

**KITTERY TOWN COUNCIL
SPECIAL MEETING
COUNCIL CHAMBERS
JANUARY 17, 2018**

1. CALL TO ORDER: Chairperson Lemont called the meeting to order at 6:00 p.m.
2. INTRODUCTORY: Chairperson Lemont read the introductory.
3. PLEDGE OF ALLEGIANCE: Chairperson Lemont led all those present in the Pledge of Allegiance.
4. ROLL CALL: Answering the roll were Councilors Frank Dennett, Jeffrey Thomson, Matthew Brock, Gary Beers, Vice-Chairperson Charles Denault and Chairperson Kenneth Lemont. Councilor Jeffrey Pelletier was excused absent.

5. EXECUTIVE SESSION:

(010218-1) The Kittery Town Council moves to go into executive session with the Town Attorney in accordance with 1 M.R.S. §405 (6) (E) to discuss a legal matter.

Chairperson Lemont noted that they will not be going into Executive Session.

6. NEW BUSINESS

- a. (010218-2) The Kittery Town Council moves, pursuant to Council Rules Section 10, to suspend the Rules governing the conduct of meetings in order to modify the order of conduct of this hearing in due form of quasi-judicial proceedings.

COUNCILOR BEERS MOVED, PURSUANT TO COUNCIL RULES SECTION 10, TO SUSPEND THE RULES GOVERNING THE CONDUCT OF MEETINGS IN ORDER TO MODIFY THE ORDER OF CONDUCT OF THIS HEARING IN DUE FORM OF QUASI-JUDICIAL PROCEEDINGS. VICE-CHAIRPERSON DENAULT SECONDED THE MOTION. ROLL CALL VOTE WAS TAKEN AND ALL VOTED IN FAVOR. SIX IN FAVOR, NONE OPPOSED, MOTION CARRIES.

- b. (010218-2) The Kittery Town Council moves to hold a public hearing to receive evidence and make a determination, on whether the current Viewing Booths License issued to Capital Video Corporation is to be suspended or revoked, pursuant to Chapter 5.9.2.3 of the Kittery Town Code, and/or a fine is to be imposed upon Capital Video Corporation pursuant to Chapter 5.9.6 of the Kittery Town Code for violations of Chapter 5.9 of the Kittery Town Code.

Chairperson Lemont opened the hearing at 6:02 p.m.

Chairperson Lemont said, prior to hearing opening statements this evening, all witnesses those interested in being a witness, please come forward as you must be sworn in. Witnesses were sworn in by the Town Clerk, Mrs. Maryann Place.

Chairperson Lemont asked if either side wished to give an opening statement, and if so, the town will go first.

Atty. Bill Dale said he will give a brief opening statement.

Atty. Dale said that the presentation by the administration and I will be brief. He said the Police Chief will be testifying that, earlier this Fall, he went over to Amazing.net, on complaints, to view the viewing booths as shown on the diagram. He said the Police Chief entered the front door, came down, pointing at the diagram, and had the occasion to look in the viewing booths.

Atty. Dale said there are eight viewing booths, set up like dressing rooms in a department store, only with no doors or curtains, as shown on the diagram. He said that the Police Chief saw two people in a viewing booth and the ordinance is quite clear that there cannot be two people in the viewing booth. He said the Police Chief saw them with his own eyes, he will testify to that and that will be our case.

Chairperson Lemont asked if the other side wished to give an opening statement.

Atty. Stephen Langsdorf, from Preti Flaherty in Augusta, said that his co-counsel is Ms. Kristin Collins and they are representing Capital Video Corporation, which operates the business, Amazing.net. He said this is more complicated than what Mr. Dale is letting on and Council will have to make some decisions about the nature of the actions that were taken, and whether or not there are violations under the town's ordinance in the way it is written.

Atty. Langsdorf said the first thing he was going to do was to ask that Chairperson Lemont, Vice-Chairperson Denault and Councilor Thomson recuse themselves from hearing this case. He said this is, as Chairperson Lemont noted, a quasi-judicial case and under due process in the Constitution, which plays a significant role in this matter, you should be unbiased against an organization and provide people and citizens with a fair hearing and due process.

Atty. Langsdorf said, under freedom of access, he requested and received copies of the renewal records from the time the business was first licensed in 2006 up to the present, and is fairly replete that some statements invoked by all three of these individuals show bias in this case. He said that Councilor Thomson, on numerous occasions, said he would vote against this business, even though there is no evidence in the record to support it. He said at one point, Councilor Thomson made the following statement: "If yet another obstacle was placed in front of this business, they might at some point feel it was not worth it and leave." He said that Councilor Thomson's statement is strongly indicative of someone who is biased.

Atty. Langsdorf said that last year, in 2017, despite reports from staff stating there were no violations, an inspection which did not indicate any violations, and no one testifying at the public hearing to support denial of the license, both the Chairperson and Vice-Chairperson voted against the license with no explanation, and that clearly indicates their bias. He said as this matter goes forward, and they do not recuse themselves, he will be raising that as an issue. He said, frankly, none of you {Councilors} should be hearing this case unless they think they could do so fairly and not already be biased. He thought that, from the record, all of you {Councilors} are.

Chairperson Lemont asked if Council could have their attorney, Duncan McEachern, respond to that statement.

Atty. McEachern thought that they should give the administration an opportunity to respond to that and then he will respond to the Chairperson.

Atty. Dale said that this is the first he has heard of it, and if the three Councilors identified would like to give their side of the story, they will all be pleased to hear it.

Atty. McEachern said in his opinion, if they feel they can hear this matter fairly and unbiased, he thought that they can proceed. He said the three Councilors would have to make that judgement themselves.

Chairperson Lemont said he felt that he can fairly listen to this case and, in an unbiased manner, make a decision.

Councilor Thomson said he certainly felt that he can listen to the testimony and evidence this evening and make an unbiased and fair decision. He said that he has served on the Town Council for almost 21 years and over the years he is sure he has voted for and against many things, various licenses and so forth. He stated that he has approached every matter that has gone before this Council in a fair, and open-minded, way and has no issue of bias this evening.

Vice-Chairperson Denault said that he felt the same as Councilor Thomson and would be able to hear this case as well. He said if the evidence supports the defendant's claim that the town's standard has not been met, so be it. He said that he has been in law enforcement for over 30 years and can certainly go either way in this particular case.

Atty. McEachern said he thought, based on that, and that Chairperson Lemont is deciding this as Chair of a quasi-judicial case, as stated, and he can do it in a fair and unbiased way, as he heard that Chairperson Lemont is capable of going forward. He asked if any of the other Councilors felt they should not proceed. Hearing none, Atty. McEachern said he has no objection to them proceeding under those circumstances.

Atty. Langsdorf thanked Atty. McEachern and noted that this business has been in Kittery for 20 years, and has been licensed for 12 years. He said prior to the November 2017 report, there had been no violations, despite a number of "no" votes by the Councilors that he had identified. He said the issue, however, is not as Mr. Dale told you, that, simply put, two people were found in the booth together and that is a violation, and the end all and be all. He said that is not the way the ordinance is written at all, and he would like to explain how it is written.

Atty. Langsdorf said the ordinance states specifically "that no more than one individual is allowed to occupy a viewing booth at one time." He said it goes on to explain what it means and how it would be necessary for the town to hold the owner or operator for that to become a violation, if it is. He said by the way they are not contesting the facts, that the Police Chief came in and saw what he saw on November 9th. He said what they are contesting is if it is a violation under the town's ordinance. He said this is way it is written regarding the responsibility of the operator for compliance: "every act or omission by an employee of the adult entertainment establishment constituting or allowing a violation of the provisions of this ordinance is deemed the act or omission of the operator if such act or omission occurs with the authorization, knowledge or approval of the operator or as a result of the operator's negligent failure to supervise the employee's conduct to insure compliance with this ordinance."

Atty. Langsdorf said there are a number of steps that have to be taken. He said what happened here is, and he is sure the Police Chief saw this when he went in, is a violation of the clearly conspicuous rules of the establishment, posted on walls in numerous locations, which states that only one person per viewing booth and that anyone violating this policy will be asked to leave.

Atty. Langsdorf said the Customer Policy of Amazing.net states explicitly, and is posted on the wall of the booths, that only one person is allowed in the viewing booth. He said further there is significant employee training and a checklist which reviews all procedures included in the customer policy. He said each employee of the store is specifically trained in how to identify, and deal with, a violation of this nature and exclude people from the premises if this occurs.

Atty. Langsdorf said that they should understand that this violation has to be proven, that the ordinance states "every act or omission by an employee..." and that they are looking at the conduct of the employee working that evening and not two people who chose to violate the policy and engage in whatever activity they were engaged in. He said the employee would have had to allow or permit this and there is no evidence whatsoever that the employee gave permission or was even aware of what was happening at that particular time.

Atty. Langsdorf said the town could hold the negligence of the employee responsible, but to hold the company responsible for violating the ordinance, you have to have shown what happened that day against the posted policy occurred with the authorization, knowledge or approval of the operator. He said there is no evidence that the company had any knowledge of this incident or authorized it, or approved it in any way. He said further, to prove this violation this would have to be a result of the operator's negligent failure to supervise the employee's conduct under this ordinance.

Atty. Langsdorf said there will be no evidence at all for Council to make this type of finding. He said all the evidence is designed to include that all training, supervision and so forth is in compliance with the ordinance including a pretty sophisticated closed-circuit video monitoring system located at the front desk to allow whomever is operating the front desk to see all around the different parts of the establishment and to see if customers have been violating the rules. He said it will be their position that, unless the town is able to prove that, the Council has no basis for finding the company liable.

Atty. Langsdorf said he will also be asking the Police Chief a few questions because they also received some records, during the Freedom of Access, that the town has been singling out this business in an improper way, to the point that they have an e-mail from the Town Manager who indicates that "stepped up enforcement which is having the desired effect" is, unfortunately, unconstitutional and an admission by staff that you are singling out this business and trying to drive business away and to put this establishment out of business. He said they are prepared to respond to whatever evidence the town puts forth.

Chairperson Lemont asked for the town to proceed in calling witnesses.

Atty. Dale called the Police Chief as his first witness.

Vice-Chairperson Denault asked if Council had a hand-out.

Atty. Dale asked if he wanted him to wait.

Chairperson Lemont asked Atty. Dale to wait a moment, then said to proceed.

Atty. Dale asked the Police Chief to state his name and position.

Chief Soucy responded "James Soucy, Chief of Police, Kittery."

Atty. Dale asked the Police Chief how long has he been the Chief.

Chief Soucy responded "almost two years."

Atty. Dale asked what Chief Soucy's background is in law enforcement.

Chief Soucy replied he has approximately 26 years in law enforcement experience.

Atty. Dale asked if that was here in Kittery or in other places.

Chief Soucy answered "in two other places" and that he spent 24 ½ years in the City of Manchester and was a State Trooper in the State of Maryland.

Atty. Dale asked if that was Manchester, New Hampshire.

Chief Soucy responded yes, that is correct.

Atty. Dale wanted to know if Chief Soucy had ever been instructed by the Town Council or Town Manager to take unfair, targeted inspections of this facility.

Chief Soucy replied no, he has not.

Atty. Dale said that a few moments ago, the licensee's attorney referenced some suggestion by the Manager that Chief Soucy had stepped up enforcement or have caused the desire for you to step up enforcement, or have you been instructed by her or anyone else to step up enforcement.

Chief Soucy answered no, he has not.

Atty. Dale said that he would like to show the Police Chief what he has marked as Exhibit "A" and handed the document to the Police Chief.

Atty. Dale asked Chief Soucy if he could identify the document.

Chief Soucy responded that it is the Viewing Booth license.

Atty. Dale asked if the Police Chief could read the license aloud.

Chief Soucy replied the license says: "Know ye that Capital Video Corporation, Cranston, Rhode Island, is duly licensed for 8 Viewing Booths at Amazing.net, 92 Route 236, Kittery for consideration of \$160, and receipt is hereby acknowledged and having complied with all the requirements for Viewing Booths and duly licensed in the Town of Kittery. The license is subject to strict observance of all laws and regulations and may continue in force until the 9th day of June, 2018 unless sooner revoked.

Atty. Dale said what is the date on that license.

Chief Soucy replied June 12, 2017.

Atty. Dale said that would be the license that was in effect this Fall.

Chief Soucy responded that is correct.

Atty. Dale said let me direct your attention to this exhibit. He said he will offer the exhibits all at once. He asked Chief Soucy if he had occasion, in October and November to go to Amazing.net.

Chief Soucy answered he did.

Atty. Dale asked how so.

Chief Soucy replied it was in response to an incident that occurred in October. He had discussed this with one of his detectives, who was investigating an incident that occurred at that location. He said that he and Lt. Desjardins had an occasion in early November to conduct a compliance check and to check-out this location as a result of a complaint. He said they did so on that date, and also followed up with an additional compliance check the day after.

Atty. Dale said let's go back to the first date this past Fall and asked Chief Soucy if it was October 5th.

Chief Soucy replied yes, it was.

Atty. Dale asked what was the complaint and if Chief Soucy knew.

Chief Soucy responded not specifically, that is in the Police Report, but the general complaint was two parties had gone into the business and had observed some indecent, or what appeared to be indecent, conduct in the area of the Viewing Booths. He said they reported it to the Police Dept. and we followed up on it.

Atty. Dale said that Chief Soucy had mentioned that last November 8th he and the Lieutenant had occasion to go back to the facility and asked him to describe that.

Chief Soucy replied they went back and conducted a compliance check at that time. He said they went back to the business and checked the Viewing Booth area and observed the conduct at that time.

Atty. Dale put up a diagram of the facility, and labelled this "Exhibit E." He asked the Police Chief to come around and asked him if his diagram looked generally like the inside of the building and was it correct.

Chief Soucy answered yes, it does look generally like the diagram, that is correct.

Atty. Dale asked Chief Soucy how many times has he been in the building.

Chief Soucy said a handful of times, and that he could not tell Atty. Dale how many times he had been in there since he has been employed by the town.

Atty. Dale handed Chief Soucy the pointer and asked him to walk us through what you and Lt. Desjardins did on November 9th, the violation date.

Chief Soucy recounted how Lt. Desjardins was parked outside and he went inside first. Indicating the path, he took on the diagram, he said he went through the front door, on the Rte. 236 side of the building past where the clerk was.

Atty. Dale said he was pointing to the upper left of the building, in the corner.

Chief Soucy said that is correct, on the 236 side. He said at that point, he went to the rear of the store where the viewing booths are, entered the hallway and stopped in the middle of the common hallway.

Atty. Dale said the Viewing Booths are there, outlined in red, and the diagram shows, numbered 1-8. He asked if that was correct.

Chief Soucy replied that is correct.

Atty. Dale wanted to know if that is a general description of the inside of the building.

Chief Soucy responded yes, it is.

Atty. Dale asked Chief Soucy what happened on November 9th.

Chief Soucy said that was the day of the violation. He said he made his way back to the Viewing Booth area and observed the violation off to my right side.

Atty. Dale asked if Chief Soucy personally see, upon his inspection on November 9th, two people in a single booth.

Chief Soucy answered yes, he did.

Atty. Dale asked him to point again, for the record, the Viewing Booth that Chief Soucy saw the two people in at that time.

Chief Soucy said he could not tell, exactly, which booth it was, probably 6 or 7, but it was on the right side, the Rte. 236 side.

Atty. Dale said there was no question there were two people in the booth.

Chief Soucy responded absolutely no question.

Atty. Dale asked if it wasn't the maintenance man, or the janitor, or anything like that.

Chief Soucy replied no, it was not.

Atty. Dale asked if either the Chief or the Lieutenant have occasion to write up a report on what you just testified, 3 visits to the facility.

Chief Soucy said yes, his Lieutenant had offered that report.

Atty. Dale handed Chief Soucy a document and asked him if he could show them what he has marked as Exhibit "B", and asked if he could tell, by taking a look, if that is the report the Lieutenant wrote up.

Chief Soucy replied yes, that is correct, and that he was familiar with it.

Atty. Dale asked if on October 5th, the Police responded to this business on a complaint by an out-of-town couple who had seen a man with his pants off.

Atty. Langsdorf objected to this comment that it is hearsay. He wanted to make it clear that this is all related to the November 9th incident, and not what someone is talking about what someone else said. He said it is not part of this case and the second hearing specifically only relates to what happened on November 9th and he would say that the comment was improper.

Atty. Dale replied that this proceeding is likely governed by the Maine Administrative Procedure Act which says "hearsay and other technical ruling of the Court do not apply and an administrative hearing such as this under the APA, technically governed that they are allowed to consider evidence that reasonable people would consider analogous should be looked at in conducting serious affairs. He said with all due respect, that the Police Report by the Chief or the Lieutenant constitutes an important matter that reasonable people would rely on in conducting important affairs.

Atty. Dale said secondly, the licensee's counsel made a reference in his opening statement that we are artificially giving up reasons to visit the place, driving up our efforts to drive this company out of business. He said he thought this report shows that is not true. He said it is clear the report shows that on October 5th, the Police went there because they got a complaint from an out-of-town couple. He said he did not think this has been unfair, or prejudiced in that the Chief was answering a response to allegations made by the licensee that we were out there unannounced to drive them out of business. He said it should be discussed with the Chief and he will submit it as evidence.

Chairperson Lemont asked if, at this time, it would be appropriate to ask Atty. McEachern for his opinion or is he expected to make a decision.

Atty. McEachern replied he thought that Chairperson Lemont make the decision as Chairman, but make it based on each of the litigants have put forward that meets the facts. He said that Chairperson Lemont was well within his right if he makes a decision that is fair and is relevant and meets the facts it is within his right to allow it.

Chairperson Lemont thanked Atty. McEachern and told Atty. Dale to please proceed.

Atty. Dale said on Exhibit B, the Lieutenant's Exhibit that on October 5th the Police Chief and Lieutenant responded to a complaint that was received.

Chief Soucy said that his patrol officers responded and that they did not personally respond on October 5th.

Atty. Dale said that your patrol officers did, and it says, on October 5th this was in response to a complaint by a couple of citizens, is that right.

Chief Soucy replied that is correct.

Atty. Dale said, the next date, November 8th, which the Chief had already testified, was a follow up to the visit that his officers had made a month earlier, is that correct.

Chief Soucy responded yes.

Atty. Dale asked Chief Soucy if he could read aloud the sentence highlighted in yellow on the Lieutenant's Report.

Chief Soucy read: "the on-duty staff member was notified and she seemed to have no knowledge of what had been occurring in the private viewing booth area. She was advised that incidents like these could jeopardize the business license."

Atty. Dale asked if the Chief was there on that date.

Chief Soucy replied yes.

Atty. Dale asked if Chief Soucy was the one who told the employee that this prohibitive conduct could result in the revocation of their license.

Chief Soucy replied that his Lieutenant did.

Atty. Dale asked if Chief Soucy was there when the Lieutenant said that to her.

Chief Soucy responded yes.

Atty. Dale said the final date, November 9th, was the date that Chief Soucy and Lt. Desjardins went back, and as was testified, he saw two people in the viewing booth, and asked is that correct.

Chief Soucy answered yes.

Atty. Dale asked Chief Soucy if he was generally familiar with Chapter 5.9 of the Kittery ordinance on Viewing Booths Licenses.

Chief Soucy replied yes, he has seen this.

Atty. Dale said he wanted to direct the Chief's attention to page 2 and asked him to read aloud, Sec. 5.9.3.3.

Chief Soucy read: "Occupants. No more than one individual is allowed to occupy a viewing booth at any one time."

Atty. Dale asked the Chief is that the allegation that is brought forward against the licensee, correct.

Chief Soucy responded that is correct.

Atty. Dale said as the Police Chief has testified already, in his opinion, there is no question that the two people he saw in the Viewing Booth were not there for janitorial or any other purpose other than for sexual purposes.

Chief Soucy replied that is correct.

Atty. Dale said the ordinance the Police Chief was talking about, Sec. 5.9 on Viewing Booths makes a reference to another one of the Sections in the ordinance, Sec. 16.2.2 and asked the Police Chief to read aloud the section he had highlighted in yellow.

Chief Soucy read: "16.2.2 Definitions, Adult Entertainment Establishment means any business in any use category, with a substantial or significant portion of which consists of selling, renting, leasing, exhibiting, displaying or otherwise dealing in materials, actions, and/or devices of any kind

which appeal to prurient interest and which depict or describe specified sexual activities, including but not limited to..."

Atty. Dale asked Chief Soucy if that is what his understanding of the business is, that Amazing.net is an Adult Entertainment Establishment.

Chief Soucy responded yes, that is his understanding.

Atty. Dale asked Chief Soucy if he was sent on a series of visits to this property by the Town Manager or any member of the Town Council for the specific purpose of unfairly investigating their business, or by design, in order to get their license revoked.

Chief Soucy replied no, he was not.

Atty. Dale thanked Chief Soucy and said he would like to offer these Exhibits A, B, C, D, and "E", the poster board.

Atty. McEachern asked if Atty. Langsdorf had a copy.

Atty. Dale said that he had sent Atty. Langsdorf copies.

Chairperson Lemont asked if the town had any more witnesses.

Atty. Dale said no, there are no more witnesses.

Chairperson Lemont asked if Atty. Langsdorf wanted to cross-examine the town's witness.

Atty. Langsdorf answered yes, and asked Chief Soucy if he had been to Amazing.net and were you aware of the signs that are posted on the walls of the establishment and showed him copies of the signs.

Chief Soucy replied that this one does not look familiar, but he has seen signs there, and this one looks somewhat familiar.

Atty. Langsdorf said that the Chief would agree then that there are signs posted that state there can only be one person allowed in the Viewing Booth, which make it clear to the customer.

Chief Soucy said without looking at them directly, yes, he believes that they are posted.

Atty. Langsdorf said when Chief Soucy went to the location on November 9th, did he speak to the female employee who was working there that day.

Chief Soucy replied yes, he did.

Atty. Langsdorf said from Chief Soucy's observation, did she say anything to him, or do anything indicating that she had allowed someone to occupy the Viewing Booth.

Chief Soucy asked for Atty. Langsdorf to repeat the question.

Atty. Langsdorf wanted to know if Chief Soucy had any knowledge that specifically the attendant gave permission for two people to be in the Viewing Booth, or is there any evidence that she knew about it and "yes, it's okay" for the people to be in the booth.

Chief Soucy replied he did not hear her give permission to anyone.

Atty. Langsdorf asked if Chief Soucy had any knowledge that she allowed the people to be in the booth in any way.

Chief Soucy answered he has no knowledge of that.

Atty. Langsdorf asked if the Chief's knowledge or observation that day was he saw two people in the Viewing Booth and he spoke with the attendant and she was unaware that there was anyone in the Viewing Booth together at that moment, and asked Chief Soucy if that is correct.

Chief Soucy responded yes.

Atty. Langsdorf asked the Police Chief what was the act or omission of that employee whom you saw, or that she knew about that constituted or allowed a violation. He wanted to know what was the Chief saying the employee did to allow the violation to occur for two people to be in the Viewing Booth contrary to posted rules. He asked Chief Soucy what was he saying that the employee did, or didn't do.

Chief Soucy asked what is it I am saying that they did.

Atty. Langsdorf said that the Chief understands that this is a case where it is necessary for you to prove all these elements of the ordinance.

Atty Dale said he knows the ordinance but does not agree (inaudible ___ opposes or requires___?)

Atty. Langsdorf said he is reading from the ordinance and asked if he may proceed.

Chairperson Lemont replied yes, if he would switch at reading the ordinance.

Atty. Langsdorf asked if there is any indication that this particular employee, that the Police Chief is aware of, that constitutes she allowed the violation of the ordinance. He asked if the Police Chief could identify any act that he knows of.

Chief Soucy responded he could surmise that she had knowledge that people were out back in the Viewing Booths and it is their responsibility to insure their rules are being followed, the rules that are posted.

Atty. Langsdorf said when Chief Soucy says "surmise" that means "guess".

Chief Soucy said based on their allowed activity and postings, but he has not seen their Standard Operating Procedure so he does not know what they tell their employees.

Atty. Langsdorf said so what the Police Chief is saying is that because someone had violated the rules he is assuming somehow someone had allowed that, and asked if that is what he is saying.

Chief Soucy responded no, he is not saying that and that what he is stating is there was a violation that occurred inside that he witnessed, and that is what he is saying.

Atty. Langsdorf said that the Chief understands the ordinance requires something more than just seeing two people inside a booth, is that correct.

Atty. Dale objected saying that is mischaracterizing the law.

Atty. Langsdorf stated that the law is clear and he is not blatantly mischaracterizing the law, he is reading the law.

Atty. Langsdorf asked the Police Chief if he has identified specifically, that he knows of, that the employee did, or did not do, or allowed for those two people to be in the booth, and wanted to know if that is correct.

Chief Soucy answered he observed the violation.

Atty. Langsdorf asked if Chief Soucy had any evidence that the owner or operator of the establishment either authorized, or was aware of, or approved of there being two people in the booth at that moment, contrary to their own company policy and stated rules, at the time the Chief went to the store on November 9th.

Chief Soucy replied he has no knowledge of that.

Atty. Langsdorf asked Chief Soucy if he had any knowledge whatsoever that the owner negligently failed to supervise its employee's conduct or any facts that the owner negligently supervised their employee.

Chief Soucy asked the owner and not the employee in the store?

Atty. Langsdorf stated that the owner or the operator themselves, the company, was negligent with respect to the supervision of that employee.

Chief Soucy replied he has no knowledge.

Atty. Langsdorf asked the Chief if he observed, when he was in the store, that there is a closed-circuit video monitoring screen, visible directly from where the employee stands as cashier at the front desk.

Chief Soucy replied yes, it is at the front counter.

Atty. Langsdorf said and it has cameras which do show all different angles inside and outside of the store which the employee would not be able to see all of without the cameras, and asked Chief Soucy if that is correct.

Chief Soucy answered it does show several views, but he did not know if it showed all views. He said there is substantial coverage.

Atty. Langsdorf said if someone is operating the cash register, or stocking goods and so forth, he or she is not going to be able to see whether someone has gone quickly from one booth to another and asked if that is fair to say.

Chief Soucy replied he did not know their policies.

Atty. Langsdorf said he is not asking him about policies. He wanted to know if someone was working the cash register and looked down to put money in the drawer, is it possible that someone could go from one booth to another without anyone seeing him or her?

Chief Soucy replied if the person was not in the middle by the viewing booths and was not looking directly at the camera, that is correct.

Atty. Langsdorf said if someone was working the cash register, by necessity and looked down to put money in.

Chief Soucy said he did not know, he is not working the cash register.

Atty. Langsdorf said that he knows how they work, the person has to look down.

Chief Soucy said it depends where the cash register is.

Atty. Langsdorf asked Chief Soucy if he knew where the one he observed was.

Chief Soucy replied he did not know where the register was.

Atty. Langsdorf said he would like to show Chief Soucy an e-mail provided to him in his Freedom of Access request, from the Town Manager, Kendra Amaral to the Town Attorney, Duncan McEachern and he wanted to make sure that he was reading it correctly: "We are currently conducting frequent, on-going, unannounced compliance checks to make sure the code is being followed. It is having the expected effect."

Atty. Langsdorf asked Chief Soucy did he have any communication with the Town Manager that he agreed the Police were conducting frequent, on-going, unannounced compliance checks.

Chief Soucy replied yes, he believed at some point they had discussed increased enforcement.

Atty. Langsdorf asked if there are any other business in town where the Police are conducting frequent, on-going, unannounced compliance checks.

Chief Soucy replied yes, there are.

Atty. Langsdorf asked if the Police Chief is personally conducting those checks as he has been doing with this business.

Chief Soucy responded he has not conducted very many checks at all with regard to the other businesses. He said he tries to do as much as he can, but his other duties take him away.

Atty. Langsdorf said sure, and asked Chief Soucy why is it that he is allowed to personally do compliance checks on Amazing.net.

Chief Soucy answered because the first compliance check that was conducted they uncovered this activity in early November – which happened to be conducted by himself and his Lieutenant and the Lieutenant and he followed up and he graciously spared his employees since he started it.

Atty. Langsdorf asked Chief Soucy when he did the unannounced compliance check on Thursday of last week, what did he find.

Chief Soucy responded that they were in compliance.

Atty. Langsdorf asked other than in November, how many other times has Chief Soucy been to the store since November 9th.

Chief Soucy asked since November 9th?

Atty. Langsdorf answered correct.

Chief Soucy responded two – three times.

Atty. Langsdorf asked if at any of those times did he observe any violations.

Chief Soucy said he only went in once and he did not observe any violations.

Atty. Langsdorf said that is all his questions, thank you.

Atty. Dale said he would like to redirect. He asked the Police Chief to take the marker and indicate on the diagram where the cash register is, if he knew.

Chief Soucy replied he did not know, and that he has never seen the cash register.

Atty. Dale asked if there is an area where the attendant stands and appears to be working a cash register.

Chief Soucy responded yes.

Atty. Dale asked where that is, generally, and if Chief Soucy could indicate that on the diagram. Chief Soucy did so.

Atty. Dale said that Chief Soucy has marked an "X" in the upper left-hand corner.

Atty. Dale asked Chief Soucy did he observe if there is a TD monitoring system there.

Chief Soucy answered yes, he did see it.

Atty. Dale asked if there were other customers in the store on November 9th when Chief Soucy and Lt. Desjardins went in.

Chief Soucy answered yes.

Atty. Dale asked if they all stayed in the store or was it just the two men running out, buttoning up their pants.

Chief Soucy responded two fled, and he was not sure how many were inside the store.

Atty. Dale said okay, and asked if the employee the Chief had met the day before is the same employee that was at the store the day of the event.

Chief Soucy said he believed so.

Atty. Dale said he believed he testified that in Exhibit B, the Lieutenant's Report, you told her previously that any violation of the ordinance could result in the loss of the license, is that correct. Chief Soucy responded his Lieutenant spoke with her, yes.

Atty. Dale asked him if he was there when the Lieutenant spoke with her.

Chief Soucy replied yes.

Atty. Dale said let me ask you a hypothetical question. He said he is driving down one of the roads in Kittery, Rte. 236 and he is speeding, and one of the police officers pulls him over. He asked if the fact that I was not caught speeding in a while does that effect if I have violated speeding laws.

Atty. Langsdorf said he objected and that this case is not about speeding laws.

Chief Soucy responded no.

Atty. Dale said the fact that he has had a clean record the last several years does not mean that his going 80 mph down Rte. 236 is permissible.

Chief Soucy replied that is correct.

Atty. Dale said that Atty. Langsdorf referenced an e-mail from the Town Manager reporting that "increased enforcement" is "having the expected effect" means compliance with the ordinances.

Chief Soucy said that is correct.

Atty. Dale wanted to know how does he read into that Chief Soucy is unfairly trying to shut the business down.

Chief Soucy said he takes offense to that, that is not the case.

Atty. Dale asked Chief Soucy, since he spoke to a couple of the employees, is it his understanding that the employees set up the floor arrangement as shown on Exhibit E.

Chief Soucy said he did not have any knowledge of that.

Atty. Dale said that Chief Soucy should give it his best guess that it is the owner or operator that set up the floor arrangement.

Chief Soucy replied that would be his best guess.

Atty. Dale said he has no other questions, thank you.

Chairperson Lemont asked Atty. Dale if there were any more town witnesses.

Atty. Dale replied no.

Chairperson Lemont asked Atty. Langsdorf if he wanted to cross examine the witness.

Atty. Langsdorf replied yes, thank you.

Atty. Langsdorf asked the Police Chief if the town approved how the booths would be set up in the location they are in as part of the license.

Chief Soucy said he has no knowledge of that.

Atty. Langsdorf said thank you, no other questions.

Atty. Dale said he has nothing further.

Chairperson Lemont asked if there any Town Councilors who wished to question the Police Chief.

Vice-Chairperson Denault thanked the Chair and asked the Chief if he could briefly explain vicarious liability.

Chief Soucy asked with regard to the store, the owner, or the employee and the activity.

Atty. Langsdorf objected, saying it is not the company, the ordinance is very specific as to what has to be proved. He said it has to be shown that there is a violation and the concept of vicarious liability does not apply.

Chairperson Lemont said he thought that any Town Councilor can be afforded the opportunity to ask any question they care to ask.

Councilor Beers said to Chairperson Lemont that he would prefer that the Town Attorney answer that question rather than the Police Chief.

Atty. McEachern said, in so far if he is asking for a legal opinion or a legal theory, then he thought they are limited to what the town ordinance says.

Vice-Chairperson Denault said thank you, he appreciated Atty. McEachern's remarks. He said his question is brought on by Atty. Langsdorf to the Police Chief that the store owner is held accountable for their employee who is not following the rules. He said he brought up vicarious liability which is when a need creates a problem which climbs to the top and he wanted to see if the Chief understood that question about the business being responsible because of the employee and he thought it goes to that.

Atty. McEachern said he thinks the ordinance speaks to that and if the Police Chief wants to bring in facts, it is permissible. He said that Sec. 5.9.4 covers two streams, first is the authorization, knowledge and approval, OR (and he urged them to read this) is it a result of the negligent failure to supervise an employee's conduct, to assure – and they have to interpret the word, assure compliance with the Chapter. He said that is what the ordinance says.

Chairperson Lemont thanked Atty. McEachern and asked if there were any other Councilors who wanted to ask questions.

Councilor Thomson said he had a few questions for the Police Chief. He asked the Chief if, in the times he has visited this establishment, did he ever see the employee anywhere else other than behind the counter in the corner.

Chief Soucy responded yes.

Councilor Thomson asked where.

Chief Soucy replied on one occasion the person was not behind the counter when there were patrons in the store, and was in the restroom and on another occasion, he believed there were one or two stocking shelves and not behind the front counter.

Councilor Thomson asked if he was correct in assuming that, in stocking shelves, they would not be able to observe the conduct in the establishment.

Chief Soucy said that they would not be able to view any activity that may be happening in the viewing booths.

Councilor Thomson said he guesses that he would need to know the company's training, or extensive training as was mentioned is such that, for example, every time there is only one employee on site, that employee should be doing nothing other than walking through the Viewing Booth area observing or watching the camera. He said if there are two then one should be manning the station for security. He asked if he can find out if there is extensive training or not.

Atty. Langsdorf said he will give Councilor Thomson that information.

Vice-Chairperson Denault said that Atty. Langsdorf mentioned the e-mail from the Town Manager and is concerned about it. He asked Chief Soucy how many other adult book stores or video stores similar to this establishment are there in the Town of Kittery.

Chief Soucy replied none.

Vice-Chairperson Denault wanted to know if that is the only store of that type in this town.

Chief Soucy answered yes.

Councilor Brock said from where Chief Soucy indicated the cash register is located, he wanted to know is that where the TV monitors are.

Chief Soucy replied yes.

Councilor Brock asked if the employees can observe what goes on in the Viewing Booths.

Chief Soucy responded they can see the activity in the hallway, but not what goes on in the Viewing Booths.

Councilor Brock asked if they can tell whether or not there is more than one person in the Viewing Booth from those angles.

Chief Soucy answered he did not believe so, no.

Councilor Brock said so the only way they can is to go back and look in the Viewing Booths themselves.

Chief Soucy said unless they see two people entering the Viewing Booth, that is correct.

Councilor Brock said he wants to make sure he understands the sequence. He asked Chief Soucy if he could summarize what happened on November 8th.

Chief Soucy responded they received a complaint and one of his officers went down and took a report and as a result of the complaint forwarded this to the detectives assigned. He said as a follow-up, he made his first visit with the Lieutenant on November 8th and November 9th, the second visit, was when he observed the violation. He said October 5th was the date of the complaint. Councilor Brock asked if at the second visit on November 8th was when the employee was warned that the licensed could be revoked for violation of the ordinance.

Chief Soucy answered yes.

Councilor Brock said that Chief Soucy went in the next day and saw, in your opinion, the violation of the ordinance.

Chief Soucy replied yes.

Councilor Brock said okay, he had nothing further.

Chairperson Lemont asked if there were any other questions.

Atty. Langsdorf said he had one and asked the Police Chief what was the violation of the ordinance that he observed on November 8th.

Chief Soucy responded he did not observe the violation on November 8th.

Chairperson Lemont said that is it, and thanked the Chief.

Chairperson Lemont asked if Capital Video wished to call any witnesses at this time.

Atty. Langsdorf replied yes, he does and asked his witness to state her full name.

Witness replied Judy Lolly.

Atty. Langsdorf asked who is her employer.

Ms. Lolly replied Amazing.net.

Atty. Langsdorf asked Ms. Lolly what is her employment position.

Ms. Lolly replied she is the District Sales Manager.

Atty. Langsdorf asked if Ms. Lolly could generally describe what her duties are as District Sales Manager.

Ms. Lolly replied she oversees the operations of multiple retail locations.

Atty. Langsdorf said okay and asked if she could tell him a little bit about the store and where they are located.

Ms. Lolly said they have over 25 retail locations.

Atty. Langsdorf asked approximately how many employees does the company have.

Ms. Lolly replied about 150 retail employees.

Atty. Langsdorf asked if part of her responsibilities is to train and manage the employees such as Kittery's.

Ms. Lolly replied yes.

Atty. Langsdorf showed Ms. Lolly a document entitled "3 Day Employee Training Checklist" and asked her if she could tell him what this is and explain how the training works.

Ms. Lolly said this is the Employee Training Checklist which specifically outlines the first three days of employment and goes over various things such as orientation, job expectation, description, general operational procedures, how to ring in the point-of-sale, booth procedures as set forth by our Procedure and Policy Manual.

Atty. Langsdorf asked if part of the orientation includes training with respect to customer policy.

Ms. Lolly said Day 1, Job Expectations, describes the culture of the company and customer policy for booth procedures.

Atty. Langsdorf said he would like to show her the document, Customer Policy, and asked if it was applicable to all locations.

Ms. Lolly replied yes.

Atty. Langsdorf asked what is the date of your policy.

Ms. Lolly responded June 1, 2014.

Atty. Langsdorf said under "Viewing Room Policies" asked her what does it state.

Ms. Lolly read one person per booth.

Atty. Langsdorf asked if this is part of the training that Ms. Lolly goes over with the employees.

Ms. Lolly answered that is correct.

Atty. Langsdorf said also, as part of the training includes how to be able to run the cash register, stock the store, use of the video and walking around the facility to prevent violations of the rules, is that correct.

Ms. Lolly replied yes, that is correct.

Atty. Langsdorf asked if there is anything under this ordinance, or otherwise, that requires an employee's entire job is to be looking down the hallway where the booths are to insure no one ever violates the rules.

Ms. Lolly responded no.

Atty. Langsdorf asked what happens when an employee observes a violation of the rules.
Ms. Lolly said the customer is asked to leave the establishment.

Atty. Langsdorf said other than physically restraining people, is there any way an employee working could prevent someone from quickly walking from one booth to another without somebody noticing.

Ms. Lolly answered no, there would be no way.

Atty. Langsdorf wanted to know if there is a system, or is there not, where the employee knows if the booth is being used and how does that work.

Ms. Lolly responded when a booth is occupied, and the video player is operable, a light will illuminate that will show the Manager or the person on duty that the booth is occupied.

Atty. Langsdorf asked if there is any way Amazing.net would authorize, have knowledge of, or approve of there being two people in a viewing booth at any one time.

Ms. Lolly said no, they don't approve of that.

Atty. Langsdorf said in terms of the responsibilities of the supervisor, one of the duties is to make sure that the employee complies with the ordinance.

Ms. Lolly replied yes, that is absolutely correct.

Atty. Langsdorf asked if Ms. Lolly felt that she makes the very best efforts to work with the employees and train them so that they can do the best possible job and follow the rules of the company.

Ms. Lolly replied yes, she does.

Atty. Langsdorf asked if that is important to the company and applies to all locations.

Ms. Lolly responded yes, it does.

Atty. Langsdorf asked if the employee had to sign off on this because they receive this type of training.

Ms. Lolly responded yes, they do have to sign off or they will not be able to be employed with this company if this is not completed.

Atty. Langsdorf asked how often does the District Manager, which Ms. Lolly says she is, visit each of the individual stores.

Ms. Lolly answered once every two weeks, minimum.

Atty. Langsdorf asked when Ms. Lolly is in the individual stores every two weeks, is she there to, at least in part, get in training or deal with any issues to get in compliance with company rules.

Ms. Lolly replied yes.

Atty. Langsdorf asked does the company care about enforcing the rules.

Ms. Lolly answered yes, very much so.

Atty. Langsdorf showed Ms. Lolly an Exhibit of the Viewing Booth rooms and asked her if they were pictures at the Kittery location.

Ms. Lolly replied yes.

Atty. Langsdorf said okay, thank you and that was all of his questions.

Atty. Dale asked Ms. Lolly if she has been in the Kittery store?

Ms. Lolly responded yes, she has.

Atty. Dale asked if they always have two or more employees in the Kittery store.

Ms. Lolly answered no, they do not.

Atty. Dale said he went in there Saturday and there was only one young woman in there. He asked Ms. Lolly if that is more typical.

Ms. Lolly replied yes.

Atty. Dale wanted to know if there are two employees on Friday and Saturday nights.

Ms. Lolly responded she cannot speak to what their schedule looks like, perhaps there might be.

Atty. Dale wanted to know if there is a company-wide rule that on Fridays and Saturdays you always have at least two employees?

Ms. Lolly replied no.

Atty. Dale asked what is the purpose of the TV monitoring system with the monitor panel on Exhibit E, marked where the "X" is in the upper left-hand corner if the camera is only shooting the hallway of the Viewing Booths and not into each of the individual booths?

Ms. Lolly responded to assist the employee who is working should she be at the register cashing out a customer, she can monitor any activity in the back.

Atty. Dale said he was going to go around to the diagram, and Ms. Lolly could watch him, and put a "Y" here and a "Z" here on the right-hand side. He said when he went in, he saw shelves of X-rated videos or movies, generally in this area marked "Y" and "Z", is that correct.

Ms. Lolly replied yes.

Atty. Dale thought that Ms. Lolly had said that occasionally the employees are stocking shelves, is that correct?

Ms. Lolly answered yes.

Atty. Dale said would Ms. Lolly explain to Council and us how can the employee – if she is in area “Y” or “Z” see either directly into the Viewing Booths, where there is a wall or the monitor if she is stocking shelves? He asked how would she see what is going on in the Viewing Booths?

Ms. Lolly responded she would not be able to.

Atty. Dale said okay and asked Ms. Lolly if this is the layout from the company. He said he assumed no individual designed the layout of the store.

Ms. Lolly said she assumed it is the company and she did not know who laid out the store.

Atty. Dale said that Ms. Lolly stated that she {company} has 25 shops.

Ms. Lolly replied yes.

Atty. Dale asked if they are all stand-alone facilities or are some of them in shopping centers.

Ms. Lolly replied some are in shopping centers, yes.

Atty. Dale said he went online and looked and each one he saw was in a shopping center except this one.

Ms. Lolly asked really?

Atty. Dale asked Ms. Lolly if she disagreed with that.

Ms. Lolly said she cannot speak for every location as she has not seen all 25 locations.

Atty. Dale asked if she has been in any one of them in Texas?

Ms. Lolly responded no.

Atty. Dale asked if she has been in any ones in New York?

Ms. Lolly replied no.

Atty. Dale asked if the ones in Connecticut or Massachusetts, they are not stand-alone or are they in shopping centers.

Ms. Lolly replied no, they are stand alone.

Atty. Dale asked if all 25 of the stores, from Ms. Lolly’s knowledge, do they all have Viewing Booths?

Ms. Lolly answered no, they do not all have Viewing Booths.

Atty. Dale asked if any of the ones that are in strip shopping centers have Viewing Booths.

Ms. Lolly responded yes, some do.

Atty. Dale said what is an example of that, which one in a shopping center has Viewing Booths.

Ms. Lolly said Groton, Connecticut is in a shopping plaza and they have Viewing Booths.

Atty. Dale said and they are an inline store with other shops.

Ms. Lolly answered that is correct.

Atty. Dale said when he looked online, he also noted that it seems like many of your shops had, what he would call, adult-oriented gifts such as what adults might have for a New Years' Eve party, hats, streamers and wanted to know if that is common in most of your shops.

Ms. Lolly replied yes, she did think that most of them carried that type of merchandise.

Atty. Dale asked of your 25 shops, how many are solely carrying adult entertainment products.

Atty. Langsdorf objected and said he does not understand why Atty. Dale is analyzing everything going on at other locations which is not even remotely relevant to the decision of whether or not there was a violation of this ordinance.

Chairperson Lemont said he also wanted to ask that question why Atty. Dale was going down that path.

Atty. Dale said okay, if she answers that question, he will be done.

Ms. Lolly asked Atty. Dale to repeat the question.

Atty. Dale asked if this is the only one that does not have regular adult-oriented party favors.

Ms. Lolly said she is not aware if that is the case.

Atty. Dale questioned her that she did not know one way or the other?

Ms. Lolly said she did not know if this particular location has party favors or not, as some others do.

Atty. Dale said thank you, and he had no further questions.

Atty. Langsdorf asked if their employees are required to walk around the store in the evening to inspect the Viewing Booth area.

Ms. Lolly replied yes.

Atty. Langsdorf asked how often are the employees required to walk around the store, including walking through and checking on the booths.

Ms. Lolly responded they should be walking around the store consistently unless they are assisting a customer.

Atty. Langsdorf said okay, so there would be frequent times – as part of the employee's training – where their job is to walk into the area to ensure compliance with the ordinance, correct?

Ms. Lolly answered yes.

Atty. Langsdorf said thank you, no further questions.

Chairperson Lemont asked if any Councilors had any questions of the witness? He said he just had one.

Chairperson Lemont said they have heard a lot about observing the Viewing Booths and he is sure that in the past, an employee found more than one person in a viewing booth. He asked Ms. Lolly what is the company's protocol for that - is that reported to the Corporate Office or dealt with in-house or a report made out.

Ms. Lolly replied, generally, it is dealt with in the store, then the District Manager, which would be my position, is partnered in that finding.

Vice-Chairperson Denault asked Ms. Lolly could someone sitting in a booth, as was described in the Kittery store, be using the booth, and as she indicated, there was an indicator light that they were using the video, but could they be in the booth without using the video, and without the light being on.

Ms. Lolly said they would consider that loitering because they are not watching the video and, at that point, we would ask the person to either leave or to start watching the video.

Vice-Chairperson Denault said they would need to make a purchase.

Ms. Lolly said yes.

Vice-Chairperson Denault asked if she thought it would be fair to say if she asked her employees to occasionally pop in and check out that area, it would be a deterrent for those who want to engage in activities that are conducive to the store's policy it would help deter that, if the employee could go in. He said potentially if they (employees) are not doing that, you would know that, you would have to trust them.

Ms. Lolly replied she monitors that from the CCTV as well and whether or not the employee is, in fact, making the rounds throughout the store.

Vice-Chairperson Denault wanted to know how often does a Quality Assurance (QA) person within the establishment, would review the video? He said if the store is open 24 hours, or whatever, times the distance, and you visit the store every two weeks, or 90 days, he wanted to know how often would she review these things?

Ms. Lolly answered she does periodically check in with her stores throughout the day. She said from her computer she can do that. She said from a retaining standpoint, she does not generally go back more than what is available to look at. She responded yes, she checks in on her stores daily.

Vice-Chairperson Denault asked Ms. Lolly that if there was an incident, she certainly could say she could recall it.

Ms. Lolly replied yes.

Vice-Chairperson Denault said this is not related to this hearing, but wanted to know does shoplifting occur in your store.

Ms. Lolly replied yes.

Vice-Chairperson Denault asked if sometimes someone gets caught and sometimes the person doesn't?

Ms. Lolly responded yes.

Councilor Brock said he believed Ms. Lolly indicated that, when somebody is watching the video in the Viewing Booth, there will be a light that illuminates that indicates that but wanted to know where does that show up, is it around the cash register?

Ms. Lolly replied yes, but systems are different, it will show on the monitor.

Councilor Brock wanted to know if the light would indicate which booth number it is.

Ms. Lolly replied yes, you can see which booth number is illuminated so you can see which booth is occupied.

Councilor Brock said so you know that someone is watching the video.

Ms. Lolly said yes.

Councilor Brock asked if she could tell if there were two people in the booth watching a video.

Ms. Lolly replied no, not from that system.

Councilor Brock said he believed Ms. Lolly also indicated that if an employee observes a violation, like two people in a booth, you would handle that internally and be alerted to that, and asked if that is correct?

Ms. Lolly responded hmmm-hmmm.

Councilor Brock asked if Ms. Lolly has been alerted to that kind of violation at the Kittery store before.

Ms. Lolly replied she is not the supervisor of the Kittery Store so she was not personally aware of that.

Councilor Brock asked if that was not part of her job duties – to know what happened at the Kittery store?

Ms. Lolly answered no, in that regard.

Councilor Brock said nothing further.

Councilor Thomson said a couple of minutes ago, Ms. Lolly said it was the responsibility of, and how the employee was trained, is that if they are not ringing up a sale, they are to be moving about the premises.

Ms. Lolly replied yes.

Councilor Thomson wanted to confirm that the only video panel for the cameras is behind the counter area.

Ms. Lolly responded hmmm hmmm.

Councilor Thomson said if they are moving about the establishment and she is behind the row of products where "Y" and "Z" are indicated, as Atty. Dale just described, then she cannot see the monitors.

Ms. Lolly replied no, they cannot, but she would assume that if they are stocking shelves or doing such things like that, they would not be monitoring any activity in the booth area. She said the Booth area is not always occupied, so maybe it is empty.

Councilor Thomson said we have to be careful of what we assume and the Police Chief was told that.

Ms. Lolly answered hmmm.

Councilor Thomson wanted to know if someone walks into that establishment and there is no one making a purchase, your employee should not be behind the counter.

Ms. Lolly wanted to confirm if there was no one making a purchase.

Councilor Thomson replied yes.

Ms. Lolly said no – not necessarily – they can be behind the counter, yes. She said they can be watching what is going on the video. Absolutely, or they could also be going in the back into the Viewing Booth area.

Councilor Thomson said that is what he is saying, if no one is making a purchase, the employee should not be behind the counter.

Ms. Lolly replied no, not necessarily.

Councilor Thomson asked how is it physically possible for an employee to monitor what is happening in the establishment if he or she is using the restroom?

Ms. Lolly asked Councilor Thomson to repeat the question.

Councilor Thomson wanted to know how is it possible, if there is only one employee working, for he or she to use the restroom, and close the door, to monitor what is happening in the establishment?

Ms. Lolly responded that what she has instructed her stores to do, when the employee has to use the restroom, is to use the restroom when there is no customer in the store, and to lock the store and put a sign up when they use the restroom so they are not opening themselves up to...

Councilor Thomson said that clearly did not happen when the Police Chief visited at the time when he came in.

Ms. Lolly answered she did not know.

Councilor Thomson said so that was a violation of company policy.

Ms. Lolly replied she did not know if the person was in the bathroom. She thought the Police Chief assumed the employee was in the bathroom.

Councilor Thomson said thank you.

Chairperson Lemont asked if there were any other questions.

Vice-Chairperson Denault said with disciplinary actions within the store (and turning to look at Atty. Langsdorf said "feel free to object"), Ms. Lolly had said earlier that she is the District Manager, he asked is that what you said or did I miss that?

Ms. Lolly replied yes, that is what she said, she is the District Manager.

Vice-Chairperson Denault said that then Ms. Lolly said "unbeknownst to me" and thought she said there was a supervisor involved.

Ms. Lolly responded there is a Store Manager and the District Manager, but she is not the District Manager for this particular store location.

Vice-Chairperson Denault asked if the Store Manager was here tonight?

Ms. Lolly replied no.

Vice-Chairperson Denault said okay, and wanted to know if it is incumbent upon your employee to pass this information along to the store manager and it is incumbent upon the store manager to let you know that there was an incident, is that correct?

Ms. Lolly answered the store manager, if there was any incident in her store, should let her District Manager know, yes.

Vice-Chairperson Denault asked him or her? He said he is concerned about the one in Kittery, not in the malls.

Ms. Lolly responded hmmm mmmm, yes.

Vice-Chairperson Denault asked how many times, in the last couple of years, has Ms. Lolly been told about incidents within the store, that are similar to this, and he did not mean employee behavior, mostly shoplifting or this Viewing Booth information.

Ms. Lolly answered a handful, a few, not many.

Vice-Chairperson Denault said a few, and asked would be four?

Ms. Lolly answered she would say about that.

Vice-Chairperson Denault said outside of that, asked Ms. Lolly if she is regularly briefed by her Store Manager of other incidents, over runs, underruns, missing items?

Ms. Lolly replied always, she has conference calls weekly and she communicates daily with all the Store Managers.

Chairperson Lemont asked if there were any more questions? Hearing none, he thanked Ms. Lolly and she stepped away from the podium.

Chairperson Lemont asked if there are any other witnesses? Atty. Langsdorf and Mr. Santamaria approached the podium.

Atty. Langsdorf said to please state your full name.

Mr. Santamaria stated "David Santamaria."

Atty. Langsdorf asked who is his employer?

Mr. Santamaria stated Capital Video.

Atty. Langsdorf asked what is Mr. Santamaria's position within the company.

Mr. Santamaria replied Loss Prevention.

Atty. Langsdorf asked if he could describe what his job duties are and what he does.

Mr. Santamaria responded he does basic employee thefts, shoplifting, CCTV issues and review and training.

Atty. Langsdorf asked what is the reason that you have CCTV, Closed Circuit TV monitoring at your stores.

Mr. Santamaria replied they have CCTV to monitor activity in the stores and for law enforcement purposes for shoplifting.

Atty. Langsdorf asked if Mr. Santamaria goes to the individual stores yourself to set them up to assure that they are in compliance with your security protocol.

Mr. Santamaria replied that he does.

Atty. Langsdorf asked if he had that net at the Kittery location.

Mr. Santamaria answered yes, he does.

Atty. Langsdorf asked him, as part of his duties, is he involved with training employees as to how to follow security procedures to ensure compliance with his own company protocol and with local ordinances such as the ordinance here in Kittery.

Mr. Santamaria replied yes, I have.

Atty. Langsdorf said to tell him what kinds of things Mr. Santamaria does when training employees and working with them in that respect.

Mr. Santamaria replied he does basic CCTV training, how to use the system and make sure that they know if they are not doing other things in the store, they need to make sure that they are always keeping an eye on what is going on in the store for potential shoplifters or any kind of booth issues.

Atty. Langsdorf asked is it the company policy, regardless of the ordinance here in Kittery, to only allow one person at a time in a Viewing Booth.

Mr. Santamaria said yes, it is.

Atty. Langsdorf asked as part of your training with the employees with CCTV, is it oriented toward those employees making their very best efforts to insure compliance with the rules.

Mr. Santamaria answered that is correct.

Atty. Langsdorf asked how many video cameras would Mr. Santamaria say he has provided for all 25 stores.

Mr. Santamaria replied probably close to 400.

Atty. Langsdorf said it is not possible for one person, like yourself to be consistently monitoring 400 video cameras, is that correct?

Mr. Santamaria replied that is correct.

Atty. Langsdorf asked Mr. Santamaria, when there is a question about an incident, is he called upon to look at the video to determine if he sees whether there has been any violation of protocol by the employee?

Mr. Santamaria replied yes.

Atty. Langsdorf said obviously you have a tremendous amount of video footage and asked how long does Mr. Santamaria retain that data?

Mr. Santamaria asked for Kittery?

Atty. Langsdorf responded yes, totally Kittery.

Mr. Santamaria replied one to three days.

Atty. Langsdorf said if the company has been advised that there has been some sort of incident and Mr. Santamaria learns about it within 1-3 days of its happening, then he can save the video to look at later and review it to determine what actually has happened at that time, is that correct?

Mr. Santamaria answered that is correct.

Atty. Langsdorf asked if the video security cameras are set up in Kittery to give all the best angles that one can give in the store to observe whether or not people are going back and forth accessing the different booths and all the other angles in the store.

Mr. Santamaria replied yes.

Atty. Langsdorf said the only thing Mr. Santamaria does not have is 8 more cameras looking directly into each of the booths, but you can see whether or not two people enter the booth or go back and forth between the booths, is that correct?

Mr. Santamaria responded yes that is correct.

Atty. Langsdorf asked is it important for the company to oversee the employees to insure the protocol of those rules.

Mr. Santamaria replied yes.

Atty. Langsdorf asked what happens if the company is aware that an employee has allowed a violation to take place? What happens to those employees?

Mr. Santamaria answered the retail side would speak to the employee and some kind of discipline would be handed down.

Atty. Langsdorf said okay, that is all he has.

Atty. Dale asked Mr. Santamaria what his last name is.

Mr. Santamaria responded "Santamaria."

Atty. Dale asked if Mr. Santamaria was familiar with the Kittery store.

Mr. Santamaria replied yes, he is.

Atty. Dale asked Mr. Santamaria to go up to the diagram with a marker and indicate where the video cameras are with an "A" – which he did.

Atty. Dale said that you have marked an "A" in the upper left-hand corner of the store behind the counter, is that correct.

Mr. Santamaria replied correct.

Atty. Dale asked Mr. Santamaria if he can put a "B" where the camera is that shoots down the aisle of the Viewing Booths, which he did.

Atty. Dale asked if these cameras are for loss prevention, which is Mr. Santamaria's principle job, or are they in there to monitor ordinance compliance.

Mr. Santamaria said he would say they are there to monitor for both.

Atty. Dale said okay, for these incidents, shown on Exhibit B, the October incident when a couple complained there were two people in a booth and the November 8th and 9th incidents, he assumed that Mr. Santamaria has gone back and looked at those tapes, right?

Mr. Santamaria responded yes, I have.

Atty. Dale said now when the Police Chief testified the second time November 9th he went in and saw two people in a booth is that correct.

Mr. Santamaria replied yes.

Atty. Dale asked if he had gone back to look at that tape, is that correct.

Mr. Santamaria replied correct.

Atty. Dale asked Mr. Santamaria to confirm that two people went into a single booth.

Mr. Santamaria responded yes.

Atty. Dale wanted to know if Mr. Santamaria said he saw other instances where two people went into a booth.

Mr. Santamaria replied no I did not.

Atty. Dale said on that date, because the Chief had a complaint, you went and checked the tape and that is what the tape showed.

Mr. Santamaria said correct.

Atty. Dale asked him if these were clearly two adult entertainment customers, correct?

Mr. Santamaria responded correct.

Atty. Dale said with all these cameras, 400 Mr. Santamaria said, what is preventing you from putting a camera in each of the eight Viewing Booths so the person at the counter could actually see inside each of the 8 booths.

Mr. Santamaria replied he can not really speak on that. He said he is not sure what the laws are on something like that.

Atty. Dale asked if Mr. Santamaria thought there may be a legal prohibition?

Mr. Santamaria replied he honestly was not sure.

Atty. Dale said that is good because he did not know the answer either.

Atty. Dale said he assumed it is not a cost prohibition to put a camera in each of the 8 booths?

Mr. Santamaria replied he did not believe there is a cost prohibition, no.

Atty. Dale said thank you, he had nothing further.

Atty. Langsdorf said with respect to the Oct. 5th incident, the Chief indicated there was a report from a couple that they had observed some kind of indecent conduct, and asked did Mr. Santamaria go back and look at the tape to determine what happened in the store.

Mr. Santamaria responded yes.

Atty. Langsdorf said Mr. Santamaria was given the exact time and date, correct?

Mr. Santamaria replied correct.

Atty. Langsdorf asked when Mr. Santamaria looked at the tape, did he observe what the couple reported.

Mr. Santamaria replied yes. Atty. Langsdorf asked if he saw any other violation when they came into the store.

Mr. Santamaria said when they first came into the store they were shopping around a bit. There might have been another customer in the retail side of the store.

Atty. Langsdorf said when they went into the booth area, there was nobody occupying any of the booths.

Mr. Santamaria said that is correct.

Atty. Langsdorf asked when it was reported that two people were in a booth engaged in indecent conduct, you considered that to be a false report?

Mr. Santamaria replied yes.

Atty. Langsdorf asked Mr. Santamaria if he reported to the company that was a false report, correct?

Mr. Santamaria responded yes, that is correct.

Atty. Langsdorf said he had nothing further.

Atty. Dale asked did the company (inaudible – could be “consider this” or “determine that this”?) was a false report made by an honest couple?

Mr. Santamaria said he was not sure what the company has done with that report.

Atty. Dale said okay, thank you.

Chairperson Lemont asked if there any other questions by Council?

Vice-Chairperson Denault said Mr. Santamaria said he has 400 cameras, and that is a lot of cameras to look at, but we are really focused on the date the Chief caught two people in the booth, and he believed that date to be Oct. 5th?

Chairperson Lemont corrected him and said no, it was November.

Vice-Chairperson Denault asked Mr. Santamaria did he see that particular incident on the CCTV?

Mr. Santamaria replied correct.

Vice-Chairperson Denault asked if the incident that he viewed was from Mr. Santamaria's security office.

Mr. Santamaria responded yes, he is able to dial into a store. He said when something, an incident, happens, he can take a look.

Vice-Chairperson Denault said that Mr. Santamaria got to see the incident so there is no question that the incident occurred based on what Mr. Santamaria saw in the tape of what the Chief testified.

Mr. Santamaria replied correct.

Vice-Chairperson Denault said that is the same view that you saw and asked Mr. Santamaria is it a static or dynamic camera, can it move back and forth or is it stationary?

Mr. Santamaria answered it is just stationary.

Vice-Chairperson Denault asked if that same view that Mr. Santamaria saw in the camera is that the same view on the screen in the store? He asked Mr. Santamaria if the camera is a multiplexer, with multiple views.

Mr. Santamaria responded yes, she had the same view that he had.

Vice-Chairperson Denault said all of the cameras sometimes they roll through, or is this a static picture of all the cameras.

Mr. Santamaria responded this is a static picture of all the cameras.

Vice-Chairperson Denault wanted to know if Mr. Santamaria had driven up to that day, and had pulled up that camera view, he could pull up that camera view with your security level.

Mr. Santamaria replied yes.

Vice-Chairperson Denault asked there is no question that the same view in Mr. Santamaria's office is what the employee would have seen, two people going into that booth, if she was watching the camera, is that correct?

Mr. Santamaria replied yes.

Vice-Chairperson Denault asked if that employee was working out on the floor could she see that camera?

Mr. Santamaria responded no.

Vice-Chairperson asked absolutely not? He asked Mr. Santamaria to look at the drawing where "Y" and "Z" had been marked by Atty. Dale, and the monitors that are facing 236, asked would it not be visible to customers.

Mr. Santamaria replied correct.

Vice-Chairperson Denault asked if she went over to #5, the left-hand side on that wall, would she be able to see it, or would that still be an angle that would not be advantageous for her to watch?

Mr. Santamaria asked for the booths?

Vice-Chairperson Denault replied yes, assuming there are items for sale between 5 and 6, it is all retail space.

Mr. Santamaria said there is all retail space here, indicating that on the diagram.

Vice-Chairperson Denault said there is no monitor check in the Bathroom, so if someone violated the company policy and went into the bathroom there would be no way to see the cameras, correct?

Mr. Santamaria replied that is correct.

Vice-Chairperson asked if the store employee is standing out front to the right-hand side of the store and was smoking a cigarette, there would be no way she would be able to see the monitor as well?

Mr. Santamaria replied that is correct.

Vice-Chairperson Denault wanted to know if there was an ashtray to the right of the door for smoking?

Mr. Santamaria said not that he was aware of.

Vice-Chairperson asked Mr. Santamaria if there were any incidents he has become aware of in that store that came after the fact – and what he means is that Mr. Santamaria found out from either word-of-mouth or from an employee or follow-up that was not reported at that time on that date.

Mr. Santamaria replied no, their Store Managers are told if an incident happens they need to report it to their District Managers. He said once the District Manager gets the information, he will take a look and they work together to figure out what happened.

Vice-Chairperson Denault asked if what he was telling him is the incident that he has been told of or are all incidents in that store that involve this type of activity in the Viewing Booths?

Mr. Santamaria answered he would like to think our employees do notify us.

Vice-Chairperson Denault asked if that is a “yes” or “no”?

Mr. Santamaria said no.

Vice-Chairperson Denault said thank you, he had nothing further.

Chairperson Lemont asked if Atty. Langsdorf had any further witnesses?

Atty. Langsdorf replied no.

Chairperson Lemont said they will hear closing statements and asked Atty. Dale to go first.

Atty. Dale said Mr. Chairman, administration has the following closing argument: the ordinance is clear, not allowed to have two people in a viewing booth, you heard testimony by the Chief, and he saw them for himself, you heard testimony from Mr. Santamaria, the Loss Prevention Manager who looked back on the tape and sure enough, two people were in the view.

Atty. Dale said he does not think there is a knowledge requirement, he thinks there is a “scientia” requirement it might be in a criminal law, but the ordinance is clear, it does not allow two people to be in a Viewing Booth at any one time. He said considering the facts produced, is it possible that two employees, and one would be at the monitor could monitor the hallway of 8 booths and could tell if there are two people and could address it.

Atty. Dale said it is pretty clear they do not have two employees there, clear the way the store is laid out, and if the employee is out stocking shelves, as shown on Exhibit E, or going to the bathroom or whatever, he or she is not going to be able to see whether there are two customers in the Viewing Booth. He said our case is that simple.

Atty. Dale said that on November 9th the Police Chief said he witnessed what their employee said it was. Thank you.

Atty. Langsdorf said he would like to offer four exhibits that he has been referring to in the course of this hearing and handed them to Atty. Dale who perused them.

Atty. Dale said he had no objection.

Atty. Langsdorf said they are labelled one through four and gave each packet to the Town Council and Atty. McEachern.

Atty. Langsdorf said as he has stated since the beginning of this matter, Atty. Dale is misreading your ordinance by the simple fact that two people sneaking into the booth unbeknownst to our company, violating the posted rules is automatically a violation. He said most definitely it is not. He said it is extremely clear that what it says is that required to hold the owner or the operator – the case is not against the employee. He said a very specific standard has been set up. He said first Mr. Dale had to prove that there was an act or omission by the employee which constituted or allowed the violation, either the employee violated the ordinance or did something or failed to do something that allowed the violation to occur.

Atty. Langsdorf asked the Police Chief if he had any evidence of what he saw that pointed to, or was there something this employee either did or condoned or allowed and it was quite the contrary. He said the employee was not aware and there were two people in the booth. He said if they had an act or omission by the employee allowing the violation, which they do not have, then the case is over. He said they have zero evidence.

Atty. Langsdorf said beyond that it would have had to have been that an act or omission constituted or allowed the violation or an act or omission of the company and it was clear it did not act “vicariously liable.” He said the language is not automatic, it is similar with cases where the employee gets into an accident and that is not what the ordinance says. He said the town has to prove that the operator or company authorized or knew about or approved that those two people violated company policy and they have zero evidence. He said they had no knowledge of what happened. He asked if the company negligently failed to supervise the employee’s conduct to ensure compliance with the ordinance. He said someone fails to do something that a reasonable person would do under the circumstances.

Atty. Langsdorf said there is not one word in the ordinance that cameras have to look into the booth as the attorney acknowledged that he was not sure if that is legal. He said there is nothing in the ordinance that says from the time the employee is in the store, he or she must be looking down the

hallway to make sure no person is walking into the booth to engage in the courageous conduct of being next to another human being.

Atty. Langsdorf said that this business is like any other business, they make the very best efforts to run their business. He said the town cannot have an ordinance that says you have to have eight employees to make sure that nothing ever happens, nothing is ever stolen, or no one goes in the wrong bathroom or breaks any rules. He said that is not how business works. He said they have to have appropriate regulations.

Atty. Langsdorf said it may be reasonably appropriate to have one or two people working in the store. He said they have heard the evidence, they are walking up and down the hall, they have frequent inspections, monitors – there is definitely no negligent failure. He said he did not know, other than literally stationing a full-time employee in the hallway, nothing is standard, sometimes people quickly shoplift things like Vice-Chairperson Denault said.

Atty. Langsdorf asked what if the town had an ordinance that shoplifting cannot occur. He said that cannot be the case. He said if you had a clean driving record for 12 years and was caught speeding, chances are the Chief would give you a warning, but that is not this case. He said this is a law-abiding company that does not have a bad history and is protected by the Constitution. He said the only proof in the case that we can agree is at the time there two people who came in and violated the company policy. He said there is no way the town can find all the things they would have to find and the way the ordinance was written it was not violated.

Atty. Dale said he had proposed decisions, one provides for a fine and the other provides for a fine and suspension, but Council can up with their own – and handed them to Atty. McEachern.

Chairperson Lemont closed the public hearing. He said he sees this as two parts, whether or not there is a violation and reach a decision and would like to talk about that amongst Councilors. He opened the floor for Council discussion.

Councilor Beers said he would like to distill the question to its essentials that there is uncontested evidence that Chief Soucy's report states there were two individuals in a Viewing Booth at one time, and two people in a Viewing Booth at one time is a violation of this ordinance.

Councilor Beers said Sec. 5.9.4 of the ordinance states: "an act or omission by the employee..." and he suggested that, by the physical nature of the layout, the number of employees, and the monitoring of the various activities and locations, that it is physically impossible for an employee to maintain 100% awareness of the occupancy of the booths all the time. He said that the violation occurred when the employee who is responsible to enforce the policy, and the rules, is an act of omission, in his mind.

Councilor Beers said the next part relates to the operator's requirement "to assure compliance" and that may be deemed physically impossible to do so, but the operator does not have the means to assure compliance with their own policy and the ordinance, and without having the physical means to do so, he would consider this to be negligent.

Councilor Brock said he agrees in part with Councilor Beers, and using 100% awareness by the employee did not think that is the standard that should be applied here. He said it is reasonable that we find a violation with the facts presented. He said he agrees with Councilor Beers and that he would say that it is negligent failure by the company to supervise its employee when there is only

one employee, which is common practice, who cannot see the booths from the TV monitors and cannot tell if there is one or two people in the booths.

Councilor Brock said that when the illumination, the light is on indicating the booth is occupied, but the employee cannot tell if there is one or two people in the booths, and that the employee, the same employee, was warned by the Police Chief, and they heard his testimony, on November 8th, and the Chief came back the next day and found two people in the booth.

Councilor Brock said, looking at those facts, this is not a system which is really set up to ensure reasonable compliance with the ordinance. He said that there was an act of omission by the employee, but it was really triggered by the policy of the company to under-staff this facility in a way that there was likely going to be a violation. He said this discussion has exposed a weakness in the staffing and monitoring by this company.

Vice-Chairperson Denault said the issue we have policy in writing that the regional manager works with the employees and the facility to know if something is happening and we have Sec. 5.9.4 and the responsibility of the operator for compliance but puts a lot on the store employee. This establishment has known for many years there are issues there. The town years ago changed the ordinance and the doors of the viewing booths were removed by the company to meet the ordinance. The store does know there is an issue.

Vice Chairperson Denault said there are cameras in the stores wherever you go, and you can see yourself in them as well. He said it is the responsibility of the operator and it is important to look at that there was an issue, the employee was told about it. He said one day does not make a difference, but there was time for the company to initiate a plan. He said, in looking at the cameras or the layout of the booths it could be addressed, and he thought there is some responsibility on the part of the company in this case.

Councilor Thomson cited Title 5 Business Licenses and Regulations, 5.9 Adult Entertainment Establishments – viewing booths. As Atty. Langsdorf said numerous times his position and that of his client was Kittery is involved in unfair excessive enforcement, but you are the only one in town, so whether the Police go there once a day, once a week or once a month for enforcement of the ordinance Amazing.net is the only established involved with this ordinance and he does not see how this can be viewed as unfair or excessive enforcement.

Councilor Thomson said the ordinance deals with terms “act or omission” and who is responsible. He said he would submit that it could be interpreted as the business being culpable when only one employee is working at any one time and that is an omission that allows a potential violation. He said or if only one employee is working who uses the restroom that may or may not be very well authorized, having training and it still happens that allows for a violation of the ordinance. He said signs are not enough and we have seen the exhibits of signs in the establishment.

He said the town also has signs displayed throughout the town in our green spaces asking people to pick up after their dogs, which is required, but not everybody does, so we cannot rely just on signs.

Atty. Langsdorf makes the argument for his client, and what it comes down to for me is that Kittery Police Dept. made a deliberate visit on a deliberate day and observed a random, never occurring before act. Pretty significant leap.

Councilor Dennett said he agrees that they have an uncontested violation brought out by the Police Chief which did occur, but there has been no refutation presented. He said Sec. 5.9.4 is what everyone is honing in on, but mine is a little more technical "an act or omission by the operator's negligent failure to supervise an employee's conduct to assure compliance with the Chapter" is tough and was very carefully crafted by someone.

Councilor Dennett said an act or omission as a result of the operator's negligent failure to supervise employee's conduct to assure compliance with this chapter is guilt before you start. He said to assure compliance, very technically if there is no violation, compliance assurance has been given and if not, there is no compliance and failure to supervise employee's conduct is negligent, yes, as opposed to intentional could be argued as well.

Councilor Dennett said there is no compliance because of the operator's negligent failure to supervise.

Councilor Beers asked Chairperson Lemont if Atty. McEachern could respond and the Chair agreed.

Atty. McEachern said, along the lines that Councilor Dennett pointed out, he has the word "insure" mentioned several times and the ordinance says "assure." He said he can give you the definition found in Black's Dictionary and read: "to make certain and put beyond doubt." He said it is a heavy burden that they will have to discuss, the failure to supervise the conduct to assure. He said under the law, if the ordinance does not define a term, Council is permitted to go to a dictionary to look up the definition of that word. He said this is what it says in Black's Dictionary and Council has to determine that burden.

Chairperson Lemont thanked Atty. McEachern.

Councilor Beers thought that Councilor Brock had articulated his points in a better fashion. He said he is getting the general sense that Council agrees a violation has occurred and the operator is responsible. He would like to speak for a moment to the idea of "retributed justice" or "progressive discipline," which says that the penalty be proportionate to the transgression or the crime." Councilor Beers said this company has been in Kittery for 20 years and this is the first formal complaint that has been brought forth, it is one instance. He said he saw nothing more than a single \$200 fine as being appropriate.

Chairperson Lemont asked if anyone else wanted to speak.

Vice-Chairperson Denault said he was also going to say progressive discipline, which goes to what Councilor Beers said, but thought he would like to see doing something, some corrective, preventive things, perhaps changing the design or putting up more cameras in the facility to assure compliance with the Code.

Councilor Beers stated a point of order Mr. Chairman in that the Town Council does not have the authority to initiate any changes, all they have is the clause in Sec. 5.9.4.

Vice-Chairperson Denault asked Chairperson Lemont if he may speak.

Chairperson Lemont replied certainly.

Vice-Chairperson Denault said he did not say he wanted to do that, he was just going along with what Councilor Beers had said. He said now that he has trouble with that. I was not saying I was going to do that. He said he has an issue with a \$200 fine and it does seek what it should be.

Chairperson Lemont asked if there was any more discussion and that they do have to have the Findings of Fact. He said he thinks he speaks for everyone that there is a violation in that no more than one individual is allowed to occupy a Viewing Booth at any one time, Sec. 5.9.3. Atty. McEachern said they should make a decision first, before the Findings of Fact.

Chairperson Lemont said that is what he just said, and that Council has a consensus.

Councilor Beers said we need a motion to make that finding.

Atty. McEachern said Council should find that there is a violation, that is the motion you should be making.

Chairperson Lemont said he would appreciate a motion on the violation.

COUNCILOR THOMSON MOVED THAT THE KITTERY TOWN COUNCIL, IN THIS HEARING THIS EVENING HEARD EVIDENCE AND TOOK TESTIMONY AND HAS FOUND THAT A VIOLATION UNDER SEC. 5.9.2.3. OF THE KITTERY TOWN CODE DEALING WITH THE NUMBER OF OCCUPANTS IN A VIEWING BOOTH HAS OCCURRED ON NOVEMBER 9, 2017. COUNCILOR BEERS SECONDED THE MOTION.

Councilor Dennett said maybe he misheard, and asked if Councilor Thomson said Sec. 5.9.3.3, as that is the correct section.

Councilor Thomson said he would amend his motion to state he: **MOVED THAT THE KITTERY TOWN COUNCIL, IN THIS HEARING THIS EVENING HEARD EVIDENCE AND TOOK TESTIMONY AND HAS FOUND THAT A VIOLATION UNDER SEC. 5.9.3.3. OF THE KITTERY TOWN CODE DEALING WITH THE NUMBER OF OCCUPANTS IN A VIEWING BOOTH HAS OCCURRED ON NOVEMBER 9, 2017. COUNCILOR BEERS SECONDED THE MOTION.**

Councilor Brock said he agreed with the violation, but also maybe seek counsel, that fact alone does not establish the responsibility fully and that was the point of the defendant's counsel's discussion. He said we have engaged in a discussion about the responsibility and we made that connection and he did not want to limit that thread in the motion to Sec. 5.9.3.3 because he was thinking that Sec. 5.9.4 the responsibility of the operator for compliance was made and the Findings of Fact to establish that as well, either individually, or collectively.

Atty McEachern agreed totally with what Councilor Brock said. He thought that Council would be making this a two-step process here.

Chairperson Lemont said he was.

Atty. McEachern said that section of the ordinance has been met, there is a violation, then you go on to the other section, the responsibility of the operator and compliance.

Chairperson Lemont asked if Councilor Thomson moved suspension or revocation of the license.

Councilor Thomson said he did not. He just said there was a violation of Sec. 5.9.3.3.

Chairperson Lemont said this has to do with the number of occupants in a Viewing Booth.

Councilor Thomson said we are establishing Findings of Fact that after hearing testimony that a violation occurred on November 9th 2017 and we heard testimony and admission by the defendant's counsel that a violation occurred as per Sec. 5.9.3.3.

Chairperson Lemont asked for a roll call.

ROLL CALL VOTE WAS TAKEN, 6-0, WITH SIX IN FAVOR, NONE OPPOSED, MOTION CARRIES.

COUNCILOR BEERS MOVED THAT THE KITTERY TOWN COUNCIL FINDS, IN ACCORDANCE WITH SEC. 5.9.4 IN THAT THE OWNER/OPERATOR IS RESPONSIBLE FOR ANY ADULT ENTERTAINMENT ESTABLISHMENT VIOLATIONS AND SEC. 5.9.5 WHICH EXPRESSLY PROVIDESTHAT THE ESTABLISHMENT IS SUBJECT TO POLICE DEPT. INSPECTION OF THE LICENSED PREMISES TO DETERMINE COMPLIANCE WITH THE ORDINANCE.

CHAIRPERSON LEMONT SECONDED THE MOTION FOR DISCUSSION.

Councilor Beers said they have found a violation and now we are finding that the owner/operator is responsible for the violation. He said another finding could be that the licensed premises were, in fact, subject to Police Dept. inspection.

Atty. McEachern said that Councilor Beers may want to expand on that. He said there was a violation of Sec. 5.9.4. by saying there was a violation in that, as a result of the operator's negligent failure to supervise the employee's conduct to assure compliance with this chapter and incorporate that under the text of this section was not met.

Councilor Beers said he has a little bit of a problem with my past experience on the Planning Board and the Board of Appeals where a motion was made and after that determination, then the Findings of Fact were articulated, and this motion includes those provisions. He said his contention is they found the owner/operator is responsible and that would be included in the Findings of Fact for the record.

Councilor Brock agrees with what he has heard both from Councilor Beers and the helpful clarification from Atty. McEachern, but he wanted to restate that they make sure that they find the responsibility of the operator for compliance under 5.9.4. because of the omission of the operator for the negligent failure to supervise the employee's conduct.

Councilor Dennett added to assure compliance.

Councilor Brock said with that expansion, he would support the motion.

Councilor Beers concurred, and Chairperson Lemont, as the seconder to the motion, concurred.

COUNCILOR BEERS MOVED THAT THE KITTERY TOWN COUNCIL FINDS, IN ACCORDANCE WITH SEC. 5.9.4 IN THAT THE OWNER/OPERATOR IS RESPONSIBLE, BECAUSE OF THE OMISSION OF THE OPERATOR DUE TO THE OPERATOR'S NEGLIGENT FAILURE TO SUPERVISE THE EMPLOYEE'S CONDUCT TO ASSURE COMPLIANCE, FOR ANY ADULT ENTERTAINMENT ESTABLISHMENT VIOLATIONS AND SEC. 5.9.5 WHICH EXPRESSLY PROVIDESTHAT THE ESTABLISHMENT IS SUBJECT TO POLICE DEPT. INSPECTION OF THE LICENSED PREMISES TO DETERMINE COMPLIANCE WITH THE ORDINANCE. SECONDED BY CHAIRPERSON LEMONT.

ROLL CALL VOTE WAS TAKEN, 6-0, SIX IN FAVOR, NONE OPPOSED, MOTION CARRIES.

COUNCILOR BEERS MOVED ADDING THE FINDINGS OF FACT FOR THE RECORD:

- 1. THE MATTER WAS BROUGHT FORWARD TO THE TOWN COUNCIL FOR HEARING ON A COMPLAINT TO THE POLICE DEPT. ALLEGING A VIOLATION OF ORDINANCE SEC. 5.9.3.3 OF CHAPTER 5.9, LISENCES FOR VIEWING BOOTHS IN ADULT ENTERTAINMENT ESTABLISHMENTS, A.E.E.**
- 2. THE PROPERTY IS APPROVED FOR A SMALL BUILDING AND IS OWNED BY CAPITAL VIDEO CORP., CRANSTON, RHODE ISLAND AND IS LOCATED AT 92 ROUTE 236. IT OPERATES UNDER THE BUSINESS NAME AS AMAZING.NET. IT HAS A TOWN-ISSUED VIEWING BOOTH LICENSE DATED JUNE 12, 2017, #17-1, COPY ATTACHED FOR THE RECORD AS EXHIBIT "A" FOR EIGHT VIEWING BOOTHS.**
- 3. THE INSIDE OF THE BUILDING HAS MULTIPLE ROWS OF VIDEOS AND OTHER MERCHANDISE FOR SALE. AT THE REAR OF INTERIOR IS A SEPARATE SECTION, WITH A ROW OF VIEWING BOOTHS, ARRANGED AS IF CHANGING ROOMS IN A CLOTHING STORE EXCEPT THAT THERE ARE NO DOORS ON THE INDIVIDUAL VIEWING BOOTHS. EACH OF THE EIGHT VIEWING BOOTHS IS OUTFITTED WITH A VIDEO PLAYER.**
- 4. THE SPECIFIC INCIDENT IS ALLEGED TO HAVE OCCURRED ON THURSDAY, NOVEMBER 9TH, 2017 AND PERSONALLY WITNESSED BY POLICE CHIEF SOUCY. HIS REPORT OF THE SAME IS ATTACHED AS EXHIBIT "B" AND DESCRIBES CHIEF SOUCY AS FINDING TWO MEN IN A SINGLE VIEWING BOOTH ENGAGED TOGETHER IN INDECENT CONDUCT AS DEFINED BY MAINE STATE CRIMINAL CODE 17-A, M.R.S.A. SEC. 8-54, APPARENT ENGAGING IN A SEXUAL ACT IN A PUBLIC PLACE.**

AND SUBMIT THAT THE EVIDENCE PRESENTED FOR THE MATTER WAS SUBSTANTIAL, WAS CREDIBLE AND IS NOT OUT WEIGHED BY CONFLICTING EVIDENCE AND THE TOWN DID MEET ITS BURDEN OF PROOF FOR THE PENALTY. SECONDED BY VICE-CHAIRPERSON DENAULT.

Chairperson Lemont asked if there was any discussion.

Atty. McEachern said he did not think that Councilor Beers needed to reference the Maine Criminal Code – but it is up to Council.

Councilor Beers said it was recommended by Atty. Dale and he does not have a problem with it.

Chairperson Lemont asked Councilor Beers to repeat what he said.

Councilor Beers said that Atty. McEachern suggested we do not include the reference to the Maine Criminal Code, but Atty. Dale recommended it, and he did not have a problem with it.

Vice-Chairperson Denault said he did not have a problem with it either, as the seconder to the motion.

Chairperson Lemont asked if there was any other discussion.

Councilor Brock said he did not believe that they had been discussing this matter as a criminal matter and that is his understanding, under the context of this hearing.

Chairperson Lemont said he would agree with the Town Attorney and his advice.

Atty. McEachern said that this case was not presented to Council as a violation under the Maine State Statute. He said whether or not it was violated, that is not what is before Council.

Councilor Beers said he is not talking about a violation, that the Chief observed two men in indecent conduct together as defined by the Code.

Atty. McEachern agreed, but the issue before the Council does not involve the finding of the men engaged in indecent conduct, it involves the violation of the town's ordinance.

COUNCILOR BEERS AMENDED HIS MOTION, TO STRIKE ANY REFERENCE TO THE MAINE STATE CRIMINAL CODE AND THAT FINDING OF FACT #4 SHOULD STATE: THE SPECIFIC INCIDENT IS ALLEGED TO HAVE OCCURRED ON THURSDAY, NOVEMBER 9TH, 2017 AND PERSONALLY WITNESSED BY POLICE CHIEF SOUCY. HIS REPORT OF THE SAME IS ATTACHED AS EXHIBIT "B" AND DESCRIBES CHIEF SOUCY AS FINDING TWO MEN IN A SINGLE VIEWING BOOTH. VICE-CHAIRPERSON DENAULT SECONDED THE AMENDED MOTION.

Chairperson Lemont asked Atty. McEachern for his legal opinion.

Attorney McEachern asked if Councilor Beers had supported the finding and included that the responsibility of the operator was due to negligent failure to supervise the employee's conduct.

Councilor Beers said that was part of the second motion and had been included.

ROLL CALL VOTE WAS TAKEN, 6-0, SIX IN FAVOR, NONE OPPOSED, MOTION CARRIES.

COUNCILOR BEERS MOVED THAT THE KITTERY TOWN COUNCIL, BASED ON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS, TWO EXHIBITS ATTACHED AND TESTIMONY BY THE POLICE CHIEF, THE MAJORITY VOTED, THAT SEC. 5.9.3.3. OF THE TOWN ORDINANCE WAS VIOLATED ON NOVEMBER 9TH 2017 THE DATE OF THE POLICE CHIEF'S INSPECTION. A FINE OF \$200 BE IMPOSED AS THIS IS THE FIRST DOCUMENTED VIOLATION OF SEC. 5.9.3.3, AND A SUSPENSION OF THE OPERATOR'S RIGHTS IS NOT IMPOSED, BUT A WARNING ISSUED TO THE LICENSEE THAT IF ANOTHER VIOLATION OCCURS WITHIN 12 MONTHS OF NOVEMBER 9, 2017, IT MAY VERY WELL RESULT IN NOT ONLY A FINE, BUT THE SUSPENSION OR REVOCATION OF THE OPERATING LICENSE. SECONDED BY VICE-CHAIRPERSON DENAULT. COUNCILOR THOMSON MOVED TO ADD ANOTHER FINDING OF FACT: AFTER LISTENING TO ALL THE TESTIMONY THIS EVENING, SUFFICIENT TRAINING AND AN OVERSIGHT DID NOT APPEAR TO HAVE BEEN PROVIDED TO THE EMPLOYEE OF THE ESTABLISHMENT, AMAZING.NET, LOCATED AT 92 ROUTE 236 AND AS A RESULT OF THAT INSUFFICIENCY WITH REGARD TO TRAINING AND THE OVERSIGHT, A VIOLATION

OCCURRED UNDER SEC. 5.9.3.3. ON NOVEMBER 9, 2017. SECONDED BY CHAIRPERSON LEMONT.

Chairperson Lemont asked if there was any other discussion.

Councilor Dennett asked if Councilor Beers could re-state his motion, a little slower.

Atty. McEachern said that Council did not reference Sec. 5.9.4, only the Section regarding two people in the Viewing Booth. He said that, in Council's decision, they should add a finding of fact was there was "negligent failure to supervise" the employee's conduct. He said what he has heard is that the Councilors discuss, and spoke to the fact that under Sec. 5.9.4, that the operator was responsible due to negligent failure to assure compliance. He said Council has heard testimony from the witnesses.

Atty. McEachern said that, since Council had made a conclusion to that effect, they may want to add that finding.

Vice-Chairperson Denault asked if it is possible – through Atty. McEachern – to add that Sec. 5.9.4 to that same finding.

Atty. McEachern said they could, but Council should not limit it to the testimony of the Police Chief as, in fact, they are basing some of your findings on "the negligent failure" on the testimony of the witnesses.

Councilor Beers said they found by unanimous vote is included in that statement and that this motion is for the penalty. He said the violation was under Sec. 5.9.3.3. and Sec. 5.94 is finding the operator's responsibility is the violation. He said no additional language needs to be added.

Councilor Brock would ask if the Town Attorney is comfortable with that position or if Atty. McEachern thinks Council needs additional Findings of Fact. He asked if they needed to make another motion on the responsibility of the operator in Sec. 5.9.4 or is that sufficient.

Atty. McEachern thought Council should have a couple of Findings to support that from the testimony heard.

Councilor Beers said he would withdraw his motion and encouraged any one else to come up with additional Findings of Fact.

Atty. McEachern said that Council discussed that.

Vice-Chairperson Denault said point of order, Councilor Beers made five excellent findings of fact on Sec. 5.9.3.3 and asked if that was correct.

Atty. McEachern said yes.

Vice-Chairperson Denault said that is the motion before them.

Councilor Beers answered no, it is not.

Vice-Chairperson Denault said he thought he seconded it.

Councilor Beers said they approved the Findings of Fact and that was the last vote. He said the motion he made, and withdrew, is to impose a penalty.

Chairperson Lemont said he cannot do that without the seconder, and he hoped that Vice-Chairperson Denault doesn't let him withdraw it.

Councilor Beers said he begged to differ with Chairperson Lemont and asked Councilor Dennett if he would care to rule on a priority matter of protocol, and asked whether the maker of the motion can withdraw.

Councilor Dennett replied no, a motion once made and seconded, and announced by the Chair, can be withdrawn only with the permission of the majority of the Council because once announced by the Chair, it becomes the property of the Council and not the maker or the seconder.

Councilor Beers said that he did not hear the Chair announce it.

Chairperson Lemont said it was moved and seconded. Nice try.

Councilor Beers said that Chairperson Lemont is with it.

Chairperson Lemont said he understands the language and will support the motion. He said they can add more Findings of Fact, and asked if that was right.

Atty. McEachern replied they can.

Chairperson Lemont said this is pretty clear.

Atty. McEachern said he (Councilor Beers) is on the Penalty section and he is backing up. He said he was not on that yet.

Chairperson Lemont said they could go back to that.

He said Council needs to make a finding that they violated Sec. 5.9.4 in that they negligently failed to assure compliance. He said they may want to put a couple of facts in there on how you reached that conclusion. He said they discussed it as a group, that it was the responsibility of the operator. He said they heard testimony from the witnesses that there is negligent failure because they did not have two employees and could not see the Viewing Booths. He said he did not think they made a specific Finding of Fact that Council all agreed on.

Vice-Chairperson Denault agreed.

Councilor Beers asked if Atty. McEachern could add that to his motion.

Chairperson Lemont said he cannot do that to this motion, Council will have to add a finding of fact and he would like to take action on the motion.

Councilor Thomson said he would like to make a motion.

Chairperson Lemont asked if it was under this motion or the motion regarding the penalty.

Councilor Thomson asked if they could hold the penalty motion in abeyance and hear one more finding of fact.

Chairperson Lemont said sure.

COUNCILOR THOMSON MOVED TO ADD ANOTHER FINDING OF FACT: AFTER LISTENING TO ALL THE TESTIMONY THIS EVENING, SUFFICIENT TRAINING AND AN OVERSIGHT DID NOT APPEAR TO HAVE BEEN PROVIDED TO THE EMPLOYEE OF THE ESTABLISHMENT, AMAZING.NET, LOCATED AT 92 ROUTE 236 AND AS A RESULT OF THAT INSUFFICIENCY WITH REGARD TO TRAINING AND THE OVERSIGHT, A VIOLATION OCCURRED UNDER SEC. 5.9.3.3. ON NOVEMBER 9, 2017. SECONDED BY CHAIRPERSON LEMONT.

ROLL CALL VOTE WAS TAKEN, 6-0, SIX IN FAVOR, NONE OPPOSED, MOTION CARRIES.

Councilor Thomson said they now have Councilor Beers' motion before Council, but he wanted to amend the motion. He said that \$200 for a fine is equivalent to 40 Latte's at Starbucks. He said he realized this is the first violation before Council, but also felt that it ends up on the bottom line of the cost of doing business. He said he would like to amend the motion.

Councilor Beers said point of order, Mr. Chairman and asked Councilor Thomson if he was changing the amount.

Councilor Thomson replied no.

COUNCILOR THOMSON MOVED THAT THE VIEWING BOOTH LICENSE ISSUED TO AMAZING.NET CURRENTLY IN EFFECT, BE SUSPENDED FOR 14 DAYS, SECONDED BY CHAIRPERSON LEMONT.

Chairperson Lemont asked if there was any discussion.

Councilor Brock asked for clarification on the motion to suspend the license for 14 days and the \$200 fine.

Chairperson Lemont said Councilor Thomson is just amending the motion to include the 14 days.

ROLL CALL VOTE ON THE AMENDED MOTION WAS TAKEN, AND VOTED 1-5, ONE IN FAVOR, FIVE OPPOSED (COUNCILOR DENNETT, COUNCILOR BROCK, COUNCILOR BEERS, VICE-CHAIRPERSON DENAULT AND CHAIRPERSON LEMONT), MOTION FAILS. ROLL CALL VOTE WAS TAKEN ON THE MAIN MOTION, 6-0. SIX IN FAVOR, NONE OPPOSED, MOTION CARRIES.

Chairperson Lemont asked Atty. McEachern if there were any more findings of fact he wanted Council to incorporate.

Atty. McEachern replied he thought they had covered their bases.

Chairperson Lemont asked for a motion to adjourn.

7. ADJOURNMENT

**VICE-CHAIRPERSON DENAULT MOVED TO ADJOURN THE MEETING AT 8:26 P.M.
SECONDED BY COUNCILOR THOMSON. ALL WERE IN FAVOR BY A VOICE VOTE.
MEETING ADJOURNED.**

Respectfully submitted,

Barbara Boggiano
Recording Secretary

Approved 2-12-18