me?

MS. BARNES: Yes. We went in and we calculated yes.

ATTORNEY SILVER: Do you have any exact numbers of items?

MS. BARNES: We do have some numbers, sir.

ATTORNEY SILVER: Have you submitted those numbers?

MS. BARNES: Not me. But we do have someone who will.

ATTORNEY SILVER: And, when did you take that calculation?

MS. BARNES: That calculation was done a couple of weeks ago.

ATTORNEY SILVER: Okay. So you have no evidence of the calculation that was done by Mr. Vinci and Mrs. Dunham on January the 28th.

MS. BARNES: No, sir. I don't.

ATTORNEY SILVER: I have nothing further.

ATTORNEY DEPAOLA: Mr. Chairman, if any of the members have any questions for the witness, this would be a good time to allow them to ask, as well.

THE CHAIR: Any questions for the witness?

(No response)

ATTORNEY DEPAOLO: Redirect if you have it?

Next witness.

ATTORNEY MCCARTHY: I'd like to call Tony Luna.

MS. SAVAGE-DUNHAM: If I could just ask you just to speak right into the microphone so that the recorder picks it up?

ATTORNEY MCCARTHY: Sure.

MR. LUNA: Tony Luna, 22 Robin Road. Marion, CT.

ATTORNEY MCCARTHY: Mr. Luna, you live in Southington?

MR. LUNA: Marion is part of Southington.

ATTORNEY MCCARTHY: How long have you lived there?

MR. LUNA: Almost five years.

ATTORNEY MCCARTHY: And, what do you do ---what is your educational background?

MR. LUNA: I have MIT undergraduate degree in engineering. I have a Master's Degree in mechanical engineering from CE Boulder. I'm a retired commander from the Navy, 5 years driving subs, and engineering duty officer, also, the last few years have worked with the Navy doing inspector general investigations for waste and abuse up at shipyards.

ATTORNEY MCCARTHY: Do you do any work with numbers?

MR. LUNA: I currently am a senior analyst and application developer with Pitney Bowes.

ATTORNEY MCCARTHY: And, how long have you done that?

MR. LUNA: I've been working with numbers ever since I started there and before there. I've worked at several different corporations over my career.

The role I'm in now, I've been there about three years. I was the quality assurance/reliability engineering manager prior to that.

And, also a consultant for the company.

ATTORNEY MCCARTHY: Okay, so it is fair to say that you are used to dealing with numbers?

MR. LUNA: I deal with numbers every day.

ATTORNEY MCCARTHY: Okay. And, have you reviewed the two letter of Attorney Byrne, one dated December 7th, 2009 -

MR. LUNA: Yes, I have.

ATTORNEY MCCARTHY: --- and the second dated November 2nd, 2009?

MR. LUNA: Yes, sir.

ATTORNEY MCCARTHY: Okay. And, especially, did you review the language in the letter of November 2nd, 2009 discussing how to count the materials that were at the store to determine the percentage of regulated materials?

MR. LUNA: Yes, I did.

ATTORNEY MCCARTHY: And, uh, one moment, please.

Did you, what did you take away from Attorney Byrne's two letters as to how the inventory should be counted?

MR. LUNA: There's kind of two separate issues there. One is the visual presentation and the other is the inventory percentage.

According to Attorney Byrne's letter and to the Southington regulations, you have to meet both.

ATTORNEY MCCARTHY: Okay. One of the problems I'm having is it's so dark where I am. Is there any way of putting a light above this at all?

ATTORNEY DEPAOLO: You can certainly move the podium if you wish if that will help.

ATTORNEY MCCARTHY: I can't see my own materials.

(Pause)

In particular, Mr. Luna, did you take a look at the letter of Attorney Byrne that is dated December 7th where he discusses that any depiction of specified sexual activity or anatomical area shall be counted in determining whether the client's store meets the definition of a sexually oriented business?

MR.LUNA: Yes, I did.

ATTORNEY MCCARTHY: And, therefore, he states, any visual presentation of any item, good and or product that is featured sold or rented at your client's proposed store which depicts or describes a specified sexual activity or specified anatomical area ---

(End of Tape #1, Side A)

(Beginning of Tape #1, Side B)

--- area and specified sexual activity.

MR. LUNA : Yes, I do.

ATTORNEY MCCARTHY: Do I have to spell those out right now for you or do you feel confident you know what they are?

MR. LUNA: Less than completely, completely and opaquely human genitals, pubic region, buttock, female breasts below a point immediately the top of the areola, human genitals in a concernably turgid state even if completely and opaquely covered, specified sexual activities means human genitals in a state of sexual stimulation, arousal, acts of human masturbation, sexual intercourse, sodomy or fondling of other erotic, touching of human genitals, pubic regions, buttocks or female breasts. That's right out of the regulation.

ATTORNEY MCCARTHY: What does it talk about in terms of sexual activity?

MR. LUNA: Anything that -

ATTORNEY MCCARTHY: It's 2-19.

MR. LUNA: 2-19? Anything that describes a human genital. Or an erect penis. Basically it.

ATTORNEY MCCARTHY: Specified sexual activity also includes what other items?

MR. LUNA: It includes fondling of breasts or other things which depicts a sexual act.

ATTORNEY MCCARTHY: Also?

MR. LUNA: Masturbation, sexual intercourse or sodomy.

ATTORNEY MCCARTHY: And, what is, what do you understand sodomy to be?

MR. LUNA: Sodomy is -

ATTORNEY MCCARTHY: Oral acts of -

MR. LUNA: -- oral acts -

ATTORNEY MCCARTHY: -- sex.

MR. LUNA: -- or perversion of a normal sexual act.

ATTORNEY MCCARTHY: Okay, so you feel familiar with all this?

MR. LUNA: Yes.

ATTORNEY MCCARTHY: Now, did you review the analysis provided to me under the Freedom of Information Act, by the zoning enforcement officer of the Town of Southington?

MR. LUNA: Yes, I did.

ATTORNEY MCCARTHY: And, did you provide an analysis of those materials?

MR. LUNA: Yes, I have.

ATTORNEY MCCARTHY: And, I would like to submit one of these documents that contains four different analyses that Mr. Luna - five different analyses that Mr. Luna will testify to. I'd like to submit this.

(Submitted for the record and on file in the Town Planner's Office.)

I didn't know that you would be here, to be honest with you but I -

ATTORNEY SILVER: I have it.

ATTORNEY MCCARTHY: Hold on, let's just see. Here, take this one.

(Pause)

Okay, under your analysis, you made five different analyses of five different scenarios, is that correct?

MR. LUNA: Yes.

ATTORNEY MCCARTHY: And, first of all, how did you designate items under your analysis of the materials, of the items that were at VIP?

MR. LUNA: Well, the only thing we had to go on was the detailed inventory sheets. And that really is just a list of totals.

When you do an actual physical inventory, you typically have where the location is within that store. So all I know is that this is some numbers that were used to calculate things. So, that's all I had to work with and that's all I actually used.

ATTORNEY MCCARTHY: Okay. Does the number for smoke shop play a very significant role in the calculations

that were used by the zoning enforcement officer and Mr. Vinci?

MR. LUNA: On the ZEO's analysis, they said it was a total of 520,026 items. Of that, 356,230 were in the smoke shop. So over half the inventory is concentrated in that smoke shop area.

ATTORNEY MCCARTHY: If the smoke shop number was deleted from the total, would that have a significant impact on whether or not VIP had over 10 percent of its items in regulated item?

MR. LUNA: That's a huge impact. It's over half of it is in the smoke shop and already they're saying they're at 5.3 percent which is actually, was not actually figured correctly by the ZEO.

You'll find out that it is well over 10. It's well over 10 percent of the inventory. That's not counting the visual presentation clause.

ATTORNEY MCCARTHY: Okay. Explain scenario one to us, please.

MR. LUNA: Scenario one, you basically have a numerator which is the number of regulated items. The denominator is the total number of items that were present in the store available for sale, not in back storage areas.

Now, I just went through the same categories that was provided, that was listed here: batteries, bondage hardware, et cetera.

One of the things that you note is that under enhancements, pills and wild berry - wild berry is actually a smoke shop item and it's contained in the smoke shop section of the inventory list. If you look towards the back of the detailed inventory sheets, the wild berry --- enhancements, wild berry area, the smoke shop area or excuse me, the wild berry are actually incense sticks and they're listed under the smoke shop

area. So that was something that was incorrectly classified on the inventory sheets.

The second one is -

ATTORNEY MCCARTHY: How were the incense sticks counted?

MR. LUNA: Individually.

ATTORNEY MCCARTHY: In other words, instead of being counted as they were meant to be packaged, as discussed by Attorney Byrne in his letter to the zoning enforcement officer, they were counted individually?

MR. LUNA: Correct.

ATTORNEY MCCARTHY: Okay.

MR. LUNA: So basically you're saying that one incense stick is equal to one sexually oriented object. Whether it's a piece of clothing or whether it's a rental movie or anything else in the store. You're equating one incense stick to everything.

ATTORNEY MCCARTHY: What about the --- continue with your analysis, please.

MR. LUNA: Well, what I did was looked at --- actually we're going to just stick to this scenario one which is what the zoning enforcement officer did.

One of the things, they calculated a total percent there of 5.3 percent. They actually, when you go through in detail, they left out the 439 magazines that they had counted by hand. And, that actually raises the number to 5.4 percent.

ATTORNEY MCCARTHY: But it still doesn't get us above 10 percent.

MR. LUNA: It doesn't get above 10 percent, but it does show that I truly believe the zoning enforcement office is not used to doing inventory counts.

ATTORNEY MCCARTHY: Okay, scenario two, please?

MR. LUNA : Scenario two, here's kind of the crux. According to Attorney Byrne's letter, it's supposed to be in the original packing that was meant to be provided by the manufacturer for sale. Okay?

If you look at the incense sticks, I included pages off of the web showing these exact same sticks for sale. And, they come in packages of 20 to like 100. You can buy 20 of them for \$3.79.

So, these incense sticks are being sold individually but they should be divided by 20 because that's how they're provided by the manufacturer.

So that 10,000, you now divide by 20.

When you go through, the thing that really stands up, there are a few key items that stand out here.

ATTORNEY MCCARTHY: When you talk about original packaging, are you talking about specifically Attorney Byrne's letter of November 2nd where he states at the top of page 3, in addition in determining the quantity of stock material placed for sale must be in their original packaging and the amount quantity that the manufacturer intended for sale?

MR. LUNA: Yes, I am talking about that specific paragraph in Attorney Byrne's letter.

ATTORNEY MCCARTHY: Do you think the manufacturer intended incense sticks to be sold by the stick?

MR. LUNA: I don't know, you can buy 20 of them for \$3.79. I don't know why you wouldn't.

ATTORNEY MCCARTHY: Okay. All right. Continue with scenario two.

MR. LUNA: Typically, you don't break open the package when you get it.

Scenario two starts to look at the packaging issue which is really the crux here. When you walk into VIP, you have --- I kind of liken it to the old fashioned video store. You walk in and you had a curtain in the back and where you said most of the videos were fine but there is the over 18 section. So, 90 percent of the store is fine and then you have this one little section.

It's the opposite with VIP. You walk in and 90% of the store is sexually oriented nature and then everything is concentrated in the smoke shop and within the smoke shop there is only a handful of line items or most of the inventory is actually, is actually being used to inflate the inventory numbers.

Specifically, the incense sticks, for one. That was 10,000. The other item in the smoke shop that really stands out are the brass and the glass screens. Now a brass screen is a little piece of --- it looks like a window screen.

ATTORNEY MCCARTHY: How big is the item?

MR.LUNA: It's about a half inch to three fourths of an inch. And, there is three different part numbers that are listed there which represent diameters of those screens.

ATTORNEY MCCARTHY: Are they being counted here individually?

MR. LUNA: They are being counted individually.

ATTORNEY MCCARTHY: Are they sold individually?

MR. LUNA: They are taken out of a bag and then they are put into smaller bags. We went in to purchase some of these screens. The cashier took a while to find it. They were located underneath --- they were located not in a visible area, but somewhere behind the counter. She reached into a large bag, large zip lock bag, she pulled out five of them and counted them

individually into --- she was supposed to, she said, put them into a plastic bag. Instead she put them into this legal size envelope. And, then when I got the envelope later and looked at it, there are actually six in there. So they're repacking inventory is what they're doing.

They're taking something that's got 250,000 that you can buy in packages of a hundred to a thousand and saying one of those is exactly the same as any other item in the store even though it specifically calls out that you're not to repackage the item. You are to leave it in the original packaging that the manufacturer intended for sale.

Why would I buy one of those for --- they sell them for 20 cents apiece - when I can buy a hundred of them on Amazon for \$2.65?

ATTORNEY MCCARTHY: So, the zoning enforcement officer counted every single one of these tiny little filters as a separate inventory item. What did that have the effect of doing?

MR. LUNA: That inflated the inventory numbers. That inflated the denominator.

ATTORNEY MCCARTHY: So, what did that do to the number of regulated items - the percentage of regulated items?

MR. LUNA: Well, the percentage went down obviously because you just inflated the denominator.

ATTORNEY MCCARTHY: So, what have you done in scenario two?

MR. LUNA: I looked at standard size packaging available off of the web for those particular items. And, I divided the total inventory count by that standard size packaging to be consistent with what the manufacturer sells. That's on scenario two.

When you do that and you use just the regulated items as determined by the ZEO, you come up with a total percentage of inventory of 19.2 percent.

ATTORNEY MCCARTHY: So, 9.2 percent ---

MR. LUNA: Nineteen point two.

ATTORNEY MCCARTHY: I know, but 9.2, 3 percent above the 10 percent regulated items.

MR. LUNA: Correct.

ATTORNEY MCCARTHY: Required under 2-19.

MR. LUNA: Required under that clause in 2-19. You have to meet both clauses. So they failed this one.

ATTORNEY MCCARTHY: So, okay. Is there anything else you want to say about scenario two?

Basically, what numbers have you used for scenario two?

MR. LUNA: For scenario two, there's a quantity which lists the standard package quantity. One of the things -

ATTORNEY MCCARTHY: You used the numbers of the ZEO, correct?

MR. LUNA: I've used the ZEO numbers that were based off the inventory sheets that VIP provided to them.

ATTORNEY MCCARTHY: But, what you have done is repackaged the items in the kind of packaging they're normally packed in, correct?

MR. LUNA: I've quantified the number of items in the manufacturers packaging as available for sale.

ATTORNEY MCCARTHY: Did the ZEO do that when she went through the store?

MR. LUNA: Only for the batteries.

ATTORNEY MCCARTHY: Only for the batteries. Only for the batteries. How did she do it for the batteries?

MR. LUNA: You can look at the battery totals off the detailed inventory sheet.

ATTORNEY MCCARTHY: And, what did she do?

MR. LUNA: She divided by four. For the batteries.

ATTORNEY MCCARTHY: Why would she divide by four?

MR. LUNA: Because I believe that was an item that was seriously questioned during the initial planning & zoning commission meetings regarding how they were going to count.

ATTORNEY MCCARTHY: Isn't counting the batteries double counting if they're going to be used in an item that is going to be counted additionally?

MR. LUNA: I'm not sure.

ATTORNEY MCCARTHY: If they are used in an item, like a dildo, then isn't that double counting?

MR. LUNA: Potentially, yes.

ATTORNEY MCCARTHY: Okay, all right.

But you've used the ZEO's numbers for scenario two except for repackaging, correct?

MR. LUNA: I used the ZEO's number for the regulated items and then I just repackaged them in the amounts available for sale from the manufacturer.

ATTORNEY MCCARTHY: As Attorney Byrne stated in his letter to the planning & zoning commission.

MR. LUNA: Correct.

ATTORNEY MCCARTHY: All right, scenario three?

MR. LUNA: Scenario three, and I'm sure that you will get into this later, looks at what should have

been classified according to Attorney Byrne's letter as regulated items. I took those regulated items, that's in the planning & zoning column, and I then divided by the corrected items for vendor packaging items.

This I believe, it will, it meets the spirit as to what is being asked by Section 2-19 of the regulations.

ATTORNEY MCCARTHY: Explain that, please.

MR. LUNA: Well, it keeps the packaging in the original packaging that the manufacturer intended for sale.

ATTORNEY MCCARTHY: What's the difference between scenario two and scenario three?

MR. LUNA: In scenario three, instead of using the number of regulated items that the ZEO is saying, we looked strictly at the regulation that said they should have included these other ones.

ATTORNEY MCCARTHY: What other items should they have included?

MR. LUNA: The condoms, ticklers, safe sex.

ATTORNEY MCCARTHY: Well now, why would we include a condom?

MR. LUNA: Because it's for a specified sexual activity.

ATTORNEY MCCARTHY: And, that's set out in 219?

MR. LUNA: Exactly.

ATTORNEY MCCARTHY: And yet, when we look at the list provided by the ZEO, what does she do with condoms here?

MR. LUNA: She does not include condoms.

ATTORNEY MCCARTHY: Ten thousand nine hundred ten of them, correct?

MR. LUNA: She - 10,910 were not included in the ZEO's determination of regulation items.

ATTORNEY MCCARTHY: What other items weren't included?

MR. LUNA: The enhancement pills and wild berry were not.

ATTORNEY MCCARTHY: When you looked at the inventory list, how were the enhancement pills counted?

MR. LUNA: They were counted as - they said as bottles. They come in packages, they come in display packages of 12 which means you're going through the store, and you see in the front section tons of boxes. And, you'd have to know that you would need to open up those boxes to see they were 12.

There's one row, I noted on the back wall that had the tops off. But you have these boxes stacked two deep, three deep all along the back of other items throughout the store and it's being used to inflate the inventory numbers.

ATTORNEY MCCARTHY: Have you been in the store, Mr. Luna?

MR. LUNA: Yes, I have.

ATTORNEY MCCARTHY: Okay. And, you've checked all this out, right?

MR. LUNA: Yes, I have.

ATTORNEY MCCARTHY: And, the number of enhancement pills here set by the zoning enforcement officer is 66,006. Correct?

MR. LUNA: Correct.

ATTORNEY MCCARTHY: Now, is that individual pills or bottles?

MR. LUNA: It's kind of hard to tell from this. The initial assessment, again, without doing a detailed physical inventory but doing the same criteria that the zoning enforcement officer did, walking around and counting the number of boxes on the shelf, counting how many deep they were, how high they were, it looks like that might be 66,000 pills based upon the number of boxes which we saw in there.

ATTORNEY MCCARTHY: So, you think the zoning enforcement officer actually counted how many pills were in each bottle and counted pills?

MR. LUNA: No. I'm saying that the inventory list provided to them had a number of 66,000 on it.

ATTORNEY MCCARTHY: Okay.

MR. LUNA: When you visibly observe how many boxes there were, you come up with, you come up with about 1600 boxes. And, then when you look at, you take the 1600 boxes and multiply by 12 and 2, you'll get about 66,000.

ATTORNEY MCCARTHY: Do you have, I mean, these were excluded as regulated items. In other words, excluded as being covered under 2-19, correct?

MR. LUNA: Correct.

ATTORNEY MCCARTHY: Can you tell me the names of some of these pills as set out here in the inventory list if I show it to you, Mr. Luna?

MR. LUNA: Yes, I can.

ATTORNEY MCCARTHY: I've got a list, too. I've got the full list if you need it.

MR. LUNA: No, I don't need the full list. It's a pretty thick list.

ATTORNEY MCCARTHY: All right.

MR. LUNA: They have enhancement pills, the ones that have, that stand out are the ones: magic pills, perform all night, rock her hard and eight hour sex.

ATTORNEY MCCARTHY: Perform all night and rock her hard and eight hour sex. And, that wasn't included as a regulated item under 2-19?

MR. LUNA: It should have been. It describes a sexual activity.

ATTORNEY MCCARTHY: Okay. Anything else that you found? I mean, are they all like that, basically, all the enhancement pills?

MR. LUNA: All the enhancement pills, it's kind of interesting, they're all made by the same company. But that's a different story.

ATTORNEY MCCARTHY: Well, they're made by the same company and where is the same company located?

MR. LUNA: They're out of New Haven, Connecticut -- - GFS, LLC. But there is no GFS, LLC but there is a GFS, Inc.

ATTORNEY MCCARTHY: Okay. All right. What other items did you include in scenario --- what scenario are you on, number three?

MR. LUNA: Number three.

ATTORNEY MCCARTHY: Number three here that weren't included by the ZEO?

MR. LUNA: The party and bachelorette gifts. There were 15,059 which were not included as regulated items.

ATTORNEY MCCARTHY: What were they? Did you go in and take a look at those?

MR. LUNA: Yes, I did.

ATTORNEY MCCARTHY: What are they?

MR. LUNA: They're piñatas shaped like, you know, shaped like a male organ. They are breasts. Glasses. There are things that describe human anatomical parts.

ATTORNEY MCCARTHY: Okay. And, these were excluded under 2-19?

MR. LUNA: Right. What I said is you can't include everything so you just, you make an assumption and I just picked a fair one for now. You can always challenge that and recalculate the numbers but I said that 50 percent of them should have been counted. Not zero percent.

ATTORNEY MCCARTHY: Okay. And, but the pills also are counted individually, correct? Not by the bottle?

MR. LUNA: When I calculated things in scenario three, I took into account the packaging issues and I counted them on a package basis and not an individual basis. Not on an individual filter screen basis or an individual pill basis. I counted it on what was visibly presented as what was for sale.

ATTORNEY MCCARTHY: What about lubricants, massage oils, 29,228. Only 15 of those was included under 2-19 by the ZEO.

Do you know what lubricants are used for?

MR. LUNA: They are used for a specified sexual activity.

ATTORNEY MCCARTHY: They are.

MR. LUNA: Yes.

ATTORNEY MCCARTHY: How is it, I mean, how could 29, 228, do you know how many of those are lubricants?

MR. LUNA: I'll have to go through in detail and look at what was listed as that.

ATTORNEY MCCARTHY: But none of the lubricants - excuse me, only 15 of the lubricants were counted.

MR. LUNA: If you count individual items, that'd be kind of hard to imagine that only 15 out of almost 30,000 would have been counted.

ATTORNEY MCCARTHY: But that's what happened.

MR. LUNA: That's what the ZEO counted.

ATTORNEY MCCARTHY: Okay. Party and bachelorette gifts, 15,059. How many of those were counted by the ZEO?

MR. LUNA: The ZEO's analysis, they counted 4981.

ATTORNEY MCCARTHY: Okay. Do you have any idea how many there were and what these items are?

MR. LUNA: You can use 4981. I used half of them, 7530. It's not going to affect the number that much.

ATTORNEY MCCARTHY: Why did you use half?

MR. LUNA: It's an assumption. When you do a model, you make assumptions. That's all you're really doing is you're modeling what the assumptions are.

Typically, what people do is they challenge what the assumptions are. I don't care if you challenge the assumptions. Just be consistent with them.

Give me another number and I'll put whatever number you want in there.

ATTORNEY MCCARTHY: So, what are bachelorette - party and bachelorette gifts, do you know?

MR. LUNA: They're ---

MS. POTTER: Excuse me. You can walk into Spencer's and buy paints and body oils and that's, there is nobody --- you know, you can go in there with a calculator and make an assumption ---

MR. LUNA: Absolutely.

ATTORNEY MCCARTHY: But you have a regulation here - 2-19 that covers it.

MS. POTTER: That's what I'm saying. They do, too.

What I'm saying is you're making an assumption but you're taking things that are - I don't know. To me, it just seems a little nit-picky.

(Audience chuckles)

ATTORNEY MCCARTHY: Well, the first two scenarios used the numbers of the ZEO.

MR. LUNA: I don't think it's nit-picky to ---

MS. POTTER: What I'm saying is you can walk in and it's all up to your speculation when you walk in somewhere. You're saying the stuff and you're saying - --

ATTORNEY MCCARTHY: No, I've asked him what these items -

MS.POTTER: --- this could be used for.

ATTORNEY MCCARTHY: Well, condoms. What else could they be used for? Water balloons?

MS. POTTER: You can buy those at CVS.

ATTORNEY MCCARTHY: What are they used for?

MS. POTTER: So now we're going to censor CVS?

ATTORNEY MCCARTHY: No, but 2-19 covers condoms. It covers things that are used in sexual activity.

MR. LUNA: And, Wal-Mart has far less percentage of condoms than they do to everything else. It's a percentage that you're shooting for.

ATTORNEY MCCARTHY: Yah. Under your regulations -

ATTORNEY DEPAOLO: Mr. McCarthy, can I ask you: How is it that you think a condom comes under 2-19?

MS. POTTER: Talk about family planning.

ATTORNEY MCCARTHY: Specified sexual activity.

ATTORNEY DEPAOLO: But it says devoted to the showing of material that is characterized by any emphasis upon the depiction or description of specified sexual activities. So how is it that a condom is a material that is, something that emphasizes -

ATTORNEY MCCARTHY: It's used, it's used.

ATTORNEY DEPAOLO: --- upon the depiction or description.

ATTORNEY MCCARTHY: Sure. It's specified sexual activities means human genitals in a state of sexual stimulation or arousal. We're going to get into that. A condom -

ATTORNEY DEPAOLO: So how does a condom -

ATTORNEY MCCARTHY: Can I finish? Can I finish?

ATTORNEY DEPAOLO: Well, can I ask you, how does a condom fit under that definition?

ATTORNEY MCCARTHY: I'm trying to answer your question.

ATTORNEY DEPAOLO: Okay. Very well.

ATTORNEY MCCARTHY: A condom can only be used on a male genital in a sexually stimulated situation. It can't be used if the male genital isn't stimulated, first.

Second of all, acts of human masturbation, sexual intercourse of sodomy, et cetera. I mean sexual intercourse, condoms; everybody knows condoms are used in sexual intercourse.

ATTORNEY DEPAOLO: So, in your opinion, then anything used or that could be used in sexual intercourse fits under our regulated items?

ATTORNEY MCCARTHY: Sure. Absolutely. Yah, absolutely.

ATTORNEY DEPAOLO: Okay. Thank you.

ATTORNEY MCCARTHY: Absolutely. Yah. Yah.

Okay, anything else? Under scenario three?

MR. LUNA: When you look at scenario three you get to about 54 percent of it is classified as sexually oriented material. Taking into account the packaging and taking into account ---if you don't believe that, it's somewhere between the, scenario two which is 19 and 54 percent. Pick your number. It doesn't matter. It's still above 10 percent.

ATTORNEY MCCARTHY: Scenario four?

MR. LUNA: Scenario four takes into account leaving the quantities as was allowed by the zoning enforcement officer and looking at Attorney Byrne's criteria, including things like condoms and enhancement pills, et cetera.

When you go through that analysis, divide by the number of individual items that were repackaged and you get 26.7 percent.

ATTORNEY MCCARTHY: What does that mean, 26.7 percent is what?

MR. LUNA: It's 26.7 percent of the inventory is sexually oriented and fits under Section 2-19 of the Southington Zoning Regulations.

ATTORNEY MCCARTHY: And, how did you reach that conclusion with regard to the items? Are there any disagreements between you and the ZEO on the items classified here?

MR. LUNA: Yes. This is exactly the same as the previous scenario. Only instead of dividing by the corrected number of items based on packaging, I divided it by the total number of items as which was done with the original scenario done by the zoning enforcement officer.

ATTORNEY MCCARTHY: Okay. Are there any other scenarios that you have done?

MR. LUNA: The other one is the last one and it is scenario five. That gets into; you have two separate businesses here. You have a sexually oriented business and a smoke shop. And, you've concentrated everything in the smoke shop. So if you just eliminate the smoke shop, you've got two different ways to count. Either the way that the zoning enforcement officer did, which is looking at regulated items divided by the total number of items in the sexually oriented portion of that store or you have it using the Attorney Byrne's method of counting sexually --- counting regulated items and divided by everything, minus the items within the smoke shop.

When you do that, if you use the criteria applied by the zoning enforcement officer, you get 17.4 percent and if you use it using Attorney Byrne's, you get 86.1 percent.

ATTORNEY MCCARTHY: How do you get 86.1 percent?

MR. LUNA: Well, when most of the store is sexually oriented in nature.

ATTORNEY MCCARTHY: Okay. Mr. Luna, do you ever go into CVS and other stores?

MR. LUNA: Yes.

ATTORNEY MCCARTHY: Do you normally find lubricants visually presented as Attorney Byrne stated in his letter at CVS?

MR. LUNA: You see them on the shelves.

ATTORNEY MCCARTHY: Do you see them visually presented, highlighted?

MR. LUNA: No, they're just on the shelves with everything else.

ATTORNEY MCCARTHY: Okay, all right.

Now, the first analysis you did, if I remember correctly, uses the actual numbers of the ZEO, correct?

MR. LUNA: Correct. And, keep in mind that there was an error with the ZEO's calculations.

ATTORNEY MCCARTHY: All right. And, the second analysis uses the numbers of the ZEO but repackaged as they would ordinarily be packaged.

MR. LUNA: Correct.

ATTORNEY MCCARTHY: Okay, so under the numbers of the ZEO, but repackaged as Attorney Byrne said they should be counted, i.e., in the way they were originally packaged, what percentage of regulated items do you come up with?

MR. LUNA: 19.23 percent.

ATTORNEY MCCARTHY: Okay, so even using the numbers of the ZEO, you come up with the 19 percent, correct?

MR. LUNA: Using the regulated items that the ZEO included, yes.

MS.POTTER: Who says --- who says that they cannot be repackaged? Who says that they have to be -

MR. LUNA: The planning and zoning commission did in their letter.

MS. POTTER: But I'm just saying, who says they have to sell them in packages of 200 for \$3.95?

ATTORNEY MCCARTHY: Would you let me handle this, please? Okay.

Attorney Byrne in his letter and I read the section a moment ago. Let me see if I can find it quickly for you, again. He said these items had to be counted in their normal packaging and the way they are normally packaged.

MS.POTTER: But that's packaging, but that's packaging as it comes to you? So you mean if CVS gets 5000 candy bars in one big box, they have to do it as one big candy bar?

ATTORNEY MCCARTHY: No. You are totally -

MS.POTTER: But that's what I'm saying. It's for resale.

ATTORNEY MCCARTHY: You totally have missed everything we've said. Everything.

What we're talking about is --- counting items. Not selling them. They can be sold in any way the store wants to.

But Attorney Byrne's analysis goes to, he states right here, in addition, in determining the quantity of stock material, which is what this about, determining the quantity of stock material ---

ATTORNEY DEPAOLO: Mr. McCarthy, just for the record, what letter and what page?

ATTORNEY MCCARTHY: I'm reading from Page 3 of the November 2nd, 2009 letter. Page 3, first paragraph.

ATTORNEY DEPAOLO: Thank you.

ATTORNEY MCCARTHY: In determining the quantity of stock material the items placed for sale must be in their original packaging and in the amount quantity that the manufacturer intended for sale.

We're not saying that they can't sell them in any other way. They can cut up those little half inch filters into four filters if they want to.

What we're saying though is to count them; you have to count it as it was intended to be packaged.

It's like the incense sticks. You can't count each one separately unless they were intended to be packaged that way. And, it's doubtful to me that they were intended to be packaged that way.

Finally ---

ATTORNEY DEPAOLO: How do you determine though -

MS.POTTER: Yah.

ATTORNEY DEPAOLO: -- what number in the package? Like you can buy a battery pack with two batteries in the pack or you can buy one with four or with twelve.

How do you determine which one you count?

ATTORNEY MCCARTHY: Well, the biggest number that we have here, it's the - is it 256 or 356?

MR. LUNA: Two hundred fifty thousand.

ATTORNEY MCCARTHY: It's 256,000 items in the smoke shop and we're talking mainly about filters.

Mr. DeMartino could have been asked in what packages are these purchased and in what packages are they normally sold?

ATTORNEY DEPAOLO: And, I presume you are going to do that this evening?

ATTORNEY MCCARTHY: No, I'm not --- no. I mean, no. That should have been the job really of the ZEO to do that. That's not my job. That's the ZEO's job.

ATTORNEY DEPAOLO: And, she asks him and she's told that they're sold individually which in fact they are

because I can go into the store and by one, I can buy two, I can buy five. And, they'll put them in the white envelope that you've shown. So what is she supposed to do with that information when she's told they're sold individually?

ATTORNEY MCCARTHY: She's to say that that is ludicrous. No one buys one at a time of these items when you can buy -

ATTORNEY DEPAOLO: But you went in there and bought five.

ATTORNEY MCCARTHY: --- ten or 20 of them for the same price.

ATTORNEY DEPAOLO: But you went in there and bought five. So, --

ATTORNEY MCCARTHY: We bought them for a purpose for this hearing tonight. That's why we did it. Not --- a person wouldn't normally go in and buy jus five.

ATTORNEY DEPAOLO: How do you know that?

MR. LUNA: You can buy a box for \$2.50 on Amazon.

So basically, what is going to happen is ---

MS. POTTER: And, you're going to spend \$7 on ---

MR. LUNA: You've got to take a look at what's happening here.

MS. POTTER: -- shipping.

MR. LUNA: He's sitting on over half his inventory is in a few bags. That's what he's doing. And, because it's not out in the open ---

ATTORNEY MCCARTHY: It's a clear inflation of the inventory -

ATTORNEY DEPAOLO: The issue ---

ATTORNEY MCCARTHY: --- to make the regulated number go below ten percent.

ATTORNEY DEPAOLO: The issue that I have is when you say that the ZEO did some ludicrous, okay? To me, when I look at this, she goes in there with the regulation; she goes in there with some instructions from the PZC. She asks the permit holder relevant questions, she's given answers.

How is she supposed to know that she's got to group things into different amounts to be able to count?

(Audience outburst)

ATTORNEY MCCARTHY: She did it with the batteries, a -

ATTORNEY DEPAOLO: Because they're packaged for sale in two's or four's.

ATTORNEY MCCARTHY: -- b, b, this is a store which primarily --- and I've been it myself - is overwhelmingly filled with pornographic material. In one drawer, it's got 256,000 items. You're going to weigh that one drawer against everything else in the store? That makes sense?

ATTORNEY DEPAOLO: If it - if it is shipped in this big bin, okay, where they're in an individual bin with 250,000 items in there, how do you know ---

(Audience outburst)

ATTORNEY MCCARTHY: Then it should be counted as one item. Because it's being packaged -

ATTORNEY DEPAOLO: As one item, that's how you would do it?

ATTORNEY MCCARTHY: --- packaged and shipped as one item.

ATTORNEY DEPAOLO: But it is not being sold that way. And, I guess that's the trouble that I'm having.

(Audience laughter)

ATTORNEY MCCARTHY: I don't know what to say to you.

(Gavel, gavel)

MR. LUNA: Inventory, any classic person that manages inventory knows what inventory turns are. You know what that is? Inventory turns are how often inventory is sold and turned over. Okay?

ATTORNEY DEPAOLO: Correct. And, do you know that with these items - with these screens?

MR. LUNA: Well, I'll tell you what, nobody would know those screens were there unless you looked at the inventory list and knew that they were stuck behind the counter. They were not out in the open.

ATTORNEY MCCARTHY: They are not even visually presented as required by Attorney Byrne. They're nowhere visually presented. They're behind and underneath the counter.

MR. LUNA: They are in a large bag, which based upon pictures looking at the bag was and looking at what's on line of about a thousand.

ATTORNEY MCCARTHY: So, they shouldn't be counted at all if they're not visually presented.

ATTORNEY DEPAOLO: So then you're saying you found them by going on line. Is that your testimony?

MR. LUNA: Going on line and going in and physically observing how they took them out of the bag and repackaged them. They repackaged them.

ATTORNEY MCCARTHY: They came in one large -

MR. BOHIGIAN: Excuse me, I have a question.

ATTORNEY MCCARTHY: I'm sorry.

MR. BOGHIGIAN: How did you know that they were for sale there?

MR. LUNA: Only by the inventory sheets. There is no way we would've known.

MR. BOHIGIAN: There was no sign or nothing?

MR. LUNA: No. There's no way you would have known that.

ATTORNEY MCCARTHY: Okay. So based upon - you've done inventories before?

MR. LUNA: I've done lots of inventories. Several counts. We are, by law, retailers have to do an inventory, a physical inventory once a year because inventory is an asset and it goes on your books as such. And, because inventory you can lose and stuff and you have to write that off correctly.

ATTORNEY MCCARTHY: Is the inventory that was done by the ZEO here meet with the normal standards of doing inventories that you've seen?

MR. LUNA: No.

ATTORNEY MCCARTHY: Does it meet with any standard of doing inventories you've seen?

MR. LUNA: No.

ATTORNEY MCCARTHY: And, again, how many years experience do you have in this?

MR. LUNA: About 20.

ATTORNEY MCCARTHY: Okay.

MR. LUNA: Managing parts.

MS.POTTER: I work in a car dealership and we count the screws and the screens and everything gets counted by singular.

MR. LUNA: I understand it gets counted but the regulation says how it was provided by the supper for sale.

MS. POTTER: I understand what the regulation says. You just told me that inventory doesn't get counted like that -

MR. LUNA: I am not sure what you are trying to ask, Ma'm.

MS. POTTER: I understand the regulations.

ATTORNEY MCCARTHY: That's what we're going under is the -

MS. POTTER: I'm just saying you said inventory.

ATTORNEY MCCARTHY: -- Attorney Byrne's ---

ATTORNEY DEPAOLO: The inventories that you're talking about, what is the purpose of those inventories, the ones that you've done in the past?

MR. LUNA? A count for the financial dollar amount of the inventory.

ATTORNEY DEPAOLO: And, typically, companies are brought in, right?

MR. LUNA: Yes, in fact, I would have much rather hired a retail inventory company to go in and do that that does that for a living. As opposed to somebody who infrequently does it.

ATTORNEY MCCARTHY: How would it be done be an inventory company?

MR. LUNA: You can call; there are several companies out there that will come in -

ATTORNEY MCCARTHY: How would it have been done?

MR. LUNA: They would come in and they would ask for a physical map as to what is in the store. Because you've got to say this item, these number of items are on this shelf, or in this bin or in this drawer. And, they then go physically verify that.

ATTORNEY DEPAOLO: And, you understand making an inspection for a zoning permit or for zoning purposes may be a different standard -

MR. LUNA: Yah, I understand making an inspection for a controversial zoning permit should have been done with extreme care.

ATTORNEY DEPAOLO: And, I am sure it was.

MR. LUNA: But there was an error just in adding up the numbers.

ATTORNEY DEPAOLO: Well, in your opinion.

MR. LUNA: No. There was an error. Go calculate the numbers and you will see she left out the magazines. So that just shows that she is not used to doing that. That's all it shows.

ATTORNEY DEPAOLO: Um-hum. And, how much time did you spend doing it? Doing this inventory on the store?

MR. LUNA: How much time did I spend?

ATTORNEY DEPAOLO: Did you spend in the store?

MR. LUNA: I walked through the store several times. I was in there for probably about a total of 40 minutes.

ATTORNEY DEPAOLO: So, you didn't meet the standard of the professional inventory ---

MR. LUNA: I wasn't going there to do that. Keep in mind there are two parts to this section. There's

visual presentation and there's inventory and you have to meet with both.

Visually, the visual amount of presentation when you come in is overwhelmingly sexually oriented in nature.

ATTORNEY DEPAOLO: And, it seems to be also --- and I guess maybe I can ask this question now. What items did the zoning enforcement officer not count that you feel belong in the inventory as regulated items?

Do you have a list of those?

MR.LUNA: I have a list from what was provided.

ATTORNEY DEPAOLO: Okay. And, what would those be?

MR. LUNA: The enhancement pills.

ATTORNEY DEPAOLO: Okay.

MR. LUNA : The party and bachelorette gifts. More of the novelties and more of the lotions. Condoms.

ATTORNEY DEPAOLO: So even a bottle of oil -

MR. LUNA: A bottle of oil that is used specifically for anal sex would definitely be counted, yes. Yes, it would. It is specified sexual activity.

ATTORNEY DEPAOLO: And, what about a lubricant you could buy at -

MR. LUNA: Have you been in the store?

ATTORNEY DEPAOLO: I have not as of yet, sir.

But let me ask you this ---

MR. LUNA: Go read the labels on the bottles.

ATTORNEY DEPAOLO: I certainly know what a condom is, okay?

And, a lubricant that you could buy in CVS, is that something you would count toward the sexually oriented items under 2-19?

MR. LUNA: With the descriptions that are on the outside of these lotions, I would count them.

ATTORNEY MCCARTHY: If it could be used for sexual intercourse, it certainly would be counted.

ATTORNEY DEPAOLO: So I could buy something like that right at the ---

MR. LUNA: It doesn't mean you can't buy it.

ATTORNEY MCCARTHY: It doesn't matter.

MR. LUNA: That has nothing to do with anything.

ATTORNEY MCCARTHY: You could use castor oil. It doesn't really matter.

ATTORNEY DEPAOLO: And, castor oil then, if I'm using it in that way, you think that's a regulated item under 2-19?

MR. LUNA: No, if it's described in that way on the packaging. That's what it is.

ATTORNEY MCCARTHY: Read him some of the names. You've got the names.

ATTORNEY MCCARTHY: Just the names, in other words, that's what's going to set it into that category? The name on the bottle?

ATTORNEY MCCARTHY: Well, if it says: all night long and it is in a store that sells this stuff, there's a pretty good conclusion that you can reach that its used like cyalis (sp) or another product to enhance sexual activity and prolong an erection.

ATTORNEY DEPAOLO: Is cyalis(sp) a regulated item in your opinion?

ATTORNEY MCCARTHY: In this store, I think it would be, yes.

ATTORNEY DEPAOLO: It would be. Okay. Thank you. I just want to be clear for the record what you're counting.

ATTORNEY MCCARTHY: Yah, I think under Attorney Byrne's analysis, it's very clear that anything that comes within 2-19 which includes sexual activity would be included.

Any other questions?

ATTORNEY DEPAOLO: No.

THE CHAIR: Can I ask you the date you went in the store?

MR. LUNA: I went in on February 21st and then again on March 14th? A week ago yesterday. What was the date, Steve?

March 13th. That was the first time. The 13th and the 18th. Those are the dates I was in the store.

THE CHAIR: Not the 21st?

MR. LUNA: No. It's the 13th of March and then the 18th of March.

THE CHAIR: You went in there three times?

MR. LUNA: No, twice. I did not go in there in February.

THE CHAIR: Okay.

MR. LUNA: One of the challenges we had was getting people to go into the store.

(Audience chuckles)

(Applause)

Including members of the Town Council. Because we have people here that are deciding what is in the store without ever going into the store.

THE CHAIR: Let me ask Mary: What was the date you went in? The 28th of January, right?

MS.SAVAGE-DUNHAM: Our inventory was performed on January 28th, 2010.

THE CHAIR: January what? The 28th?

MS. SAVAGE-DUNHAM: January 28th.

THE CHAIR: And, you went in -----

Now would you say from day to day the inventory would change?

MR. LUNA: Absolutely it does change. Yes.

THE CHAIR: Absolutely, right?

MR. LUNA: Yes.

THE CHAIR: Okay, so you went in on -

MR. LUNA: On another day and of course it's going to be different. That's why for the analysis, I used the sheets which were provided.

THE CHAIR: Okay, any questions?

ATTORNEY DEPAOLO: Okay, Mr. Silver, you can cross examine?

ATTORNEY SILVER: You know, Mr. Chairman, I am going to ask for a ten minute break. We have a lot of material that came in that I've seen just for the first time.

I've been asked to cross examine. Usually in any kind of court proceeding, anything that is given weeks ahead of time. I am really requesting some time so that I can just review my notes and my partner's notes

from the testimony that was given to adequately ask questions.

THE CHAIR: We will grant ten minutes. A ten minute recess.

(Whereupon, the meeting was recessed at 8:30 o'clock, pm)

(Whereupon, the meeting was resumed at 8:42 o'clock, p.m.)

(End of Tape #1, Side B)
(Beginning of Tape #2, Side A)

JOSEPH LaPORTE, Chairman, resuming the Chair:

THE CHAIR: Okay, we will continue the public hearing.

The Appellee will be recognized.

ATTORNEY SILVER: Before I start my examination, I will indicate, Mr. Chairman and the board, once again, I am Daniel Silver for the record. That I am going to brief and I am not going to spend a lot of time in cross examination of this man.

But to indicate that much of what we will do, we'll put on our affirmative matter, but I do have a few questions for the witness.

Sir, if you would come forward, please?

Sir, you've indicated that you've made inspections of the premises on two occasions in March of 2010, is that correct?

MR. LUNA: Yes, it is.

ATTORNEY SILVER: And, you did not see the premises on January 28th, 2010 when staff came and did an inventory?

MR. LUNA: No, I did not.

ATTORNEY SILVER: And, are you aware of anything within the ordinance itself which would indicate that a count, an individual count is not - of things for sale is not proper?

An individual count of the inventory is improper. Is there anything in the ordinance that you are aware of?

MR. LUNA: The ordinance calls out two parts: visual presentation and the inventory level. Its two parts and you have to meet both.

ATTORNEY SILVER: No. I asked a question: Is there anything in the ordinance which prevents -

ATTORNEY MCCARTHY: I am going to object, okay. Is he asking a question or is he yelling at him?

MR. LUNA: I gave you an answer.

ATTORNEY DEPAOLO : Gentlemen, let's ---

MR. LUNA: I gave you an answer.

ATTORNEY SILVER: He's not asking the question. The question is very limited.

ATTORNEY MCCARTHY: He's answered the question.

ATTORNEY SILVER: He is not answering the question.

ATTORNEY MCCARTHY: Yes, he is.

ATTORNEY SILVER: Question ---

THE CHAIR: Calm down.

ATTORNEY SILVER: The question, let me repeat the question. Have you reviewed the ordinance, sir?

MR. LUNA: Yes.

ATTORNEY SILVER: Is there any language within 2-19 which would prohibit the zoning enforcement officer or anybody in the town from taking an individual count of inventory?

MR. LUNA: That's why they hired Attorney Byrne.

ATTORNEY SILVER: I asked a question.

MR. LUNA: I gave you an answer.

ATTORNEY SILVER: No, you didn't. Have you seen anything in the ordinance? Are you aware of anything?

MR. LUNA: There are two parts to the ordinance.

THE CHAIR: A yes or no.

ATTORNEY SILVER: I think the board gets ---

THE CHAIR: A yes or no would be fine.

ATTORNEY SILVER: It's a yes or no.

MR. LUNA: Yes or no. There is an inventory clause in there. It does not specify how the inventory is to be counted and that's why there was a letter written to the planning & zoning commission from Attorney Byrne to Daniel Silver and your client specifying how the planning & zoning commission interprets our own Southington zoning regulations and not you.

(Applause, applause)

(Audience outburst)

ATTORNEY SILVER: Sir, do you agree --- I withdraw that question.

Sir, do you agree that the um, that your inspection, that you never counted each individual item?

MR. LUNA: I went through the store and then when I did the analysis, I used the inventory sheets that were provided by your client.

ATTORNEY SILVER: Okay. And, do you agree that your opinion today is based solely on the letter which is written by Attorney Byrne?

MR. LUNA: No, it's based on the regulation. It's based on the inventory sheets provided. And, it's based on a letter from Attorney Byrne.

ATTORNEY SILVER: Okay. In the inventory --- excuse me. In the ordinance itself, is there any language in the ordinance which describes sexually oriented products?

MR. LUNA: Yes.

ATTORNEY SILVER: Okay. And, in that ordinance -
Next question. Did you review the zoning application that was submitted by the applicant in June of 2009?

MR. LUNA: I reviewed the application that was submitted in June of 2009, approved in August, without notifying the planning & zoning commission. Yes, I did. I did review that.

ATTORNEY SILVER: All right. And, are you aware that the application of August 6th of 2009 which was an application for zoning approval, was in fact, approved by the zoning enforcement officer?

MR. LUNA: And, not by the planning & zoning commission per our regulations.

ATTORNEY SILVER: I just asked you a question. I am not asking for a legal opinion.

I'm asking you: Are you aware that the zoning office signed the approval of the application?

MR. LUNA: That's why there was an original appeal back in August.

MR. SILVER: I'll move on to another question. I think the question was asked and question answered.

Sir, do you have any basis for the methodological standard that you used to evaluate this material?

MR. LUNA: Meaning what? The type of analysis that I did?

ATTORNEY SILVER: That is correct. Is there anything written which substantiates your analysis?

MR. LUNA: I used a similar process to what the zoning enforcement did only I corrected for the packaging issues which are clearly there.

ATTORNEY SILVER: I asked you: Are you aware ---

MR. LUNA: Yes, there is. There are groups called APEX, American Production Inventory Control Society and now they're called the American Operations Control Society.

I did contact them and I also looked at information on how to do cycle counts. I can provide all that information if you would like that.

ATTORNEY SILVER: Did you put that into your direct testimony?

MR. LUNA: This isn't court. This is - -

ATTORNEY SILVER: Yes or no?

MR. LUNA: -- and appeal. We're representing one of the citizens of this town who says this is a business that is misclassified. That's what we are doing.

I'm not court. I'm talking to citizens of our - and we're standing up for citizens within our group.

(Audience outburst with applause)

Every, every permit has been looked at by only three people: the zoning enforcement officer, the town planner and your client.

ATTORNEY SILVER: Sir -

MR. LUNA: This is the first time it's been in public.

ATTORNEY DEPAOLO: Mr. Luna, I am going to stop you.

ATTORNEY SILVER: The witness has gone way --- is testifying. This is supposed --

MR. LUNA: Okay, well there is a public hearing person (sic) I will save that for that because this is a public hearing. It's a public hearing. It's not court. It's a public hearing.

It's a public hearing.

ATTORNEY SILVER: You are under cross examination according to the protocol of this hearing. And, --

ATTORNEY DEPAOLO: If you would do your best, Mr. Luna, to answer the questions. You can make a statement (inaudible).

MR. LUNA: I will, thank you.

ATTORNEY SILVER: Do you agree, sir, with counsel's representation that anything that contributes to sexual intercourse would be defined as a sexual product under this ordinance?

MR. LUNA: Under this ordinance, yes.

ATTORNEY SILVER: Do you agree that your opinion is based on the fact that you have counted items which may have some tendency to contribute to sexual intercourse?

MR. LUNA: Could you state the question again? I'm trying to understand what you are asking.

ATTORNEY SILVER: Yes, I'll repeat the question, again. Do you agree, sir, that your evaluation of what constitutes a sexually oriented product is based solely on the fact that an item may potentially be used in sexual intercourse?

MR. LUNA: I am going by the strict interpretation of the Southington zoning regulations.

ATTORNEY SILVER: I asked you personally.

MR. LUNA: No, I'm sticking to the regulation.

ATTORNEY SILVER: I didn't ask you what they did.

MR. LUNA: I can't have a personal opinion. I have to go by what the regulation says and that's what the regulation says.

(Applause, applause)

ATTORNEY SILVER: I will indicate to the board that these are decisions for the Zoning Board of Appeals. I'm trying to ask this individual questions and I can be here all night and it's obvious I am not going to answers to my questions.

I will ask a few more than I am going to --- otherwise; this is going to go on like this all night.

THE CHAIR: If you could just answer yes or no, or don't answer at all.

ATTORNEY SILVER: Do you feel that the problem with this store is that its theme is sexually oriented?

MR. LUNA: Yes, it is. The theme is sexually oriented.

ATTORNEY SILVER: Okay, does the ordinance itself give any language that if any retail establishment is sexually oriented, that it comes under this regulation?

MR. LUNA: If the ordinance, if the criteria --

ATTORNEY SILVER: Just yes or no?

MR. LUNA: -- is met. What is the question that you're asking? That any store falls under this ordinance?

ATTORNEY SILVER: That's right.

MR. LUNA: Any store? Yes, potentially does fall under this ordinance.

ATTORNEY SILVER: Okay. As long as the item contributes to sexual intercourse, that in itself meets the definition of a sexual item. Is that yes or no?

MR. LUNA: No. The regulation says 10 percent of the inventory or 10 percent of the visual presentation time. And, if you go into any other store that sells condoms, you will see that their inventory is far greater in the other areas that are not regulated.

ATTORNEY SILVER: Okay. So you're saying that a condom is classified as a sexual item under 2-19?

MR. LUNA: Yes. Yes, absolutely.

Do you?

ATTORNEY SILVER: Pardon?

(Applause)

MR. LUNA: Classify a condom as a sexually oriented item?

ATTORNEY SILVER: Yes.

MR. LUNA: There you go.

ATTORNEY SILVER: I've asked you a question if a condom in your opinion is defined as a sexually oriented item under 2-19 and counts as a threshold count as to the number of adult products.

MR. LUNA : Yes. And, I asked you if a condom was a sexually oriented product and you said yes.

ATTORNEY SILVER: Okay.

MR. LUNA: Okay.

(Pause)

ATTORNEY SILVER: And, are you aware, sir, you said that you reviewed the application of zoning compliance by the applicants. Is that correct? In August, excuse me, in June of 2009?

MR. LUNA: In August of 2009, there was a planning & zoning commission meeting where all of this came up.

ATTORNEY SILVER: No. I asked you a question of did you review the application of zoning enforce - application of zoning approval which was submitted in June of 2009 to the zoning enforcement officer?

MR. LUNA: That was passed on the August 19th, so, yes I did look at that application. After it was approved.

ATTORNEY SILVER: And, did you note in there, in that application, that the applicant set forth that the only items which were defined, which should be defined as sexually oriented materials included: books, magazines and DVDs. Were you aware that -

MR. LUNA: I'm aware the application is very consistent with every other application that VIP has in every other town.

ATTORNEY SILVER: I asked a question. Were you aware that he defined -

MR. LUNA: He? Who defined the sexually oriented products? Not the regulation.

MS.POTTER: Excuse me. You're starting to sound like the Rain Man. I keep hearing about the

regulation. We all know the regulation. That's why we're here.

MR. LUNA: It's just not being applied and that's why we're here.

MS.POTTER: But I am saying, just answer yes or no. You sound like the Rain Man. You know? He's only asking you. He's not, it's your opinion.

ATTORNEY SILVER: Let's keep this brief. I have no further questions. I'll present my case.

Thank you very much.

(Applause)

ATTORNEY DEPAOLO: Any further, Mr. McCarthy?

ATTORNEY MCCARTHY: Yes. I would like to ask some questions of Ms. Savage.

Ms. Savage, if you were counting packs of cigarettes at this store on this particular day and they were regulated items, would you count them by individual cigarette or by packs?

MS. SAVAGE-DUNHAM: That is irrelevant because there is no cigarettes ---

ATTORNEY MCCARTHY: I am asking you a hypothetical. And, the hypothetical is: If cigarettes were a regulated item, would you count them per cigarette or per pack?

MS. POTTER: Or carton.

MS. SAVAGE-DUNHAM: I would, it would depend on how they were intended for sale. There are some stores; there are some states that only permit the sale of cigarette by carton.

In other places, you are allowed to sell them by pack.

So, it would depend on how they were displayed and intended for sale.

ATTORNEY MCCARTHY: But would it be possible that you would each and every cigarette if the stated allowed cigarettes to be sold individually, as well?

MS. SAVAGE-DUNHAM: Potentially. When we go into the store, if we saw a display cases set up with all individual cigarettes there, perhaps we would.

ATTORNEY MCCARTHY: Did you see a display case with filters anywhere in the store the day you inspected it?

MS. SAVAGE-DUNHAM: With filters?

ATTORNEY MCCARTHY: Filters for pipes in the smoke shop section of the store.

MS. SAVAGE-DUNHAM: Screens.

ATTORNEY MCCARTHY: Screens. I'm sorry. Whatever they're called here. Did you see a display?

MS. SAVAGE-DUNHAM: The screens were not yet stocked on to the shelves. They had just come in.

ATTORNEY MCCARTHY: Okay. And, did you ask Mr. DeMartino in what form they come in? How they were packaged when they came in? Whether they came in in one package, ten packages, a hundred packages, two hundred and fifty six thousand packages?

MS. SAVAGE-DUNHAM: We actually discussed how Mr. DeMartino ordered them and how he intended to sell them. Not only in this store but in all of his stores.

ATTORNEY MCCARTHY: But did you ask him how they came in? How they were received into his store and in what sort of package?

MS.SAVAGE-DUNHAM : I saw them how they were received in the store.

ATTORNEY MCCARTHY: How were they received?

MS. SAVAGE-DUNHAM: They were received in bulk.

ATTORNEY MCCARTHY: So, in other words, 256,000 were received together as one package?

MS. SAVAGE-DUNHAM: No, there was packages of smaller increments because the screens were sorted by size and by cohort; there was 20 or 30 thousand in each set. I would have to refer to the manufacturer.

ATTORNEY MCCARTHY: That's my question. How many were in each subset?

MS. SAVAGE-DUNHAM: I would have to refer back to the manufacturer's page. At the time of the inventory, we looked at what was ordered and how it was - he actually had that.

ATTORNEY MCCARTHY: You said 20 to 30 thousand in each package.

MS. SAVAGE-DUNHAM: In each bubble pack. Yah, there was large amounts.

ATTORNEY MCCARTHY: So, if you were to count them by the way they were packaged, 20 to 30 thousand in each package, that would reduce the 256,000 enormously, wouldn't it? If you had counted it that way.

MS. SAVAGE-DUNHAM: Clearly.

ATTORNEY MCCARTHY: Okay. And, it would have put Mr. DeMartino's store, VIP, well over 10 percent regulated items.

MS. SAVAGE-DUNHAM: Questionable.

ATTORNEY MCCARTHY: Why questionable? If you reduce it by, if you divide it by 20 or 30 thousand, by it, I mean 256,000; do you have any clue as to --- any idea as to what that would come out to?

MS. SAVAGE-DUNHAM: Even if we removed all of the smoke shop items from the inventory, given the gross

over count of regulated products within the store, the applicant would still be well below the 10 percent as per staff's inspection.

ATTORNEY MCCARTHY: Well, that's what Mr. Luna did. He took your numbers and removed the smoke shop items and I believe came in with a number that was significantly over 10 percent. It was close to --- what was it?

ATTORNEY DEPAOLO: Mr. McCarthy, are you asking a question?

ATTORNEY MCCARTHY: Yah. He came in at 17.4 percent when he excluded the screens. So do you disagree with that number?

MS. SAVAGE-DUNHAM: I haven't seen Mr. Luna's numbers and so I certainly can't comment on them.

I stand by my inventory.

ATTORNEY MCCARTHY: Do you have them now?

MS. SAVAGE-DUNHAM: I do not.

ATTORNEY MCCARTHY: Who has them?

MS. SAVAGE-DUNHAM: One copy was entered into the record and the secretary has that.

ATTORNEY MCCARTHY: Okay, all right.

But would it not be possible if you divided the 256 by 30,000 that that number would be reduced so significantly that the VIP store would have significantly more than 10 percent in regulated items?

(Pause)

Is that possible?

MS. SAVAGE-DUNHAM: According to our numbers? You know, I disagree.

ATTORNEY MCCARTHY: Would you like to take a moment to take a look at that and divide 30,000 into those numbers and then give me an answer, please?

ATTORNEY DEPAOLO: Mr. McCarthy, we're not going to do math. You've entered the numbers into the record and we're -

ATTORNEY MCCARTHY: I don't feel she has answered the question.

Honestly, I mean, she can take a look at that and divide that and know that that reduces the number significantly.

ATTORNEY DEPAOLO: Her answer was that based on her count, even if she did that, it would not put the adult oriented items over 10 percent. That's what she testified to.

ATTORNEY MCCARTHY: And, I'm asking -

(Pause)

Ms. Savage, when did you first meet the proprietor of 228 Queen Street?

MS. SAVAGE-DUNHAM: I don't recall the exact date. I believe it was in June of 2010(sic).

ATTORNEY MCCARTHY: And, what were you doing at the time?

MS. SAVAGE-DUNHAM: At work in the Town of Southington. Mr. DeMartino came in to discuss his store.

ATTORNEY MCCARTHY: Did you ever meet him when you worked in Manchester?

MS. SAVAGE-DUNHAM: No, I did not.

ATTORNEY MCCARTHY: Did you handle any part of his application for approval for a VIP store in Manchester when you worked there?

MS. SAVAGE-DUNHAM: No, I did not. Not that I recall.

THE CHAIR: Can I ask you: What does this have to do with the inventory?

Sir?

ATTORNEY MCCARTHY: It doesn't have anything to do with the --- who is asking the question?

THE CHAIR: I am.

ATTORNEY DEPAOLO: The Chairman.

ATTORNEY MCCARTHY: Okay. Um, it doesn't have to do with the inventory but it has to do with prior problems that sprang out that were identical to this same exact problem and therefore relevant to this problem in the Town of Manchester.

THE CHAIR: But we are only interested in Southington.

ATTORNEY MCCARTHY: Okay, all right.

(Pause)

Now, you excluded condoms from your count of regulated items, correct?

MS. SAVAGE-DUNHAM: Correct.

ATTORNEY MCCARTHY: It's 10,910 of them, right?

MS. SAVAGE-DUNHAM: There was other materials within that product, that category. But yes, we did not find any items in that department to be regulated.

ATTORNEY MCCARTHY: The other items was ticklers safe sex. Can you tell me what a tickler safe sex is?

MS. SAVAGE-DUNHAM: It's a product for sale in Mr. DeMartino's store.

ATTORNEY MCCARTHY: But you don't know what it is?

MS.SAVAGE-DUNHAM : I am not here offer a primer on sex.

ATTORNEY MCCARTHY: No, I'm not asking you. But you, you deemed this not to be a regulated item, yet you don't know what it is. How is that possible?

MS. SAVAGE-DUNHAM: It is possible to apply the planning & zoning commission standards to the inventory upon visual inspection and very easily determine what would be regulated and what would be not.

My job is not to assume that something might be used -

ATTORNEY MCCARTHY: Okay. So a tickler safe sex in your opinion, whatever it is, is not a regulated item?

MS. SAVAGE-DUNHAM: That is correct.

ATTORNEY MCCARTHY: And, a condom is not a regulated item?

MS. SAVAGE-DUNHAM: The condoms that we observed in the store were not deemed to be regulated.

ATTORNEY MCCARTHY: And, enhancement pills used to extend the period of time a male can conduct sex is not a regulated item?

MS. SAVAGE-DUNHAM: The pills that were in the store were not determined to be regulated as per the standards.

ATTORNEY MCCARTHY: And, lubricants are not a regulated item?

MS. SAVAGE DUNHAM: Well, it depends on the lubricant. Some of the lubricants were determined to be regulated.

ATTORNEY MCCARTHY: Well, out of 29,000, you found only 15 to be regulated.

MS. SAVAGE-DUNHAM: That's correct.

ATTORNEY MCCARTHY: Okay, thank you.

Party and bachelorette gifts, 15,000 of them. You found 4,981 to be regulated but left off 11,000. Correct?

MS. SAVAGE-DUNHAM: That's correct.

ATTORNEY MCCARTHY: Okay.

(Pause)

I have no further questions, thank you.

THE CHAIR: Thank you.

ATTORNEY DEPAOLO: Mr. Silver?

ATTORNEY SILVER: Mr. Chairman and members of the commission, before I start my affirmative case in chief, as the Agenda would indicate.

ATTORNEY DEPAOLO: Mr. Silver? Do you have any cross for Mrs. Dunham?

ATTORNEY SILVER: Okay. Yes. I do have some questions.

Ms. Dunham, if everything came in bulk, but was broken down for individual sales, in your opinion, was your count based upon the individual items for sale?

MS. SAVAGE-DUNHAM: Yes.

ATTORNEY SILVER: If, for example, videos were purchased 100 per carton, how would you count those?

MS. SAVAGE-DUNHAM: I would count them individually.

ATTORNEY SILVER: Okay, because they are sold individually. Is that correct?

MS. SAVAGE-DUNHAM: That's correct.

ATTORNEY SILVER: As it was presented to you that all the items which you counted included in your inventory count were for sale on an individual basis?

MS. SAVAGE-DUNHAM: Correct.

ATTORNEY SILVER: Do you have any evidence that any of the items that you counted were not for sale individually?

MS. SAVAGE-DUNHAM: Well, to be clear, we did count like a package of rolling papers as one item.

ATTORNEY SILVER: That's right.

MS. SAVAGE-DUNHAM: That package of rolling papers came in a case of rolling papers. So a case of rolling papers may have had 200 or a larger number of individual books of cigarette papers. So we did not count that case of rolling papers as one item. We counted it as the number of individual books of rolling papers - that was the number of inventory units in that box.

ATTORNEY SILVER: Absolutely. So that your example of papers were sold on a package basis and you counted them on a package basis.

MS. SAVAGE-DUNHAM: Correct.

ATTORNEY SILVER: And, when you counted other products, they were sold only if they were offered for sale on an individual basis.

MS. SAVAGE-DUNHAM: Correct.

ATTORNEY SILVER: And, the reference to sales of packs of cigarettes, is it true that you would count them as one pack unless they were sold individually?

MS. SAVAGE-DUNHAM: That's correct.

(Pause)

ATTORNEY SILVER: At this time, I have nothing further. I will reserve any future comments for Ms. Dunham during my direct examination.

Thank you.

ATTORNEY MCCARTHY: Redirect, if I may.

Ms. Savage, are you familiar with the letter that as written by Attorney Silver on November 19th, 2009 to Town Attorney Mark Sciota in which he discussed your relationship with - prior relationship with Mr. DeMartino's store in Manchester?

MS. SAVAGE-DUNHAM: I have a letter -

ATTORNEY MCCARTHY: And, I do think this is relevant to the discussion here.

MS. SAVAGE-DUNHAM: I do have the letter in front of me.

ATTORNEY MCCARTHY: My question for you is this: In the letter, he states that you, zoning enforcement officer, Mary Savage, was intimately aware of the proposed nature of 228 Queen Street's business and concluded that it satisfied the ten percent of total presentation time provision when she issued the zoning permit.

Ms. Savage had extensive meetings with myself and 228 Queen Street's owner regarding the products that would be sold and she was also familiar with the nature and inventory of the business as a result of her previous employment in Manchester where a similar business is located.

So, is it true that you were familiar with the inventory of this store at 228 Queen Street because of your prior involvement with the same store in Manchester?

MS. SAVAGE-DUNHAM: No. That's not true. The store -

ATTORNEY MCCARTHY: So what Attorney Silver said in this letter isn't true?

ATTORNEY DEPAOLO: That's what she said.

MS. SAVAGE-DUNHAM: What I'm saying is I worked in Manchester when the store came in there.

ATTORNEY MCCARTHY: So, the first time you saw these products from VIP was when you went out on January 28th for the inspection?

MS. SAVAGE-DUNHAM. No. As I stated previously in my opening statement, I visited a VIP store in November of 2009. I believe I've covered that, already.

ATTORNEY MCCARTHY: Is that what Mr. Silver do you think is referring to in his letter?

MS. SAVAGE-DUNHAM: I can't speak for Attorney Silver.

ATTORNEY MCCARTHY: Because he claims you're intimately aware of --- you were intimately aware of the -

ATTORNEY DEPAOLO: Sir, she testified that that is not correct in her opinion.

ATTORNEY MCCARTHY: Thank you.

THE CHAIR: Are we all set?

ATTORNEY DEPAOLO: Any other witnesses, Mr. McCarthy?

ATTORNEY MCCARTHY: Just give me one minute.

(Pause)

ATTORNEY DEPAOLO: I'm sorry, recross, Mr. Silver.

ATTORNEY MCCARTHY: I do have on more witness. It's Steve Briggs.

ATTORNEY DEPAOLO: Is this going to take long, Mr. McCarthy?

ATTORNEY MCCARTHY: It's very short. It's going to be very short.

ATTORNEY DEPAOLO: Okay.

ATTORNEY MCCARTHY: Mr. Briggs, where do you live?

MR. BRIGGS: I'm Steve Briggs and I live on Sunset Ridge Drive in Southington.

ATTORNEY MCCARTHY: At any point did you have occasion to go into the store at 228 Queen Street known as VIP?

MR. BRIGGS: Yes, I've been in the store three different times.

ATTORNEY MCCARTHY: And, what was the purpose of those visits?

MR. BRIGGS: My first visit was --- I'll give you the dates. September - excuse me. Sunday, February 14th, 2010 and that was for my own understanding of what the store contained. I've been hearing a lot from different people of what's in there and I did not want to go by second information or hearsay. I needed to go in there myself so that I could speak honestly of what was in the store.

The second time I went in there was Sunday, March 13th. That was to assist in the count of products.

The third time was Thursday, March 18th and that was to purchase the brass pipe screens.

ATTORNEY MCCARTHY: When you were assisting the count of products, who were you assisting?

MR. BRIGGS: Uh, Tony Luna was there. And, um, Lisa Barnes was also there.

ATTORNEY MCCARTHY: And, what did you count?

MR. BRIGGS: I counted, focused on the smoke shop area, the pipes. The knives. The brass knuckles, the stun guns and um, and then I also went to the DVD section and did an estimated count of those.

ATTORNEY MCCARTHY: Okay. Were there other people with you also doing counts?

MR. BRIGGS: Yes. Tony and Lisa.

ATTORNEY MCCARTHY: Okay. And, did Tony use any of that, do you know, in that analysis that he did?

MR. BRIGGS: Well, the analysis that he provided tonight was the numbers given to him by the ---

ATTORNEY SILVER: I object to this. I know this is an administrative body, but this witness is testifying about something someone else said and I really have held my own -

ATTORNEY MCCARTHY: No. I am not asking him anything what anyone else said.

MR. BRIGGS: I didn't say anything about what anybody said.

I'm telling you my opinion of what I saw.

ATTORNEY MCCARTHY: No, not at all. I just want to know his opinion. What is the third occasion - you went out to do what?

MR. BRIGGS: The third occasion was to purchase the screens.

ATTORNEY MCCARTHY: And, did you?

MR. BRIGGS: Yes, I did.

ATTORNEY MCCARTHY: And, where were the screens located?

MR. BRIGGS: Well, when I went into the store, there were other customers in there and so I looked around to see if I could find any. I went to the smoke section there with all the pipes and uh, to see if I could see them. And, I didn't visually see them anywhere.

So, I went over to the counter and I had to wait in line because she was waiting on a customer. So, she then asked, she got done with that customer and as she was putting batteries in a vibrator --- apparently they test the vibrator before they leave the store - I asked her, I said, hey, do you sell screens for pipes. I see you have a lot of pipes in the store. Do you also sell the screens?

And, she said, yes, we do. I said, well, I'm interested in buying some. Can I buy one? Or how do you sell them?

She told me, no. They sell them five for a dollar. So, I said well, if I wanted to buy you know, quantity, can I get a discount? She said, no. No matter how many you buy, they're going to be five for a dollar.

So, I purchased five of them and that's when she pulled out the - behind the counter. And, the counter is kind of high in there so I couldn't see if they were just on a shelf or if she opened a drawer. But she pulled out the three different size bags.

ATTORNEY MCCARTHY: Were they visible?

MR. BRIGGS: From where I was standing at the counter?

ATTORNEY MCCARTHY: Yes.

MR. BRIGGS: No, they were not visible. Until she brought them out and put them in front of me on the counter.

ATTORNEY MCCARTHY: Okay, and any idea of how many were in the bag?

MR. BRIGGS: No, because these things are small and thin. I mean, I could guesstimate 500 to a thousand. That's just a guesstimate.

ATTORNEY MCCARTHY: How small are they?

MR. BRIGGS: Uh, maybe a half inch, something like that. Very thin. As a matter of fact, when we got them out of the store, we found out that they had actually; two of them were stuck together, so I actually got six for a dollar.

ATTORNEY MCCARTHY: Okay. All right. Well, we didn't have to mention that but ---

(Audience chatter)

MR. BRIGGS: It could have been a bonus.

ATTORNEY MCCARTHY: All right. Just two more questions.

Was the smoke shop in any way similar to the rest of the store at VIP?

MR. BRIGGS: The only way I say it would be similar was I noticed there was one shelves that had these unique pipes that were actually, I don't know if they were wood or bone or what they were made out of. Maybe plastic. But they were naked individuals in different like sexual positions on these pipes.

ATTORNEY MCCARTHY: This was in the smoke shop?

MR. BRIGGS: That was on the smoke shop. I mean, other than that, the smoke shop is not what I would call sexually orientated other than those pipes.

ATTORNEY MCCARTHY: But what about the rest of the store? If you were to leave those filters aside, how would you characterize the balance of the store?

MR. BRIGGS: In my opinion there is no question that it is a sexually oriented business. I mean, I mean, I would encourage anyone that has not been in there to go see and make up your own mind because it is very, it is very obvious.

ATTORNEY MCCARTHY: Would you, have you ever seen any battery operated penis vibrators at CVS?

MR. BRIGGS: No. I have not.

ATTORNEY MCCARTHY: No. Have you seen any of the other stuff that's in this store in CVS, any of the penises or dildos or any of the other things like that?

MR. BRIGGS: No, I have not.

ATTORNEY MCCARTHY: Okay. So for some reason CVS doesn't carry them, do they?

MR. BRIGGS: I have not seen them.

ATTORNEY MCCARTHY: No further questions.

ATTORNEY SILVER: I have a question.

ATTORNEY DEPAOLO: Mr. Silver?

ATTORNEY SILVER: I have absolutely no questions of him.

THE CHAIR: Thank you.

ATTORNEY DEPAOLO: Thank you.

Anything else, Mr. McCarthy?

ATTORNEY MCCARTHY: No.

THE CHAIR: We're all set? Okay.

Anyone speaking in favor of the applicant?

ATTORNEY DEPAOLO: Oh. We have to give Mr. Silver a chance, Mr. Chairman.

THE CHAIR: Oh, I thought he was, okay. Fine. I thought he was done.

ATTORNEY SILVER: Yes, I have a rather lengthy presentation, so let me get started. To begin with, before I begin my presentation, I'd like to indicate that I had given to counsel, Mr. DePaolo, this evening a motion which I have copies for that I wanted to present to you prior to my putting on my affirmative case.

ATTORNEY DEPAOLO: Okay, we'll need to take that into the record, Mr. Silver.

So, if you have copies?

ATTORNEY SILVER: Yes.

(Pause)

Before I commence talking about this motion, I'd just like to indicate a couple of things. First of all, I recognize we are before the Zoning Board of Appeals in Southington. We are not before a court. And, as a result of that our procedure is a little bit different although we are attempting this evening to give everybody due process and there is the right of cross examination.

Ordinarily, in a court proceeding and I understand this is not and obviously we are not holding you to the same level, legal capacity as a Judge in the Superior Court. However, it is normal that if you're going to address the rights of a party to have the matter heard, that is usually done first prior to anybody submitting any evidence.

In this case, because of the --- what has been given to you by the Town Attorney, Assistant Town Attorney, I am presenting after the applicant has put on their case several reasons why for the record we

feel that this body does not have the jurisdiction to actually hear this matter.

And, which resulted in this motion which is before you this evening. I can do one of two things. I'm trying to keep my comments as brief as possible. I know there's many members of the public -- and it's already getting late -- who want to speak. I could read this into the record or -

ATTORNEY DEPAOLO: I'm sorry. Mr. Silver, we are going to put a copy into the record. It looks like you're challenging standing?

ATTORNEY SILVER: That is correct.

ATTORNEY DEPAOLO: And, then the second issue you are raising is what?

ATTORNEY SILVER: The second issue is actually a standing issue which has been found by the courts to be a standing issue that basically this appeal is based, is really a back door attempt to appeal the town's, Mr. Vinci's, approval of zoning authority which I will get into in my case in chief on August the 6th, 2009 for which no appeal had been taken.

That what we're attempting to do this evening from the testimony both of the zoning enforcement officer and Mr. McCarthy and his witnesses is deal with a modification of an interpretation of the zoning regulation in Southington which did not occur until Mr. Byrne's letter on December --- I think it was on December the 2nd, which is already in evidence. In which he has indicated and I will get into with my direct testimony.

Yes?

ATTORNEY DEPAOLO: It seems you're raising municipal estoppels as your second ground?

ATTORNEY SILVER: That is correct.

ATTORNEY DEPAOLO: Okay, Mr. Chairman, my inclination on this would be to recommend to you that you just take this into the record. Allow Mr. Silver to present any evidence into the record that he feels is relevant to this and the same with Mr. McCarthy. He can present evidence that he feels is relevant.

But I think that these two issues can be raised in the Superior Court if the parties choose to appeal this decision. So, I would prefer, if you're willing, is to just kind of take these into the record, set them aside and then proceed with the merits of the case.

THE CHAIR: I will agree.

ATTORNEY DEPAOLO: And, I don't know if the parties --- if that's acceptable.

ATTORNEY MCCARTHY: It's acceptable to me as long as I have an opportunity to respond. The first time I saw this is tonight when I walked in.

ATTORNEY DEPAOLO: Very well.

ATTORNEY SILVER: I understand, it's the same way I've seen Mr. McCarthy's evidence for the first time when it was submitted and not before hearing.

I'll indicate that I've given Mr. McCarthy this prior to the commencement of the hearing.

ATTORNEY MCCARTHY: Sixty seconds.

ATTORNEY SILVER: Okay, and --- that's true. That's absolutely true.

And, in addition, just for the record, the third part is that we - I'm talking about my client - looks at this as really an appeal of a CO which was issued on January 28th by the building inspector and it has nothing to do with zoning because zoning was approved on August the 6th, 2010 (sic).

I'm not going to get into any more details. Just for the record, the motion speaks for itself.

I have attached some statutes dealing with that issue, as well. I think that it's probably fair at this point, before I proceed with my affirmative evidence and background of this matter to place into the record, if Mr. McCarthy wants to have any brief comments concerning this limited issue, I think it's probably the appropriate time to do so.

Then I can move forward with my case.

THE CHAIR: I agree.

ATTORNEY DEPAOLO: We're going to take this motion into the record.

ATTORNEY MCCARTHY: Yes.

ATTORNEY DEPAOLO: Both of you can present whatever evidence into the record that you choose.

But my understanding is ---

ATTORNEY MCCARTHY: This is a legal motion that's -

ATTORNEY DEPAOLO: That's correct.

ATTORNEY MCCARTHY: --- not an evidentiary motion.

ATTORNEY DEPAOLO: It raises standing, okay, whether your client is an aggrieved person and it also raises municipal estoppels. And, my preference would be to ask the Chairman to just take the evidence into the record.

My understanding is you each could raise those issues later in the Superior Court, if you chose to, and then we can proceed with the merits of the case.

ATTORNEY MCCARTHY: I would just reassert what I stated earlier and that is Mr. DeMartino is not a party

to this action. The parties are the zoning enforcement officer and Ms. Barnes, the appellant. That's it.

ATTORNEY DEPAOLO: Very well.

ATTORNEY SILVER: Thank you, Mr. Chairman.

What I'd like to do again in order to attempt to save some time because my presentation could be quite lengthy is Mr. Byrne(sic) presented his client and asked a number of questions. What I have done is I have copies for everybody, include counsel, and I have put together an affidavit of Mr. DeMartino of the facts as we see them leading up to from the time that he put in his application for zoning compliance in June of 2009 through the decision and the granting of the certificate of occupancy on January the 28th.

What I would like to do is I will pass those out at this point for each member of the commission. Then I can do one of two things --- I would recommend as I do in most zoning hearings and I think you've had it before you, is you can read this affidavit or I can --- it's a six page affidavit, I can read that into the record. Or, we can take some time for you to read it.

Mr. Martino(sic) is here and subject to cross examination both by Mr. McCarthy and by any member - questions any members of the commission have. This would save us quite a bit of time and I'm suggesting this is the proper way to do it.

THE CHAIR: Well, it's going to - we won't cut any time by doing that. If you present it, we'll save a lot more time.

ATTORNEY SILVER: Well, I could read it - I could give you --- why don't I submit this and I can just read this into the record and then you'll be subject to cross examination or questioning or whatever.

(Pause, pause)

Um, can I indicate that there is one copy that somebody has which is the original? Because there is a CD. Okay, you have the original. Why don't we just hold that and it can be for the record. That is the original signed affidavit as well as the CD which I will refer to in these remarks. So you have the original.

(Pause)

I am going to read for the record, and you can follow along with me, all counsel have copies, it's an affidavit of Dominick DeMartino.

Mr. DeMartino, would you please stand up and perhaps you can come stand before me or sit right over here. It is going to be a little lengthy.

This is Mr. DeMartino. Mr. DeMartino signed this affidavit and indicates that he is over the age of 18 and understands the obligation of the oath - of an oath.

I will ask Mr. Martino(sic) one question. Mr. Martino(sic) have you read this affidavit?

MR. DEMARTINO: Yes, I have.

MR. SILVER: Okay. And, you'll notice that you have signed this and had your signature notarized by myself as a Commissioner of the Superior Court. Is that correct?

MR. DEMARTINO: That's correct.

MR. SILVER: And, have your sworn to the truth and accuracy to the best of your knowledge and belief as to the contents of what is in this affidavit?

MR. DEMARTINO: Yes.

MR. SILVER: All right, with that in mind, Paragraph 2 indicates that I am the sole member of 229 Queen Street LLC, a Connecticut limited liability company.

229 Queen Street, LLC is a tenant at the property located at 229 Queen Street, Southington, Connecticut and presently operates a business known as VIP or Very Intimate Pleasures.

The landlord is an entity known as BLR Realty Company, a Connecticut corporation.

The business trade name used by 229 Queen Street, LLC is VIP (Very Intimate Pleasures) it consists of a retail business.

The activity and sales of said business was listed on the proposed activity and sales of said business was listed on the zoning application submitted by the applicant.

The proposed activity was set forth in the zoning permit application was a retail store for the sale of clothing, hosiery, novelties, gift cards, party supplies, tobacco products, accessories, personal care items, books, magazines and DVDs.

Included with said definition was a basic list of the type of inventory which would be carried and a copy of which is attached is Exhibit A.

If we look at Exhibit A, there is a tab. This is, I had the whole application later on, but this a tab which shows the list of inventory, the types of inventory -- remember, this was in June before he was opened and ordered anything -- of the proposal that he submitted to the zoning enforcement officer.

And, what he indicated, as you can see the list of items and I'm not going to go through, except please look at the star at the end. The total amount of these products, according to, this is in your application before you, as defined under 2-19 of the Southington zoning applications, will not exceed five percent of the store limit. You'll notice what is stated, is we've indicated to the town in our zoning application, in

August, that the only items that would be considered in our opinion to be adult items would be DVDs and rentals, DVD/VHS sales and magazines. Those were the only items that we considered to be sexual in nature under the zoning regulations.

The sole reason that 229 Queen Street, LLC entered into the lease for the building at 229 Queen Street was to operate a VIP retail store pursuant to its proposed proposal submitted to, in its zoning application.

Article 36 of the lease between 229 Queen Street, LLC, and the landlord, BLR Realty, sets forth the contingency that allows 229 Queen Street to terminate the lease within four months of the commencement date if it did not receive the zoning permit from the Town of Southington to operate its proposed business including the sale of sexually oriented DVDs, books, magazines, which was not to exceed five percent of the storage inventory.

Exhibit D is a copy of that contingency clause which was contained in Mr. DeMartino's lease. It indicates that - I'll ask Mr. Martino(sic) a question.

(End of Tape #2, Side A)
(Beginning of Tape #2 Side B)

(Continuing) --- told that I was outside the grounds of relevancy. What is this? How is this relevant?

Let me finish. How is this relevant to the numbers that were taken by the ZEO on January 28th?

ATTORNEY SILVER: Okay, it's relevant on the basis of our argument of municipal estoppels. Which is in the record.

ATTORNEY DEPAOLO: Could we abbreviate your talking points because we have taken this whole thing into the record.

ATTORNEY SILVER: Yes, I mean -

ATTORNEY MCCARTHY: Attorney Silver may -

ATTORNEY SILVER: As I indicated, I can give, instead of going through this, I can give you five minutes to go through this and then open this up for any questions.

ATTORNEY DEPAOLO: And, I think, Mr. McCarthy, do you need extra time to go through this to be able to -

ATTORNEY MCCARTHY: No.

ATTORNEY DEPAOLO: Okay, so you would be prepared to question Mr. DeMartino if you chose?

ATTORNEY MCCARTHY: Yes.

ATTORNEY DEPAOLO: Okay.

ATTORNEY SILVER: Why don't we take a recess at this point?

ATTORNEY DEPAOLO: Well, let's --- Mr. Chairman, what is your preference on this?

THE CHAIR: Yah, we'll take five minutes.

ATTORNEY SILVER: That's fine.

I'd like to abbreviate as much as anybody else.

Thank you.

(Whereupon, the meeting was recessed at 9:30 o'clock, p.m.)

(Whereupon, the meeting was resumed at 9:40 o'clock, p.m.)

JOSEPH LAPORTE, resuming the Chair.

THE CHAIR: The public hearing will continue.

ATTORNEY SILVER: Mr. Chairman, two comments. I just noticed, you'll see the cover of my exhibit book, its 228 Queen Street, LLC. The affidavit, there's a typo. It says 229 and it is 228. Let the record reflect that was a Scribner's error on my office's part. It's 228 and not 229.

The only other thing that I'd like to add is that part of my argument was on municipal estoppels and included a DVD which was a lengthy, about an hour and a half DVD of a planning & zoning commission meeting on October the 20th of last year in which we claim there was a modification of interpretation of the original zoning regulation. That DVD is in the record, I've been told. And, I just want to confirm that the commission does not --- we are prepared to show that. We have a DVD player here. But I was told that that would not be necessary but I just want to understand that this book that I've submitted is a list of our exhibits dealing with all the issues that were dealt with in my motion.

THE CHAIR: And, can you have your client say anything about the inventory in his store?

ATTORNEY SILVER: The what?

THE CHAIR: Talk about the inventory in the store?

ATTORNEY SILVER: He is here to answer any questions that you have.

THE CHAIR: Any questions?

MR. BOHIGIAN: Yah, I have a question. You have to be 18 to get into the building, correct?

MR. DEMARTINO: That's correct.

MR. BOHIGIAN: And, how do you do that? You check IDs?

MR. DEMARTINO: We have somebody at the door that greets the public as they come in and asks for identification if you're under, if you appear to be under 35.

THE CHAIR: Any questions? Any more questions?

(No response)

Okay.

ATTORNEY SILVER: Any other questions of the commission on this??

ATTORNEY DEPAOLO: Mr. McCarthy, any questions?

ATTORNEY MCCARTHY: No. but I have two questions in rebuttal, as I said.

ATTORNEY DEPAOLO: Come up to the microphone.

ATTORNEY MCCARTHY: Yah, I have two questions of two witnesses. One question each in rebuttal. One question each.

ATTORNEY DEPAOLO: Well ---

ATTORNEY MCCARTHY: He says somebody is at the door. I have two witnesses who will testify that they've been in the store and no one is at the door.

ATTORNEY DEPAOLO: I think right now its cross of Mr. Demartino, if you have any.

And, then after Mr. Silver finishes his case, you'll get another opportunity.

ATTORNEY MCCARTHY: Okay, alright. Thank you.

ATTORNEY SILVER: Since Mr. McCarthy asked the question, I'll have Mr. Demartino address that question.

Mr. Martino(sic)?

MR. DEMARTINO: In regards to the -

MR. SILVER: People coming into the store without being asked their age. And, you indicated they were over 35.

MR. DEMARTINO: Basically, you know, we don't have somebody standing at the door. The clerk or one of the staff members that works the particular quadrant of the store are responsible for IDing potential customers and greeting.

They're both as important to us. But obviously carding people is most important because if we sell material of an adult nature to an underage person, it is a federal offense. So we are not trying to have one of our employees or our company be put in that type of situation so I can assure you that we do card individuals that come into the store that look under age.

ATTORNEY DEPAOLO: Mr. McCarthy?

ATTORNEY MCCARTHY: Question: where do you card them? If it's not at the door, where do you card them?

MR. DEMARTINO: No, it's at the door.

ATTORNEY MCCARTHY: Oh, it's at the door?

MR. DEMARTINO: As a matter of fact, they may get carded a second time at the register because the person who actually sells the materials to the potential underage person would be responsible - would be arrested, similar to selling cigarettes.

ATTORNEY MCCARTHY: So, it's your testimony that everyone that comes in is carded at the door?

MR. DEMARTINO: If you look to be younger than 35, you will be asked for your identification.

ATTORNEY MCCARTHY: So that now changes your testimony. Everyone isn't carded at the door. Only

people that look like they're younger than 35. Is that correct?

MR. DEMARTINO: If you look like you're under 35, you will be carded.

ATTORNEY MCCARTHY: Okay, so that's a different answer than was given before. It's not everyone. It's only people under 35. Correct?

MR. DEMARTINO: I think my answer has been clear each time.

MR. BOHIGIAN: Excuse me, the reason why I asked the question was the applicant was asking earlier that bongs would be sold to everybody in the high school and I was just wondering how those people could actually buy that stuff if they weren't 18. So that was my question.

MR. DEMARTINO: They couldn't buy it at our store.

MR. SILVER: And, I will indicate that this has come up in other of my cases around the country that people can -- over 18, for example, over 21 buy alcoholic beverages and give them to minors.

And, the proprietor of the package store cannot be responsible if a person over 21 purchased alcoholic beverages and gave them to a minor. That is an offense for an adult to give it to minor. But it is not an offense to the proprietor.

Mr. DeMartino understands his responsibility under the law. I will indicate that he has been in business here since February of this year and there have been no incidents.

And, I can ask him to testify if he has any incidents in any of his other stores ever and the answer is absolutely no.

He has never had any problem with that. His staff is adequately trained for that purpose and he has taken care of that. He is responsible for that.

THE CHAIR: He answered the question.

ATTORNEY DEPAOLO: Anything else, Mr. McCarthy for Mr. DeMartino?

ATTORNEY MCCARTHY: No.

ATTORNEY SILVER: I have no further witnesses except for Mr. DeMartino's brief testimony and for the exhibits which have been placed in the record with the caveat on the 229 to 228 which was a typographical error in the affidavit. And, I apologize to the commission. It slipped me.

THE CHAIR: You're all set. Thank you.

All set?

Anybody to speak in favor of the applicant pertaining to the inventory?

Anybody to come up here and speak in favor of the applicant pertaining to the inventory?

ATTORNEY DEPAOLO: Anybody speaking in favor of the appeal. The Chairman is saying it correctly.

KENNETH GRAY: My name is Kenneth Gray. And, I'm at 594 West Center Street Extension.

I had some prepared remarks but I've modified them and reduced them in light of the conversations that have gone on.

It just would seem to us as we sit here observing this process, that the - in this case here --- that the obvious meaning of the regulations regarding sexually oriented businesses are willing to be overlooked by the ZEO.

And, have been reinterpreted, modified or otherwise applied for the benefit of the VIP and not even referred to the PZC.

And, I would like to state that I remain concerned about the negative impact of VIP especially in regards to this location, however, as the time has passed, especially this evening, there's a lot of time that has passed, I am more deeply concerned that our zoning regulations are devolving into powerless collections of words easily manipulated to serve the will of a few rather than the well being and the will of the people of Southington.

(Applause)

My remaining hope is that you, the Zoning Board of Appeals, will have the wisdom and the courage to take a stand in representing the citizens of Southington and enforce our present regulations in this matter.

It has been said that the Concerned Citizens for Pornography Free Southington are seeking to enforce their values on those who disagree with them. Yet, this is not true at all.

But we often feel that this violation of regulations is an assault on the health and the safety of our community and a disregard for the laws in which makes it less appealing for those who would want to move here.

Thank you very much.

THE CHAIR: Thank you.

(Applause)

ATTORNEY DEPAOLO: Mr. Chairman? Just in response to that comment, I am just going to ask you to take Section 14 of our zoning regulations into the record. Because when people comment that the ZEO has somehow done something wrong here, I really have an objection

to that when it's right in our regulations that in fact she is the person who has the authority the permit.

And, she did exactly what the regulations required her to do. So, I would ask that you take Section 14 of our regulations into the record just so that they are part of this record if it gets appealed.

Thank you.

THE CHAIR: Thank you.

Anyone else to speak in favor of the applicant pertaining to the inventory?

RAY KASTNER: My name is Ray Kastner, 115 Reservoir Ridge. First of all, I want to clarify something. I do a lot of work in the town. And, I think our Planners here do an excellent job. I have never had a problem with them. I've been doing business 20 years. And, I think they're in a position that they shouldn't be in.

I know that there are people that are professionals at doing inventory. And, putting them on the spot and going to do an inventory on subjects that they're not familiar with --- very clear that they've never been in a store like that. For them to say what is sexually explicit, I think is ridiculous.

They're good at what they do - at planning. And, if we take somebody that does inventory as a profession and we stick them as a Planner, they're not going to know what they're doing.

So, I just think something else should have been done as far as who takes the inventory. Somebody that's an expert at it. I think that's where it should've been done.

Another thing, they were talking about taking inventory. Usually, when something is shipped, it's in --- it has bar codes. And, they brought up the pack,

about the cigarettes. You know, you buy a pack of cigarettes; you're not going to sell them individually.

Or in my --- other business. Golf balls. They come in cartons. There's a bar code. Or we can sell them in a three pack. Very rare somebody asks us, yah, we might take it out, but we try to sell them in packages. That's how they come and that's how they should be sold.

So there should be a better way of defining because I think that's where the big argument that we have is. A lot of these are broken down.

And, the other thing about the age. I get a diet coke every day. I got to the same mini mart. And, there's people always in there buying cigarettes. No matter how old they are, they've got to show an ID. And, you're going to guesstimate somebody coming in on something that important that has a chance of buying knives and you know, brass knuckles and all the other sexually --- they can be walking around the store going through all these things before somebody probably comes up --- maybe he's not 18, after all.

So, somebody should be at the door if they're really concerned about stopping underage people going in there.

Thank you.

THE CHAIR: Thank you.

Anybody else speaking in favor of the applicant pertaining to the inventory?

You have to come up to the podium.

JIM CAREY: 366 Pattonwood Drive. I'm not making an argument pro for it. I just want clarification on some issues, is that all right?

THE CHAIR: We're just going to listen to you.

MR. CAREY: All right. Fine. In the original application, I heard the gentleman say magazines and what have you. I didn't hear him mention anything about smoking gear, knives, or sexual toys.

I don't know whether that was eliminated or not. But if it was, it should've been addressed at that time.

Secondly, the big thing is about these filters. If the filters, and that's up to you to decide whether that's pro or con, whether you count them or you don't count them. But I think, the attitude I saw up there, well, we don't want to do the math. Please do the math. It's that important, to do that math. You know it was done once, let's do it again. Make sure we get it right.

And, let's see what else. Oh, the other thing about whether Walgreen's sells creams or what have you, if this is a sexual store and it does say sexual things on it, whether Walgreens or CVS sells it or not, is irrelevant.

The fact that it's in this store, if it pertains to sexual activities, then it should be counted. That's all I have to say.

THE CHAIR: Thank you.

Anybody else to speak in favor of the --

(Applause)

PATRICIA HACKETT: Dawn Lane. Lifelong resident of Southington and I am well aware that we have adult oriented businesses in Southington.

I am also well aware that Spencer's Gifts sells things, but Spencer's Gifts is not in Southington and it is not within 250 feet of a residential area.

I'm not sure what Mr. Silver is afraid of. If he's correct, then let's just allow the appeal. Because not only will he win, but he'll paid for his time and then the people of Southington will be able to have their concerns addressed.

This is the way that we were told we had to have the concerns addressed. Because this application was submitted as a non-adult oriented business. I was told by Ms. Dunham that we have to take them at their word. I they submit an application that says this is not going to be an adult oriented business, we cannot question that. All we can do is go into the store after it opens and see if they comply. And, then if they do not comply, we can call zoning enforcement.

So I am a little bit troubled by the way some of the people that were here testifying tonight were treated. Because they were doing exactly what they were asked to do.

THE CHAIR: Can we talk about the inventory, please?

MS. HACKETT: Yes. Absolutely. My first question would be, why do you have to be over 18 to enter a retail establishment if it is not adult oriented?

Is it illegal to buy, Mr. DeMartino's word, bong?

Is it illegal to shop in a retail establishment that is equal to Victoria's Secret or CVS?

Mr. Silver asked if Mr. Luna was aware that Mr. Martino's(sic) interpretation of adult oriented business regulations were videos, magazines, et cetera. And, a very limited number of items.

Is Mr. Silver aware that I and other people talked to the Attorney General's Office and the Attorney General of the State of Connecticut's office disagrees with that interpretation?

The Attorney General's Office agrees with the interpretation that a visual presentation is the merchandise displayed in the store.

Did the Zoning Board of Appeals examine the original packaging of items to determine if it is legal to repackage them for individual sale?

What is the total adult oriented merchandise in Manchester?

I've been in the Hartford store and the Hartford store has the same merchandise as the Southington store.

THE CHAIR: Let's talk about the Southington store, please.

MS.HACKETT: The Hartford store has the same merchandise as the Southington store.

Once again, the visual presentation is far beyond ten percent. If you want to count the 250-something thousand screens that may or may not be legal for sale, then obviously, you are going to be beyond the ten percent. Commissioner Oshana addressed that concern way back when.

Alright. There are, you can play with numbers anyway you want but the term visual presentation is very clear. All right?

There is no doubt as to what this store sells.

Again, based on what I've heard here tonight, the Manchester store would not be deemed adult oriented. And, I go back to the question, if this is not an adult oriented store, why do people have to be carded?

If people have to be carded, then by definition, it must be an adult oriented store.

(Applause)

Thank you.

THE CHAIR: Thank you.

Anyone else to speak in favor?

CAROL SALKA: My name is Carol Salka. I live at 35 Nicolo Way here in Southington. I've been a resident of Southington for over 40 years.

This evening, I stand before you as a Concerned Citizen of Southington asking that you consider all that you have heard pertaining to this appeal to close VIP.

The appeal before you is not just about pornographic inventory. It is about protection.

It is not just about sexual counting of items. It's about safety. Whose safety and protection? That of the citizens of Southington as well as those who work and shop here. It's about the protection of our children, our women, our men, our neighbors. It's about the safety of our neighborhoods, our streets, our parking lots, our parks. Indeed, the whole of Southington.

Let me quote some findings from a recent study on the affects of pornography on individuals, marriage, family and community. These are some of the effects:

THE CHAIR: Can we please speak about the inventory?

ATTORNEY DEPAOLO: Mr. Chairman, this may be going a little beyond the issue before us.

MS. SALKA: Okay, well, I won't say the effects then. I'll just continue and eliminate ---

ATTORNEY MCCARTHY: If I may, Ms. Barnes testified -

THE CHAIR: Excuse me, excuse me.

ATTORNEY MCCARTHY: It's part of her grievance.

THE CHAIR: You're out of order. Excuse me.

ATTORNEY MCCARTHY: She should be allowed to speak openly.

FROM THE AUDIENCE: Let her speak.

THE CHAIR: We want to talk about the inventory.

ATTORNEY DEPAOLO: Mr. McCarthy? What's the relevance?

ATTORNEY MCCARTHY: The fact that you don't get it is the problem.

(Applause, applause)

That's the problem.

ATTORNEY DEPAOLO: Let me ask it this way: Under the statutes, what is the relevance?

ATTORNEY MCCARTHY: This is a public hearing, grievement; she's already testified she's very concerned for her neighborhood. Ms. Salka is testifying as to the effects on the entire town.

ATTORNEY DEPAOLO: And, what does that have to do with a certificate of zoning compliance?

ATTORNEY MCCARTHY: No. I think it does. I think it's a public hearing and the latitude should be given to the people who are speaking at this hearing.

ATTORNEY DEPAOLO: Very well.

MS. SALKA: May I continue?

THE CHAIR: Go ahead.

ATTORNEY DEPAOLO: You may proceed now.

MS. SALKA: It's three; I'm only naming three effects that this study found.

Men who view pornography regularly have a higher tolerance for abnormal sexuality including rape, sexual aggression and sexual promiscuity.

Another finding: The presence of sexually oriented businesses significantly harms the surrounding community leading to increases in crime and decreases in property values.

Another finding: Child sex offenders are more likely to view pornography regularly or to be involved in its distribution.

The appeal before you is not just about finances. It's about family values. It's not just about money, it's about morality. And, it's not just about the dollar. But about decency and doing what is right.

Can we put a price tag on the protection and safety of our citizens?

Someone needs to stand up and say: enough. We have heard and seen what is in the store and know the harmful, destructive effects it produces in lives and communities.

Will the members of the Zoning Board of Appeals boldly and courageously rise to the occasion to protect our community and its citizens? Will you stand up and say no to VIP -- not here.

Thank you.

THE CHAIR: Anyone else to speak in favor?

VICTORIA TRIANO: Hi, everybody. The last thing you needed is to hear somebody else talk tonight. But I do want to just share something very quickly. And, that is that I know that the staff works very, very hard. And, I know that all of you are looking for what's best for Southington.

What I want to say to you is that I would hope that because there is such a discrepancy in the inventory and this is nothing against Ms. Savage or Mr. Vinci or anyone else, but would you consider bringing in a professional counter to go out to the store and to get something that we can agree on for the inventory.

The other thing I just quickly want to say is this and that is that the folks that are sitting there, even though the emotions right high and sometimes people say things and they're very passionate about it, the reality is that we're all on the same side. We're trying to find what's best for Southington.

So, I want to thank you for the opportunity. Even though it's late, there has been a real openness here and I want to thank you on behalf of all of them and even though there may be a little bit of passion running deep here on this and of course there is, but we can come to an agreement on this thing and we can do what's right for Southington.

Thank you very much.

MR. VINCI: Pastor Triano?

MS. TRIANO: Yes?

MR. VINCI: Could you please state your name and address for the record?

MS. TRIANO: Oh, I'm sorry, Frank. Yes.

I'm Victoria Triano and I live at 33 Belleview Avenue in Southington.

Thank you for the protocol, Mr. Vinci.

(Applause)

THE CHAIR: Anybody else to speak in favor of the applicant?

DAVID SMITH: My name is David Smith, 66 North Summit Street. I know that we're trying to address strictly inventory issues, so I'll keep my comments to that.

My only comment basically is based on the condoms. If you ask any high school student in Southington that went to a health class, I'm sure they can tell you that a condom is a sexually oriented object.

And, how many of us here would be embarrassed if we had an elementary school child come out with condom in-hand in the middle of a party and say hey, look at the balloon I have.

That's all I have to say.

Thank you.

(Applause)

THE CHAIR: Anyone else to speak in favor of the applicant?

(No response)

Anyone else here?

STEVE BRIGGS: Of Sunset Ridge Drive. This has to do with inventory, so you may just have to bear with me until I get to that point. But as a member of the Concerned Citizens, I've been reading a lot of newspaper articles and most of them were not written in favor of us and what we're standing up for.

One of the articles, March 2nd, in the Southington Citizen, a Plainville resident wrote that look at what VIP means. Pleasure.

Okay, pleasure. I've been in VIP so I've seen the pleasure that they provide there.

So, I look over the inventory list they've provided and I see a department called: bondage hardware. Okay, I can see a lot of pleasure in that.

Some items in the department are metal handcuffs in silver --- they had different colors: silver, black, pink. I guess the pink ones are quite nice.

Deluxe all leather bondage kit. Okay? Pleasure items.

Maybe these items are pleasurable items to an adult male, friend of the family, who sexually assaulted Marcos Mercado, Jr. Which began when Mercado was 11 or 12. Mercado, if you don't remember is the accused killer of Thomas Skykowski(sic) of Southington.

THE CHAIR: Excuse me. What does this have to do with the inventory?

MR. BRIGGS: Well, this is the inventory that they're selling in the store.

You know, if one of these inventory items was sold to an individual that sexually assaulted somebody, would we as residents and you as members making a decision on this be comfortable with that decision? On these inventory items? I mean, this is inventory. This is the inventory that they're selling in the store.

THE CHAIR: Well, talk about the inventory in the store, then.

FROM THE AUDIENCE: He is.

THE CHAIR: No, he's talking about a story.

MR. BRIGGS: Another one of the articles written in The Observer, March 12th, 2010, this person wrote that they had no issue with VIP. And, they commented that -- let me get the quote here:

"What did she, meaning Lisa Barnes, think that they were going to sell in the store"?

This is pertaining to inventory. I mean, what did you think they were going to sell in that store? I mean, I had a good guess what the inventory was going to be and that's one of the reasons why I went in there to personally see what they were going to sell for the inventory.

So even these people in town are citizens of mine, you know, fellow citizens, even though they maybe didn't agree with what I was standing up for, they also saw the harm and potential bad of this. Calling things pleasurable. Maybe if you smoke pot or hashish you could buy a pipe there from their massive inventory of pipes. And, that could be classified as pleasurable.

Granted, it is illegal. But it maybe --- in your eyes it maybe pleasurable. Or something that's doing that, it maybe pleasurable.

So, my concern is that the inventory that is in that store, and I've been there three times, and I'm not sure there was even one piece of inventory that I would take out of the store and bring to my, show to my grandson or granddaughter.

That's all I have to say.

Thank you.

THE CHAIR: Thank you.

Anyone else here to speak in favor of the applicant?

Anyone here to speak in favor of the applicant?

(Pause)

TONY LUNA: Robin Road, Marion, Connecticut. I think it's pretty clear from an inventory standpoint that they're playing a game. I guess what really

concerns me is that the town is playing it with them. That's what concerns me.

(Applause)

You're looking at a store, where there is two parts to the regulation: visual presentation and the inventory. They're doing everything they can to focus just on the inventory and completely ignoring the visual presentation.

I would ask each of you who up here has been in that store except for Frank Vinci and Mary Savage. Who up here has been in that store?

MS. POTTER: I've been in the store?

MR. LUNA: And, you have. Would you agree that it's a sexually oriented business?

MS. POTTER: I think what I do behind the doors of my---

MR. LUNA: I understand. But the regulation is they are to protect the citizens. The regulations are there to protect the citizens. And, to say that Lisa Barnes cannot talk about secondary effects, completely misses the point of this appeal.

Had they been classified as a sexually oriented business by their inventory, we wouldn't be here. She has every right to talk about those effects.

ATTORNEY DEPAOLO: Mr. Chairman, you know, you are getting off the track.

MR. LUNA: How so? It's inventory. We are talking about the inventory.

ATTORNEY DEPAOLO: No, you are not. You're talking about secondary effects.

MR. LUNA: Secondary effects from had this town classified it as a sexually oriented business based on

what is in the store which only a handful of people sitting there have seen ---

ATTORNEY DEPAOLO: I would suggest you comment on the inventory, if you wish to.

Because that is what the board is going to -

MR. LUNA: Okay. There's two parts to the regulation. There's visual presentation and inventory.

ATTORNEY DEPAOLO: -- consider.

MR. LUNA: And, they're playing a game with packaging. And, you can see that when you look at the numbers. And, any way you look at the numbers, they're over the threshold.

Just the fact that he came in saying it was 5 percent and the numbers came in at 5.3 percent. One would think that you would even question that.

But this permit was issued and the CO signed on the same day without anybody looking at it after all the controversy that this store has had.

This is the first time we've been in front of a group of our own citizens asking to do the right thing. Every other decision regarding the initial zoning permit, the sign permit, and the last certificate --- the last zoning permit issue with the CO was only made by three people: the Town Planner, the ZEO and Mr. DeMartino. No one else has had a chance to do it.

When an appeal was filed last fall, it was suddenly dropped at the last minute. Okay?

ATTORNEY DEPAOLO: Mr. Chairman -

THE CHAIR: Okay, excuse me. They did everything under the regulations that they could do.

MR. LUNA: And, then you hired Attorney Byrne to come in and help clarify the planning & zoning's

interpretation of the regulations and that was communicated but it wasn't followed. That's the problem we have. It should have been followed.

THE CHAIR: Okay, let's continue with the inventory.

MR. LUNA: That's what we're saying, he gave how to classify the inventory and that interpretation by our planning & zoning commission, which the town specifically hired an attorney ---

THE CHAIR: You're going backwards. You're going backwards. Please go forward. You're going backwards.

(Pause)

MR. LUNA: You have to ask --- answer the question by looking at it first hand, based on looking at the inventory, is that a sexually oriented business, or not.

That's what I'm asking the Zoning Board of Appeals to do. I am not asking you to do it ---you can decide when you want. But I would ask you to go in and I would ask you that you bring your wife, and your mother and your pastor and you go in and look at them and say: this is not sexually oriented. If you can do that, then that's where I know where we stand with the town.

Thank you.

(Applause)

THE CHAIR: Anybody else to speak in favor of the applicant?

Anyone else here to speak in favor of the applicant?

(No response)

Anybody here opposing the applicant?

Anyone here opposing the applicant?

ATTORNEY DEPAOLO: In favor.

THE CHAIR: In favor?

SPEAKER: I have not been in the store. I wouldn't go into a store like that. I'm sorry. That's not my kind of place.

ATTORNEY DEPAOLO: Could you state your name, please?

MS. CAMERON: oh, I'm sorry. My name is Margaret Cameron and I live at 1122 Pleasant Street here in Southington. I've been here for 35 years. I raised my five children and now my I'm raising ---well I'm not raising my grandchildren, but they're here all the time, too.

Anyways, first of all, as far as this inventory goes, I don't think that there is any question about the fact that this is a sex shop. It's a sex store.

I mean, the name of the business is Very Intimate Pleasures. Now there wouldn't be anything else that would be very intimate pleasures unless it's sexual. So I think the name spells it out, what kind of store it is.

Also, just listening tonight to the counts that were done --- I know when Mary was reading the different things that were considered sexual and not sexual, I thought to myself condoms? How could you not consider them to be sexual? That's the only thing they're for. So, I would certainly think that that has been missed.

If there's going on with packaging, where it normally sells in a package of a hundred or a package, one package, but you could it as a hundred and it's a non-sexual thing, then you certainly are inflating the inventory of what is sexual and what is not sexual.

And, so I think, too, that there has been a series of mistakes that have been made here. And, I think that as someone suggested that a professional organization should be called in to do the counting. It shouldn't have been left to a few people that are not familiar with the way inventories are counted. I think that would be --- that was an injustice to the Town of Southington. I think it can be corrected and it should be corrected.

You know, sex shop, is it a sex shop? I think it is. You know, how many businesses in town have to keep their windows dark so that we can't see inside? Why can't we see inside there? Unless there is something that we don't want people to see and that's because it is a sex shop.

So, I think that this is a very sexually orientated business and that's why it's --- it has the regulations that it has because we don't have to propose those regulations to a donut shop or grocery store or something because they don't apply. But they certainly do apply here.

And, one thing I do want to say in ending here is that and I'm not attacking you, but I did and I am definitely for this business being out of Southington, but as I observed you as a group and your comments, I did very much feel that you are very favorable towards this business. That came across that way to me, personally. I don't know about anybody else.

(Applause)

But I think you have to check yourselves on this and be sure that you are open because you are in charge of our town. You are people who are leading this town and you have to be careful about the things that you do.

And, I appreciate, you know, Southington has always been such a great town to live in. I've never had to

fear of anything. Here in town, we know that our zoning board and the rules and laws that have been made to protect to all of us, businesses and protect the businesses and as well as the people, it's always been good. It's always been good.

And, I think that, you know, this probably right from the beginning was not handled right. I mean, with a business that wanted to come into our town that had so much controversy, even in the next town over from us, that it should have probably been brought to a public expression of whether people wanted it in town right from the beginning, right from the beginning.

So, I do think there have been a series of errors that have happened in this but I just hope that you'll do the right thing here because this business does not belong in Southington. It is really not a good business for us.

Thank you.

(Applause)

GEORGE COLE: 267 Pin Oak Drive. I had no intentions on speaking tonight, but a couple of points I'd like to make while I'm here.

You know, we keep going over this condom thing. Condoms? Can we set the record straight on condoms? They're not sexually orientated period? They don't fall under our regulation. So if they've got ten zillion of them, we can't count them.

Correct?

THE CHAIR: Are you speaking for or against, please?

MR. COLE: I'm for. I don't know. Against. Whatever. I'm not for anything, I wanted to come up and make a few points.

Partly with the inventory as it has been discussed a number of times.

But, the job you people have to do here, what it comes down to is our regulations. The regulations - we already had two stores like this previously in Southington and we had a strip club. We did nothing.

And, now we've got this third one. And, again, are we going to, after this gets in and gets over with, are we going to let the regulations stand again? We should have changed the regulations when the book store went - you have to change them or this is going to keep happening to us. They should have been done.

We really need to blame everybody. It's all of our fault that this came in here. It's not their fault. It's not Mary's fault and it's not Frank's fault. It's all of our fault.

We should have made sure our regulations were written so this could never happen to us. It's too late now. We're not going to beat 'em. You can't beat them now.

That's all I'd like to say.

THE CHAIR: Okay, thank you.

Anybody else to speak in favor of the applicant?

Anybody else speaking ---

DAN VALENTE: I'm Dan Valente. I'm the Chairman of the Parish Council at St. Thomas Church in Southington. I'm also in the local Knights of Columbus, Council 15. And, we've stood behind (inaudible) from day one.

THE CHAIR: Your address?

MR. VALENTE: I've been in VIP. Pornography, drug paraphernalia.

THE CHAIR: Can I have your address?

MR. VALENTE: I am actually not a resident of Southington but I am here representing my church and we are speaking in favor of representing Lisa. We're in favor of her application.

I just want to say that I've been in the store. I've seen the drug paraphernalia, pornography and everything that they sell.

And, I just really, really want to echo what other people have said to please go in to look at the material and to really see if that fits with our zoning regulations.

Please! Don't rush this. Do this right. We can't let our deliberations, our external deliberations be based just on our internal fears. We have to do the right thing by the rule of law.

Thank you.

(Applause)

THE CHAIR: Anyone else to speak in favor of the applicant?

REVEREND NICHOLAS MELO: 99 Bristol Street, Southington.

The number that stands out in Lisa's testimony is 48, 48 children that live in close proximity to this store. And, I'm just asking what message are we giving, what environment are we giving to our children. I think that is what has been missing in this whole discussion.

Where are we going and what we providing for our children?

THE CHAIR: Thank you.

(Applause)

Anyone else to speak in favor of the application?

JOANNE NYERICK: Hi, my name is Joanne Nyerick. I live on Kensington Road. And, I'm very grateful to this group of people who represent those of us parents with young, in my particular case, daughters. We have a lot of programs in place in Southington to prevent our kids from turning the wrong way.

And, now with your approval of VIP we're giving them access and we're saying that it's okay to do some of the things that I know our Youth Services is so adamant about preventing.

We have the STEPS Program. We have the DARE Program. And, I just think that it's going against what we're trying to give to our children as far as a message and what's right.

And, I'm disappointed in our town for allowing it to happen, but I am very grateful to this group, again. And, I commend them.

Thank you.

THE CHAIR: Anyone else to speak in favor of the applicant?

Anyone here opposing the applicant?

Is there anyone here opposing the applicant?

(No response)

Okay. Do we have any rebuttal?

ATTORNEY DEPAOLO: And, then, Mr. Chairman, I think we should give each of the parties an opportunity and maybe Mr. Silver can go first.

If you have any comment or rebuttal?

ATTORNEY SILVER: Mr. Chairman, members of the commission, the first amendment is a wonderful thing. You have seen the first amendment in action. I have been a lawyer involved with first amendment issues for

thirty-nine years. I'm former President of the First Amendment Lawyers Association.

I handle matters not only in the area of sexual expression. I represent teachers. I was retained today or consulted today by a teacher on a first amendment issue. I represent students, librarians in other matters.

The first amendment is a wonderful, wonderful thing. And, there's no reason --- there is a reason why it's the first amendment and not the eighteenth amendment. And, the fact is that the residents of the Town of Southington were able to come out and say something tonight is a credit to the first amendment.

However, we have to look where we are at and what is the purpose of this hearing. The purpose of this hearing is to determine to make a legal interpretation under your responsibilities as members of the Zoning Board of Appeals in Southington under the zoning regulations as they existed at the time of the application of this in June of 2009.

There is a state statute, 8-2h, which states as follows, and not verbatim: if an application for a permit, a zoning permit, is made to the town in subsequent to the application the zoning regulations would change, which they have not by the way, but if they were to change, the use which was proposed in that application is grandfathered in the same way as a nonconforming use. And, you are all aware with-

(End of Tape #2, Side B)

(Beginning of Tape #3, Side A)

(Continuing) - which contributes to sexual intercourse is a sexually oriented material. I ask of you to look at your regulations, review the regulations. That is the source of your decision, any decision that you make.

By the way, I will just for the record indicate that I have filed motions that the interpretation given by Attorney Byrne is the incorrect definition. And, the correct definition is the definition that was relied on by the zoning enforcement officer back in August the 6th, 2010(sic) for which no appeal was taken.

I understand I'm not going to go back on that. But we're here and you indicated what my marching orders are.

MS. SAVAGE-DUNHAM: It's 2009.

ATTORNEY SILVER: Two thousand nine, excuse me.

Thank you for the interruption.

So I indicate to you that you need to look at the source of the material in order for you to make your interpretation.

And, if you look at the ordinance, which is 2-19, and I ask you to review that ordinance because that is the source of any decision that you would make in light of the decision you have and the way you're going forward with this hearing. It is clear that you are talking the ten percent in addition to a store like Mr. - like VIP, talks about media items.

The presentation time talks about the presentation of media items, not the theme of an item. Not what somebody thinks you could do with an item. But it actually deals with a definition of a media item which are DVDs, videos, books and magazines which is part of our application which we have indicated to the town that if we're over that particular number, we're in violation of our zoning permit.

There are also special conditions that were put on that permit which is part of this application. And, we are subject to those special permits (sic). Those

special conditions are in the zoning permit which was signed by Mr. Vinci which is part of the record.

For example: No mannequins in the store. There are other items and I can review them if you'd like, but they're in the record for your review.

We may disagree on what constitutes a sexual item for the purpose of this regulation. But it's clearly not any item which or would have any connection with the concept of sexual intercourse.

As Assistant Counsel indicated, and I was trying to make my comments brief because much of this is technical. I understand that and you understand that. But Section 14 of your ordinance clearly provides the rights of the zoning enforcement officer to sign a permit for zoning approval.

There was no requirement to go back to the planning & zoning commission. It's clear that this is the pattern. And, you all know we can take notice of the fact that this has been done hundreds and hundreds and hundreds of time. Appeals come before you from the zoning enforcement officer and those are the kinds of things that you hear. Not from the planning & zoning commission. But from the zoning enforcement officer and this is what we have here.

Now, we may be unhappy --- not we, you may be unhappy. Members of the audience may be unhappy with the wording of the ordinance. And, there was one speaker who addressed that issue and I'd like to refer to that.

Basically, what I'm saying is, my client came in according to his affidavit and I was present at these conversations. We came to the town after reading your zoning regulation. We came up with what we felt was a reasonable interpretation of the zoning regulation.

We put that into an application and we submitted it to the Town of Southington, the zoning enforcement officer, per your zoning regulations. We did that.

We had several meetings. Two meetings. Plus there were other phone conversations and during these meetings, there was no misrepresentation of what we intended to do, what we wanted to do. There was no accusation here this evening here that there was any misrepresentation. We cooperated fully with all of the questions that were answered by all of the zoning officials of the town.

On August the 6th, 2010(sic) a zoning permit was granted and a building permit was granted. On the basis of that zoning compliance approval, and no appeal being heard by the zoning --- there was no appeal that was taken and it was withdrawn. No appeal was taken and the decision of the zoning enforcement officer became final.

As a result of that, a building permit was issued and Mr. Martino(sic) on behalf of VIP went out and spent money under his building permit and built a premises.

I was not until November the 7th - November the 2nd letter of 2010(sic)-

ATTORNEY DEPAOLO: You will have the same opportunity, Mr. McCarthy.

ATTORNEY SILVER: Pardon?

ATTORNEY DEPAOLO: Mr. McCarthy is objecting on relevance.

ATTORNEY SILVER: Okay. Well, I think it's relative to the discussion, the background of what went on here. It is the same way he's talking about relevance -- you know, I've really been very quiet and have no objected to the issue. This is an administrative hearing and it's up- ---

Now, I will get on with my conversation. I do not want to be here all night and fight with the board. It's not my reason or not my purpose here to fight with the board.

But I will indicate that we are dealing with a specific provision of the Southington zoning regulations. And, those specific provisions could have been different. May have, should have, whatever. They were not. Those are the regulations that we are facing here this evening.

(Audience interruption)

And, the fact of the matter is -

ATTORNEY DEPAOLO: Sir?

THE CHAIR: You're out of order, sir.

(Audience interruption)

You're out of order, sir.

(Audience interruption)

Okay, you're out of order.

ATTORNEY DEPAOLO: Sir ---

THE CHAIR: Okay, you're out of order.

(Audience interruption)

ATTORNEY DEPAOLO: Sir, public comment is over. We have to give the parties an opportunity.

Mr. McCarthy will have an opportunity to give a summary.

AUDIENCE SPEAKER: Only if it pertains to the issue which is inventory. Not a history lesson.

MR. SILVER: It's what --- it is what constitutes a sexually oriented item for an inventory count which is

very critical and that is subject to an interpretation of the ordinance as it is.

The ordinance as it is could have, for example, had exclusions of percentages as to what we call wellness products. And, by the way, wellness products are sold by CVS. They're sold by Wal-Mart. And, you can buy them on line from Wal-Mart and CVS, as well.

So, they are there. Okay? But those wellness products are not in any way within your regulations limited within your regulations.

THE CHAIR: Sir? We know the regulations. You don't have to keep repeating it.

ATTORNEY SILVER: Pardon?

THE CHAIR: We do know the regulations.

ATTORNEY SILVER: That's right. And, I put forth that the regulations do not include those.

What the planning & zoning board wants to do in the future is up to the planning & zoning board. But that's not in this application.

Basically, I would indicate that the count was completed by staff on the basis of what was requested of them by the Southington Planning & Zoning Commission.

It was completed. The staff gave to you their opinion of why they came up with the opinion they did and why the count is there.

My suggestion is that the certificate of occupancy is a legal certificate of occupancy. And, that if the town feels in any way that in the future they are in violation of their zoning permit, the town has a course of action.

Okay. We have indicated to the town and we have indicated to Mary that we will work with them and give

them at any point in time inventory counts and everything else. That is not a problem.

The problem is is the zoning and the count and based upon an interpretation of the Southington zoning regulations as they were in existence when this application was submitted in June of 2009.

Thank you very much.

THE CHAIR: Thank you.

Does the applicant want rebuttal?

ATTORNEY MCCARTHY: Yes. I think that the decision in this matter turns on the inventory that is in the store. And, I think that um, it's extremely important for the members of the zoning board of appeals to actually go out to see the store, to see the inventory.

Take a look at the filters and where they're kept. See whether they're visually presented as required by Attorney Byrne's two letters that he already set out the criteria for determining what to count and what not to count.

See for yourselves. I think it's important for you to see for yourselves before you make a decision. I actually proposed that ahead of time that board members --- I never proposed that they meet or get together or anything like that, but that board members consider going out and see the premises themselves.

I think what you'll find is one drawer with 200 or 356,000 filters and then a porn shop with everything else in it. So, I think you can make the decision for yourself if you go out and see it.

In terms of those filters, the zoning enforcement officer said they could be in packs of 20,000, 30,000. If you divide 30,000 into 256, it comes to approximately 10. Ten.

So if you take that into the numerator - the numbers that we have here, the zoning enforcement officer found 28,000 regulated items. So if you take, if you replace the 256 with 10, it changes that number enormously to where you are significantly over 10 percent of the items in the store as sexually regulated items.

Additionally, the first amendment argument that was made that there is a first amendment right to put a pornography store any where one wants, that issue was long ago resolved in a case called Reton Theaters where the United States Supreme Court said, yes, there is a first amendment right but towns have the right to say where those stores can be located. And, that's why towns have set up areas in which porn shops are located and they're generally located together in a part of town that is separate from everyone else. So they do have their first amendment right to speak, but it isn't in everyone else's face. That's what the first amendment says about this.

And, 2-19, with regard to the inventory, I would ask that you all take a look at that, as well. I think it's pretty clear. It talks about specific sexual activities. It includes human masturbation, sexual intercourse or sodomy. That pretty much covers the whole territory as far as I know. I mean, there's nothing I know that doesn't fall within --- there is nothing sexual that I'm aware of that doesn't fall within those categories. And, therefore, anything within the store like condoms or lubricants or anything like that, that would be used in sexual activities or sodomy would be covered by your regulations. And, I would ask you to take a look at that, as well.

Finally, I want to agree with what several people said which was that this isn't personal. And, I certainly don't mean to personally attack anyone in the town here. There is a disagreement that we have. It's a serious, vigorous disagreement that we have as to how

the numbers were counted and how the inventory was counted. And, we feel very strongly that the inventory, if counted properly, would come in at over ten percent regulated items. And, we ask this body to take a look at the store and confirm that fact itself.

Thank you very much.

THE CHAIR: Have you finished your presentation? We're all set.

Okay, this public hearing is closed.

10:40 o'clock, p.m.

REGULAR MEETING

Approval of Minute - Meeting of March 9, 2010

Mr. Bedard made a motion for the approval of the Minutes from the last regular meeting of March 9, 2010. Ms. Potter seconded. Motion passed unanimously on a voice vote.

NEW BUSINESS:

A. Appeal #5762, Application of Lisa Barnes to appeal the decision of the Zoning Enforcement Officer concerning the issuance of a Certificate of Zoning Compliance under Section 15-03 of the Zoning Regulations, 228 Queen Street, property of BLR Realty Company, 325 (+/-) feet north of the intersection with Lazy Lane in a B zone.

Mr. Bedard made a motion for the approval of Appeal #5762A. Mr. Kuklinski seconded.

The Chair stated it is his opinion that the zoning enforcement officer completed his job in inventory inspection of VIP, that's my opinion, correctly.

Mr. Kuklinski agreed with the Chairman.

Mr. Vinci asked for that to be repeated.

The Chair stated it was his opinion that the zoning enforcement officer completed his job inventory inspection of VIP correctly.

Mr. Kuklinski stated he agreed with the Chair. We have to follow our ordinance the way it is.

Ms. Potter said she was sad to say that only 67 people showed up for the meeting tonight. We had to have this whole place. And, we had more people show up for the goats, which tends to make you wonder.

I'm like heartbroken because I --- what's in my heart is not what is in the regulations. And, I have to vote what is in the regulations. I just want to make that perfectly clear.

Like I said, it's a shame that 67 people in Southington showed up and most of them belong to churches or religious groups but that out of 40,000 people, it didn't even get that kind of attention as to goats.

Mr. Sherman stated there is certainly a lot of room to debate the morality of the issue and even whether the regulations as they were written were to everybody's liking. However, they were what they were.

And, the only question before us is whether the staff acted properly in interpreting and issuing the CO and it's my belief that they did.

The Chair asked if there were more discussion.

(No response)

A yes vote would be in favor of the applicant and a no would be for the town.

ROLL CALL: Sherman: No

Kuklinski:	No
Potter:	No
Bedard:	No
Chair:	No

(Motion fails.)

MISCELLANEOUS/NEW BUSINESS/OLD BUSINESS

Nothing to report this evening.

Mr. Bedard made a motion to adjourn. Ms. Potter seconded. Motion passed unanimously on a voice vote.

(Whereupon, the meeting was adjourned at 10:46 o'clock, p.m.)

Joseph LaPorte, Chairman
Zoning Board of Appeals