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Court of Appeals No. 33140-7-III

Supreme Court No. _____

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SPOKANE VALLEY,

Respondent,

vs.

BRIAN DIRKS, CHRISTINE DIRKS, MARESSA DIRKS AND CA-WA CORP, a California Corporation doing business as HOLLY WOOD EROTIQUE BOUTIQUE,

Appellants.

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

Judgment in the Spokane County Superior Court Cause No. 12-2-01887-6
Honorable Annette Plese, Presiding

Gilbert H. Levy, Attorney for Appellants
Suite 330 Western Triangle Building
2125 Western Avenue
Seattle, WA 98121
(206) 443-0670

ORIGINAL

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I. IDENTITY OF PETITIONERS

The Petitioners are the Appellants below, Brian Dirks, Christine Dirks, Maressa Dirks, and CA-WA CORP d/b/a/ HOLLYWOOD EROTIC BOUTIQUE.

II. CITATION TO COURT OF APPEALS DECISION

Petitioners seek Supreme Court review of the unpublished decision of the Washington Court of Appeals, Division III, in Cause No. 33140-7-III. The Court of Appeals decision was filed on October 22, 2015. On December 15, 2015, the Court of Appeals filed orders denying Petitioners' Motion for Reconsideration and Motion to Publish the Court of Appeals decision.

III. ISSUES PRESENTED FOR REVIEW

The first issue presented for review is whether the Court of Appeals erred in determining that CA-WA's business is not a lawful non-conforming use under the Spokane Valley Zoning Code.

The second issue for review is whether the Court of Appeals erred in determining that the applicable sections of the Spokane Valley Licensing Code do not constitute an impermissible prior restraint and/or an invalid time, place and manner restriction in violation of the First Amendment to the United States Constitution and Article 1, Section 5 of the Washington Constitution.

The third issue presented for review is whether the Court of Appeals erred in upholding summary judgment in favor of the City on the question of whether the City's adult entertainment zoning restrictions fail to provide reasonable alternative avenues of communication in violation of the First Amendment and Article 1, Section 5 of the Washington Constitution.

IV. STATEMENT OF THE CASE

A. Statement of Procedure

Respondent City of Spokane Valley, (hereinafter "Plaintiff" or the "City"), filed a complaint for declaration of public nuisance and warrant of abatement, alleging that Petitioners, (hereinafter "Defendants") were operating their business in violation of the City's zoning and licensing ordinances. CP 1-8.[1] Defendants answered the complaint and filed counterclaims alleging that their business was a lawful non-conforming use and that the City's ordinances violated Article 1 Section 5 and the First Amendment. CP 15-17, 18-33, 838-843.

The City filed a motion for declaration of public nuisance and request for a warrant of abatement. CP 644-672. In the motion, the City alleged that Defendants were operating their business without a license as required by Chapter 5.10 of the Spokane Valley Municipal Code,

[1] The abbreviation "CP" refers to the Clerk's Papers.

(hereinafter "SVMC"). Id. Defendants opposed the motion and filed a cross motion for summary judgment. CP 648-672. In their cross motion, Defendants argued that Chapter 5.10 amounted to an absolute ban on adult movie theaters and was therefore unconstitutional under the First and Amendment and Article 1, Section 5. Id. Following argument, the Trial Court granted the City's motion and denied the Defendants' cross motion. CP 3902-3911. The Trial Court withheld action on the warrant of abatement pending a decision on the constitutionality of the adult entertainment-zoning ordinance, SVMC Chapter 19.80.

The City then filed a motion for summary judgment seeking a determination that the zoning restrictions in Chapter 19.80 are valid under the First Amendment and Article 1, Section 5. CP 4139-4153. Defendants opposed the Motion arguing that there were genuine issues of material fact that precluded summary judgment. CP 4154-4181. The Trial Court granted the City's motion and issued a warrant of abatement. CP 4481-4485.

Defendants filed a timely notice of appeal to the Washington Supreme Court, seeking direct review. CP 4486-4462. The Supreme Court remanded the case to the Washington Court of Appeals, Division III. On October 22, 2015, the Court Appeals filed an unpublished opinion

upholding the decision of the Superior Court.[2] Defendants filed timely motions for reconsideration and to publish the Court of Appeals Decision. Both motions were denied on December 15, 2015.[3]

B. Statement of Facts

Defendant CA-WA CORP, (hereinafter "CA-WA"), operates a business in Spokane Valley at 9611 East Sprague under the business name, Hollywood Erotic Boutique, (hereinafter "HEB"). CP 673, 674. The business was formerly operated by World Wide Video of Washington, Inc. Id. World Wide dissolved in 2006 and CA-WA took over the business. Id. The business name remains the same and the format is unchanged. Id. CA-WA leases the premises from the Dirks family, who own the property. Id. at 674.

HEB is located in a two-story building. CP 674. On the ground floor, the business has a retailing component in which it sells DVD's, books, magazines and novelties of a sexually explicit nature. Id. The business also has mini theaters on the second floor, which feature sexually explicit movies. Id. The mini theaters are contained in separate rooms situated along a common aisle. Id. Each room accommodates up to ten patrons and contains chairs and a screen. Id. The screen in each room is

[2] A true and correct copy of the Court of Appeals decision is attached hereto as Appendix A.

[3] True and correct copies of the order denying reconsideration and the order denying publication are attached hereto as Appendices B and C.

connected by a cable to a DVD player. Id. The DVD players are located downstairs in the main room where a clerk operates them. Id. Patrons enter the mini theaters by purchasing a ticket for $12.00. Id. The ticket price entitles a patron to view full-length movies shown in the mini theaters. CP 675.

HEB began operating at 9611 East Sprague in 1999. CP 675. The mini theaters were installed in 2002. Id. The mini theaters are distinguishable from businesses commonly known as peep shows. Id. Peep shows are movie booths intended to accommodate one patron at a time. Id. Each booth typically contains a screen and a device, which enables the viewer to view short segments of a sexually explicit movie by inserting a token or a coin into the device. Id. HEB is the only business in the City, which has both a retail component and mini theaters. Id.

Spokane Valley was incorporated on March 21, 2003. CP 689. Prior to that time, HEB was located in unincorporated Spokane County. CP 25. Under the Spokane County Code, businesses defined as "adult entertainment establishments" were permitted to locate only in certain zones within the County, subject to set back requirements from certain specified zones and uses. CP 25, 183-185. The Spokane County Zoning

Code defined an "adult entertainment establishment" as "an establishment defined pursuant to Chapter 7.80 of the Spokane County Code. CP 146.[4]

At the time of its incorporation in 2003, Spokane Valley adopted Chapter 7.80 of the County's Business License Code. CP 234, 235. The City also adopted the County's Zoning Ordinances, including a five-year amortization provision for "adult retail use establishments". CP 231, 695, 738. In September 2003, the Spokane Valley Council amended its zoning code to eliminate the five-year amortization provision for "adult retail use establishments". CP 702-704. The City never adopted an amortization provision for "adult entertainment establishments". Id. Under the Spokane Valley Code, "adult retail use establishments" and "adult entertainment establishments" which were originally lawful but later became non-conforming were treated the same as other non-conforming uses. Id. Under SVMC Section 19.20.060(B)(1), non conforming uses are permitted to continue indefinitely unless discontinued or abandoned for a period of twelve consecutive months.

In 2007, Spokane Valley adopted SVMC Chapter 19.80. CP 704, 705, 759-768.[5] Chapter 19.80 was intended to replace the provisions of

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[4] The definitions applicable to "adult entertainment establishments" are contained in Chapter 7.80.040 of the Spokane County Code and are set forth in Appendix D

[5] SVMC Chapter 19.80 and Appendix A to the Spokane Valley Zoning Code are attached to this brief as Appendices E and F. Appendix A contains the definitions applicable to "adult entertainment establishments".

the previous adult entertainment zoning ordinance that had been adopted from the County. Id. Under Chapter 19.80, "adult entertainment uses" are only permitted to locate in the Community Commercial and Regional Commercial zones. SVMC 19.80.030(A). They must be set back one thousand feet from the nearest property lines of certain specified uses, including public libraries, public playgrounds and parks, public or private schools, nursery schools, day care centers, churches, convents, monasteries, synagogues, and other adult uses. SVMC 19.80.030(B).

In 2010, the City adopted Ordinance 10-006, which replaced the previous Chapter 5.10 of the licensing code, dealing with the licensing and regulation of "adult entertainment establishments". CP 862.[6] The legislative record preceding the adoption of Ordinance 10-006 consisted of: (1) Secondary effects studies conducted by other municipalities; (2) Reported court decisions from the State of Washington dealing with the constitutionality of local ordinances governing peep shows and live entertainment establishments; (3) Police reports from other municipalities dealing with sexual conduct that commonly takes place in peep shows; (4) Police reports of sexual conduct occurring in the mini theatres at 9611 E. Sprague. CP 3143-3859.

[6] SVMC Chapter 5.10 is attached to this brief as Appendix G.

As amended by Ordinance 10-006, SVMC § 5.10.020 provides that no person may operate an "adult entertainment establishment" without obtaining a license. SVMC § 5.10.040(A)(9) provides, "No adult entertainment license may be issued to operate an adult entertainment establishment in a location which does not meet the requirements set forth in Chapter 19.80 unless otherwise exempt." SVMC § 5.10.160 provides violations of provisions of Chapter 5.10, such as failure to obtain a license, constitutes a misdemeanor and each day's violation constitutes a separate offense.

SVMC § 5.10.080(C)(6) provides:

> No adult arcade station may be occupied by more than one person at any time. Any chair or other seating surface within an adult arcade station shall not provide a seating surface of greater than 18 inches in length or width. Only one such chair or other seating surface shall be placed in any adult arcade station. No person may stand or kneel on any such chair or seating surface.

SVMC § 5.10.080(D)(3) provides in part:

> All arcade stations must open to the public room so that the area inside is fully and completely visible to the manager. No curtain, door, wall, merchandise, display rack, or other enclosure, material, or application may obscure in any way the manager's view of any portion of the activity or occupants of the adult entrainment establishment.

The City began its efforts to close down HEB's mini theatres in 2007, claiming that it was operating an "adult entertainment establishment" without a license and it was operating in the wrong zone. CP 814-822.[7] HEB's representative responded to the City's notices by pointing out that the business did not constitute an "adult entertainment establishment' as that phrase was defined in the SVMC because the movies were not being shown "in a booth". CP 823-831. The parties never reached an agreement and the present lawsuit followed. CP 1-8.

V. ARGUMENT FOR ACCEPTANCE OF DISCRETIONARY REVIEW

A. The City's Licensing Code Imposes an Absolute Ban on Adult Movie Theaters

HEB argued in the Superior Court that its business was not subject to Chapter 5.10 because the ordinance applied only to peep shows, meaning single occupancy movie booths. The Superior Court disagreed with this construction in essence holding that Chapter 5.10 applies to any enclosure containing a screen that permits the viewing of a sexually explicit movie. CP 3908. In the alternative, HEB argued that the regulation amounts to an absolute ban on multiple occupancy adult movie theaters because no theater can operate if it can accommodate only a

[7] The City's abatement order only pertains to the mini theaters. The City takes the position that the retail portion of HEB's business is a lawful non-conforming use. CP 703.

single patron at one time or contain only a single chair. See SVMC 5.10.080, subsection (C)(6). Likewise, it argued that no theater can operate if the viewing area or auditorium must be open to the public room so that it is "completely visible to the manger". See SVMC 5.10.080, subsection (D)(3). Thus, the regulation amounts to an impermissible prior restraint or an invalid time, place and manner restriction. The Court of Appeals agreed with the HEB's reading of the ordinance.[8] The Court nevertheless held that the ban was permissible under the First Amendment and Article 1 Section 5, because it was justified by the need to deter sexual conduct and because those who wish to view adult movies on premises may still do so in single occupancy viewing booths. Id.

The Court of Appeals analyzed the constitutionality Chapter 5.10 under the rule announced in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). Under *Renton,* so called time place and manner regulations are constitutional if: (1) **they do not ban adult theaters altogether**; (2) they are content-neutral and not enacted for the purpose of restraining speech; (3) they are narrowly tailored to further a substantial governmental interest; (4) they provide reasonable alternative avenues of communication. Id. at 49-55, 930-934.

[8] "We agree with CA-WA that SVMC 5.10.080(C)(6)'s limitation of one person per theater could theoretically prevent auditorium adult theaters from operating in Spokane Valley". Order Denying Reconsideration at p. 2.

In *Ino Ino v. City of Bellevue, Inc.,* 132 Wn. 2d 103, 127, 937 P. 2d 154 (1997), this Court evaluated the constitutionality of a nude dancing licensing ordinance similar to Chapter 5.10 under the test set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct.1673 (1968). A regulation is constitutional under the *O'Brien* test if: (1) the regulation is within the constitutional power of government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restrictions on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest. Id.[9] The Court held that Article 1, Section 5 of the Washington Constitution provides enhanced protection for live nude entertainment in the case of prior restraints but that so-called time, place and manner regulations not involving "pure speech in a traditional public forum" are evaluated under federal standards. Id. at 121, 166. The Court declined to characterize the distance restriction in the Bellevue licensing ordinance as a prior restraint, rather than a time, place and manner regulation, because it did not effectively ban the speech. Id. at 125, 168.

[9] The Ninth Circuit has stated that there is no substantive difference between the *O'Brien* and *Renton* tests and a given result under one necessarily dictates an identical outcome under the other. *Clark v. City of Lakewood,* 259 F. 3d 996, 1005, n. 3 (9th Cir. 2000).

Spokane Valley's regulation is unconstitutional both under the *Renton* test and under Article 1, Section 5 because it bans adult movie theaters altogether. The Court of Appeals suggestion that a city can completely ban a particular form of expression so long as something similar is available is a radical departure from established jurisprudence. It would be like saying that members of the public cannot go to movie theaters because they can watch the same thing on television or cannot attend live entertainment venues because they can watch movies that depict the same sort of entertainment. Justice Kennedy in his concurring opinion in *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 445, 122 S.Ct. 1728, 1739-1740 (2002) held that under the *Renton* test "a city may not regulate the secondary effects by suppressing the speech itself."[10] That is precisely what happened in this case. The Court of Appeals decision is both obvious error and a grave danger to the exercise of free speech rights.

B. This Court Should Grant Discretionary Review Because This Case Involves Significant Issues of Adult Entertainment Zoning Law that Have Never Previously Been Considered by a Washington Court

In support of its motion for summary judgment, the City presented evidence that the Community Commercial and Regional Commercial

[10] Because *Alameda Books* was a plurality decision, Justice Kennedy's concurrence is considered to be the controlling opinion in the case. See *Center for Fair Public Policy v. Maricopa County,* 336 F. 3d 1153, 1160 (9th Cir. 2005).

Districts together comprise 5% of the City's land. CP 4082. It presented evidence that there are currently 4 adult businesses operating in the City including two adult retail establishments, the retail portion of HEB'S business and a nightclub that features nude dancing. Id. All of these businesses were lawfully in existence at the time that City adopted Chapter 19.80 and are currently operating as lawful non-conforming uses. Id.

In support of its motion, the City presented the report of Real Estate Appraiser Bruce Jolicoeur. CP 4042-4078. Mr. Jolicouer conducted a survey all of parcels in Spokane Valley that are legally zoned for "adult entertainment establishments" and "adult retail use establishments". He concluded that that there are currently 45 sites available for adult oriented uses within the city. CP 4044. He opined that, "These 45 sites could accommodate a minimum of 4 and as many as 5 simultaneously located adult-oriented businesses." Id.

In opposing the City's Motion, Defendants' presented the report of Land Use Planners Lee Michaelis and Robert Thorpe. CP4182-4221. They concluded that there are three areas in the City where adult entertainment uses could potentially be located. CP 4191-5197. They consist of a small industrial park, (Area 1), the Spokane Valley Mall, (Area 2), and a commercial strip at the west end of Sprague Avenue.

(Area 3). Id. There are a maximum of 39 properties that meet zoning code requirements within these areas and a maximum of 4 adult uses that can exist simultaneously, given the 1000 foot set back requirement from other adult uses. Id. They pointed out that a majority of the properties in these areas are occupied by existing uses and businesses. CP 4205-4213. Five of the properties are occupied by the Union Pacific Railroad and one is occupied by the Spokane Transit Authority. Id. Additional occupied properties include La Quinta Inn, McDonalds, I-Hop, Wendy's, Nordstrom Rack, Oxford Suites, Walmart, Costco, Home Depot and Big 5 Sporting Goods. Id. **In total, 1.2% of the City's land is available to adult entertainment establishments**. CP 4220.

The Defendants presented the declaration of Commercial Real Estate Broker, Rich Crisler. CP 4317-4323. Mr. Crisler has worked as a commercial real estate broker since 1978 and is familiar with the local market. Id. He was asked to determine which of the properties listed as "viable parcels" in the Jolicouer report are available for rent or sale to an adult entertainment business at present or in the reasonably foreseeable future. Id. Mr. Crisler determined that several of the "viable parcels" were occupied by a single business and in all there were thirty three properties. Id. Four of the thirty-three were vacant land and existing businesses occupy the remaining properties. Id. The existing businesses

included established franchises and big box retailers such as Home Depot, Lowes, and Costco. Id. Mr. Crisler opined that 15 of Jolicoeur's "viable parcels" are occupied by well-established businesses and were unlikely to become available anytime in the reasonably near future. Id.[11]

In general, adult entertainment zoning ordinances are time, place and manner restrictions governed by the *Renton* test. Under this test, a valid regulation must be content neutral, narrowly tailored to further a substantial governmental interest, and leave open alternative avenues of communication. 475 U.S. at 929, 930. Although applicable to only a specific category of speech, regulations of this type are content neutral if they aim to eradicate undesirable secondary effects associated with the speech. Id. The Supreme Court held that municipalities provide adequate alternative avenues of communication so long as they do not deprive adult theaters of a "reasonable opportunity to open and operate an adult theater within the city". 475 U.S. at 54, 106 S. Ct. at 932. However, the Court did not specify what constitutes a "reasonable opportunity to open and operate", leaving that task to the lower courts.

[11] Mr. Chrisler stated, "The basis of my opinion is that these properties are occupied by well established commercial businesses owned by large corporations, the properties are typically leased to subsidiary corporations, the properties were constructed and open for business within the last 7 or 8 years, and the normal length of the leases for big box businesses such as these is 20 to 30 years." CP 4322.

This Court has twice considered First Amendment challenges to adult entertainment zoning ordinances. *Northend Cinema Inc. v. City of Seattle,* 90 Wash. 2d 709, 585 P. 2d 1153 (1978), was decided prior to the *Renton* decision. In that case, the ordinance confined adult motion picture theaters to the city's downtown business district. The plaintiffs in that case failed to present any evidence that adult movie theaters would have a difficult time securing locations within the permitted area and the Court therefore rejected their argument that the ordinance was a prior restraint. Id. at 717. In *World Wide Video, Inc. v. City of Tukwila,* 117 Wash. 2d 382, 816 P. 2d 18 (1991), the Court dealt with a different issue, which was whether the city's adult zoning ordinance was narrowly tailored. The Court held that it was not because it applied businesses that had not been shown to generate the adverse secondary effects that the ordinance was intended to prevent. Neither of these cases dealt specifically with the question of what constitutes a reasonable opportunity to open and operate an adult entertainment business. This Court has never heard a post *Renton* alternative avenues challenge.[12]

[12] The Court of Appeals, Division III, entertained a constitutional challenge to the City of Spokane's adult entertainment zoning ordinance in *World Wide Video v. City of Spokane,* 125 Wash. App. 289, 103 P. 3d 1265 (2005). However, that case did not involve an alternative avenues challenge and the plaintiff presented no evidence of the unavailability of alternative sites.

Much has changed in the law in this area since courts decided *Northend* and *Renton*. There is Justice Kennedy's concurring opinion in *Alameda Books,* which held that the cities could not seek to eradicate secondary effects if the net result of their effort was to diminish speech. 535 U.S. at 445. In addition, the federal courts have developed standards for determining whether the city has met its obligation to provide a reasonable opportunity to open and operate.

In *Topanga Press, Inc. v. City of Los Angeles,* 989 F. 2d 1524 (1993), the Court held that a city is required to provide a reasonable number of relocation sites. The parcel must be part of an actual business real estate market and must be potentially rather than actually available. Id. at 1530, 1531. A relocation site must be available to some generic commercial business although not a particular type of business. Id. A parcel is not part of the relevant real estate market if it is unlikely to become available to any commercial business. Id. at 1532.

In *Lim v. City of Long Beach,* 217 F. 3d 1050 (9th Cir. 2000), the Court of Appeals held that the city has the burden of proving that there is a reasonable opportunity to open and operate. "A city cannot merely point to random assortment of properties and simply assert that they are available to adult businesses." Id. at 1055, 1056. In *Diamond v. Taft,* 215 F. 3d 1052 (9th Cir. 2000), the Court of Appeals held that in situations

were existing businesses are required to close and relocate, the proper measure of sites is the number of adult businesses that can exist simultaneously given the like use set back requirement. In *Young v. Simi Valley,* 216 F. 807 (9th Cir. 2000), the Court held that the test for determining whether there was a reasonable opportunity to open and operate depended on a number of factors, including the percentage of acreage available, the number of sites potentially available in relation to the population, incidence of adult businesses in comparable communities, community needs, and the goals of the city plan. Id. 822.

This Court should grant discretionary review to decide what standard is applicable for determining whether there is a reasonable opportunity to open and operate an adult business. This Court is free to adopt its own reasonable interpretation of *Renton* and *Alameda Books* and is not obligated to follow in lock step with the lower federal courts. On matters of federal law, this Court is bound only by the decisions of the United States Supreme Court. *W.G. Clark Construction Company v. Pacific Northwest Regional Council of Carpenters,* 180 Wash. 2d 54, 62, 322 P. 3d 1207, 1211 (2014). In adopting the appropriate standard, this Court should consider Justice Kennedy's analysis in *Alameda Books,* and look to whether the City's ordinance leaves the "quantity and accessibility

of the speech...substantially undiminished." *Alameda Books, supra,* at 445.

In addition, there is the question of whether the city's zoning ordinance constitutes an impermissible prior restraint subject to enhanced scrutiny under Article 1, Section 5. This case is unlike *Northend Cinema, supra,* where the Court rejected a prior restraint challenge because the plaintiffs failed to show that there would be any difficulty in relocating their businesses to the permitted zone. Here, the evidence suggests that by limiting adult entertainment businesses to 1.2% of the available land in the city, wherein existing businesses occupy most of the properties, including well-established franchises unlikely to relocate any time soon, the City has created an effective ban. See *Ino Ino, Inc. v. City of Bellevue, supra,* 125, 168.

VI. CONCLUSION

This Court should grant discretionary review under RAP13.4(b) because this case presents significant questions of constitutional law. Review should be granted regardless of whether the Court of Appeals decision is unpublished. This case has precedential value in the sense that Cities and Counties throughout the State will consider the Court of Appeals decision and possibly follow it, regardless of whether it may not be cited as precedent.

Dated this 12th day of January, 2016

/s/Gilbert H. Levy
Gilbert H. Levy. WSBA # 4805
Attorney for Petitioners

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of Washington State, that on the 12th day of January, 2016, I caused to be served the foregoing document via Email and U.S. Mail on Menke, Jackson, Beyer LLP, 807 North 39th Avenue, Yakima, WA 98902:

Dated this 12th day of January, 2016

/s/Gilbert H. Levy
Gilbert H. Levy. WSBA # 4805
Attorney for Petitioners

APPENDIX A

FILED
OCTOBER 22, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CITY OF SPOKANE VALLEY, a Washington non-charter city, Respondent, v. BRIAN DIRKS and CHRISTINE DIRKS, husband and wife; and MARESSA DIRKS and JOHN DOE DIRKS, wife and husband; and CA-WA CORP, a California corporation, d/b/a HOLLYWOOD EROTIQUE BOUTIQUE, a/k/a HOLLYWOOD EROTIC BOUTIQUE, Appellants.	)	No. 33140-7-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — This case requires us to examine the applicability of certain licensing and zoning code provisions to Hollywood Erotic Boutique's adult video viewing rooms, and the constitutionality of those provisions. We hold that the licensing and zoning code provisions apply to Hollywood Erotic Boutique's viewing rooms, and that the challenged provisions are constitutional. We, therefore, affirm the trial court's summary judgment order and order of abatement.

FACTS

CA-WA Corp. operates Hollywood Erotic Boutique (HEB), a retail business at 9611 East Sprague Avenue in the City of Spokane Valley. CA-WA leases the premises from members of the Dirks family, who own the property. HEB was formerly operated by World Wide Video of Washington, Inc. CA-WA purchased HEB in 2006.

HEB's retail portion of the store sells sexually explicit DVD's and magazines, as well as adult novelties and lingerie. Since 2002, HEB has also operated six enclosed viewing rooms on the premises where patrons can watch sexually explicit movies for an entrance fee. Five of the viewing rooms are on the second level of the building situated along a continuous corridor. Each viewing room is separated from the corridor by a closed door, is roughly 10 feet by 10 feet, contains multiple plastic chairs for seating people, and a large screen television for viewing movies in the darkened room. Movies play continually. Patrons pay $12 to enter the viewing room area, may remain in the viewing room area for four hours, and are permitted to move from room to room. Patrons cannot control the movies being shown. The screen in each room is connected by a cable to a DVD player. The DVD players for each room are located behind the clerk's counter downstairs and are controlled by a store employee.

In the spring of 2007, a citizen complaint led the City of Spokane Valley to believe that CA-WA was operating an adult entertainment establishment at HEB. The City investigated in May 2007. Code enforcement officer Chris Berg and members of

other city agencies met with the manager of HEB at the business. The manager granted city officials permission to inspect the business. Detective James Wakefield inspected the second floor area. In addition to observing the closed viewing rooms as described above, he also observed persons in the rooms masturbating.

After the inspection, all agency personnel who were present agreed that an adult entertainment arcade was being operated on the second floor of HEB. We will later provide Spokane Valley's definition of "adult entertainment arcade." Mr. Berg informed the manager that HEB was licensed for retail sales, and to continue to operate the viewing rooms, HEB needed to obtain an adult entertainment establishment license through the City. The manager agreed to shut down the viewing rooms until a license could be obtained. HEB did not obtain an adult entertainment establishment license and eventually reopened the viewing rooms.

More site visits occurred over the next several years. Detective Wakefield continued to report on the activities at HEB. His reports show that viewing rooms generally contained one, two, or three men engaging in masturbation, although one report reflects five men and one woman, with all but two men engaged in masturbation. The City also documented Internet postings for sexual encounters at HEB.

Over the course of the multi-year investigation, the City exchanged correspondence with CA-WA. Director of Operations Darryl Richardson denied that HEB's activities required it to be licensed as an "adult entertainment establishment" as

defined by the Spokane Valley Municipal Code (SVMC). In May 2012, the City filed a complaint against CA-WA and the Dirks for declaration of a public nuisance, code violations, and a warrant of abatement. The complaint was aimed only at the viewing rooms, not at HEB's first floor adult retail business.

Historical County and City Adult Entertainment Regulations. HEB began its adult retail business in 1999 and the viewing rooms in 2002, prior to the City incorporating in March 2003. We, therefore, examine the pertinent adult entertainment regulations in effect prior to the City's incorporation.

In 1999, 9611 East Sprague was within unincorporated Spokane County and subject to the Spokane County Code (SCC). Spokane County prohibited operation of an adult entertainment establishment without a valid license.

The County also regulated zoning of adult entertainment establishments. Adult bookstores and adult entertainment establishments were allowed in the B-3 zone under chapter 14.628 SCC, but not if within 1,000 feet of property zoned UR-22, UR-7, and/or U/R 3.5. 9611 East Sprague was rezoned to B-3 on January 11, 1999. The parcel was within 1,000 feet of property zoned UR-22. Nevertheless, HEB established its retail sales operation on this parcel later in 1999.

The County amended its zoning code in September 1999. The 1999 amendment separated adult retail establishments from adult bookstores. The resolution also made the definition of "adult entertainment establishment" the same as the definition found in

chapter 7.80 SCC in the County licensing code. Section 7.80.040 contains the following definitions:

> "Adult arcade device," sometimes also known as a "panoram," "preview," "picture arcade," "adult arcade," or "peep show," means any device which, for payment of a fee, membership fee, or other charge, is used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, or live adult entertainment *in a booth setting*. All such devices are denominated under this chapter by the term "adult arcade device." The term "adult arcade device" as used in this chapter does not include other games which employ pictures, views, or video displays, or gambling devices which do not exhibit or display adult entertainment.
>
> "Adult arcade establishment" means a commercial premises to which a member of the public is invited or admitted and where adult arcade stations, booths, or devices are used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, or live adult entertainment *in a booth setting* to a member of the public on a regular basis or as a substantial part of the premises activity.
>
> "Adult arcade station" or "booth" means an enclosure where a patron, member, or customer would ordinarily be positioned while using an adult arcade device or viewing a live adult entertainment performance, exhibition, or dance *in a booth*. Adult arcade station or booth refers to the area in which an adult arcade device is located and from which the graphic picture, view, film, videotape, digital display of specified sexual activity, or live adult entertainment is to be viewed. These terms do not mean such an enclosure that is a private office used by an owner, manager, or person employed on the premises for attending to the tasks of his or her employment, if the enclosure is not held out to any member of the public for use, for hire, or for a fee for the purpose of viewing the entertainment provided by the arcade device or live adult entertainment, and not open to any person other than employees.
>
> "Adult entertainment establishment" collectively refers to adult arcade establishments and live adult entertainment establishments, as defined herein.

CP at 241 (italics added to "booth" or "booth setting" for future references). These definitions were in place in 2002, when HEB began operating its viewing rooms.

Upon incorporation in March 2003, the City adopted the County zoning regulations as the City's interim regulations. In 2007, the City adopted chapter 19.80 SVMC to replace the provisions of the adult entertainment zoning ordinance. According to SVMC 19.80.010, the City's intent in adopting chapter 19.80 SVMC was to "protect the general public health, safety and welfare of the citizenry of the City of Spokane Valley through the regulation of operations and licensing of the adult entertainment devices, premises and personnel of adult entertainment establishments." SVMC 19.80.020 stated that the licensing requirements of adult uses were contained in chapter 5.10 SVMC. SVMC 19.80.030(B) prohibits adult uses within 1,000 feet of public libraries, public playgrounds and parks, public or private schools kindergarten to twelfth grade, nursery schools, mini-day care centers, day care centers, places of religious worship, and any other adult use. In addition, SVMC 19.80.030(C) prohibits adult uses within 1,000 feet of areas zoned Single-Family Residential Estate districts (R-1), Single-Family Residential Suburban districts (R-2), Single-Family Residential districts (R-3), Single-Family Residential Urban districts (R-4), Multifamily Medium Density Residential districts (MF-1), Multifamily High Density Residential districts (MF-2), Mixed Use Center districts (MUC), Corridor Mixed Use districts (CMU), City Center districts (CC), or Neighborhood Commercial districts (NC). Because 9611 East Sprague

was zoned CMU, adult entertainment establishments were not allowed where HEB was located, unless HEB qualified as a lawful nonconforming use.

In 2010, the City changed its adult entertainment licensing code, repealing the prior version of chapter 5.10 SVMC and replacing it with new regulations. The City found the new regulations were necessary to protect the public. The City based this determination on studies and police reports demonstrating the adverse impacts generated by adult entertainment businesses, including public sexual conduct, possible spread of sexually transmitted disease, prostitution, and other criminal conduct.

Just as in prior versions, the 2010 version of SVMC 5.10.020 required a license for operation of an adult entertainment establishment. Additionally, the new ordinance stated that an adult entertainment license would not be issued for operation of an adult entertainment establishment in a location that does not meet the zoning requirements set forth in chapter 19.80 unless otherwise exempt. SVMC 5.10.040(A)(9).

The new licensing ordinance contained definitions that were similar to the prior definitions in the code, except that references to "booth" and "booth setting" were eliminated. The 2010 definitions still listed an adult arcade establishment as a type of adult entertainment establishment. SVMC 5.10.010. For "adult arcade establishment," "adult arcade device," and "adult arcade station" the 2010 SVMC definitions state:

> "Adult arcade device," sometimes also known as a "panoram," "preview," "picture arcade," "adult arcade," or "peep show," means any device which, for payment of a fee, membership fee or other charge, is used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activities or sexual conduct. All such devices are denominated under this chapter by the term "adult arcade device." The term "adult arcade device" as used in this chapter does not include other games which employ pictures, views, or video displays, or gambling devices which do not exhibit or display adult entertainment.
>
> "Adult arcade establishment" means a commercial premises, or portion of any premises, to which a member of the public is invited or admitted *and where adult arcade stations or adult arcade devices* are used to exhibit or display a graphic picture, view, film, videotape, or digital display of a [sic] *specified sexual activities or sexual conduct* to a member of the public *on a regular basis or as a substantial part of the premises activity.*
>
> "Adult arcade station" means any enclosure where a patron, member, or customer would ordinarily be positioned while using an adult arcade device. Adult arcade station refers to the area in which an adult arcade device is located and from which the graphic picture, view, film, videotape, digital display of specified sexual activities or sexual conduct is to be viewed. These terms do not mean such an enclosure that is a private office used by an owner, manager, or person employed on the premises for attending to the tasks of his or her employment, if the enclosure is not held out to any member of the public for use, for hire, or for a fee for the purpose of viewing the entertainment provided by the arcade device, and not open to any persons other than employees.

SVMC 5.10.010 (italics added for ease of future reference in analysis of these provisions). SVMC Appendix A includes substantially similar definitions. Appendix A directs that undefined terms be construed as defined in *Webster's New Collegiate*

Dictionary.[1] HEB has never possessed a license to operate an adult entertainment establishment, whether before or after the City incorporated in March 2003.

Proceedings in Trial Court. In 2012, the City filed a motion for summary judgment for declaration of public nuisance, code violations, and warrant of abatement. CA-WA responded to the City's motion and also filed its own cross motion for partial summary judgment. CA-WA asked the court to find that HEB was a lawful nonconforming use under the SVMC. Also, CA-WA argued, and the City agreed, that an order of abatement would be premature until the constitutionality of the ordinances could be analyzed.

On April 5, 2013, the trial court entered an order declaring HEB's viewing room activities a public nuisance in violation of SVMC 5.10.020(A) and SVMC 19.80.030(C). The court denied CA-WA's cross motion for partial summary judgment.

In a written opinion, the court noted that HEB was in operation prior to City incorporation, so chapter 7.80 SCC applied to HEB. The court determined that the viewing rooms qualified as an adult entertainment establishment under the definitions in SCC 7.80.040 because (1) HEB used a DVD player to display a graphic picture screen to

[1] The County code did not contain a similar directive. We note that there is no such dictionary as "Webster's New Collegiate Dictionary," but there are numerous editions of *Merriam-Webster's Collegiate Dictionary*. We will use the 11th edition, published in 2003, since that was the newest edition at the time of the 2010 ordinance amendments.

six separate theaters of specified sexual activity for the cost of a fee by the invited public, (2) DVD players are devices as contemplated by the code that were used to exhibit or display, on a commercial premises, where the public was admitted for a fee and could watch, and (3) HEB ran these viewing rooms during its business hours, equating to a regular or substantial basis. The trial court also determined that because HEB was not licensed under the County licensing requirements, nor could it be because it was within 1,000 feet of a disqualifying zone, HEB was not a lawful nonconforming use. The trial court further determined that because HEB could not obtain an adult entertainment license at its present physical location, it did not have standing to challenge the licensing requirements of chapter 5.10 SVMC.

The remaining issue for the trial court was whether chapter 19.80 SVMC denied CA-WA a reasonable opportunity to open and operate an adult entertainment business. After a period of discovery, the City filed a motion for summary judgment on the constitutionality of the zoning code. One part of the issue was whether alternative avenues of communication remained available under the challenged zoning regulation. The City supported its summary judgment motion with a list of parcels lawfully zoned for adult entertainment uses. The City's expert, Bruce Jolicoeur, determined that there were 54 available relocation parcels, none of which were in an industrial or manufacturing zone and all of which were commercially zoned. Mr. Jolicoeur then excluded 9 of these parcels as lacking road frontage, leaving 45 relocation sites.

The City also presented a declaration from land use planning consultant Reid Shockey. Mr. Shockey concluded, among other things, that 5.0 percent of Spokane Valley's acreage was available for adult entertainment establishments.

City planning manager Scott Kuhta stated in his declaration that there were four adult businesses in the geographic area incorporated into Spokane Valley. All of these businesses were lawful at the time of incorporation and had valid nonconforming use rights. A fifth adult retail business closed sometime between 2003 and 2004. Mr. Kuhta stated that the number of adult businesses has remained steady considering that no new applications have been filed.

In response, CA-WA presented a declaration and report from land use planners Lee Michaelis and Robert Thorpe. The report identified 39 properties within Spokane Valley that could be used as adult businesses. The majority of these properties were occupied by existing businesses. Five of the properties were occupied by the railroad and one by the Spokane Transit Authority. Others were occupied with large retailers, restaurants, or hotels. The report identified 1.2 percent of the City land available for adult entertainment establishments.

Real Estate broker Rich Crisler also provided a declaration for CA-WA. Mr. Crisler offered his opinion as to whether the owners of the various sites were likely to make their land available to adult businesses. Mr. Crisler asserted that four of the properties were vacant land and the majority of the remainder were occupied by existing

businesses. Additionally, Mr. Crisler contended that 15 of the parcels identified by Mr. Jolicoeur were occupied by well-established businesses and were unlikely to become available within the reasonably foreseeable future.

On December 20, 2013, the trial court granted the City's motion and issued a warrant of abatement. The court determined that no genuine issue of material fact existed as to the adequacy of the alternative avenues of communication for CA-WA to open and operate an adult entertainment establishment within the City. The court also determined that the City was entitled to summary judgment as a matter of law on CA-WA's counterclaims, including the constitutionality of chapter 5.10 SVMC and/or chapter 19.80 SVMC. The trial court concluded that the City was entitled to a warrant of abatement pursuant to chapter 7.48 RCW for CA-WA's unlawful adult entertainment establishment at HEB, as defined by chapter 5.10 SVMC.[2]

CA-WA appeals. CA-WA contends that (1) HEB's viewing rooms are a lawful nonconforming use, (2) HEB's viewing rooms are not subject to the licensing requirements of chapter 5.10 SVMC because the viewing rooms do not fall within the definition of "adult entertainment establishment," (3) HEB has standing to challenge chapter 5.10 SVMC, and (4) SVMC's adult entertainment licensing and zoning regulations are unconstitutional.

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[2] The court's order exempted HEB's adult retail activities.

ANALYSIS

On appeal, orders of summary judgment are reviewed de novo. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). This court reviews the material in the same manner as the trial court and in the light most favorable to the nonmoving party. *Morris v. McNichol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974).

A moving party is entitled to summary judgment if there are no material issues of fact and judgment should be entered as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Morris*, 83 Wn.2d at 494. The burden of showing that there is no material issue of fact is on the moving party. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). "Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact." *Id.* Summary judgment should be granted only if reasonable persons can reach but one conclusion. *Id.*

1. Whether HEB's viewing rooms are a lawful nonconforming use

CA-WA contends that HEB's viewing rooms are a lawful nonconforming use and therefore are not subject to the licensing and zoning requirements of SVMC. CA-WA

maintains that the Spokane County Code in place when HEB began operating its viewing rooms did not apply to (and therefore did not prohibit) multi-occupancy viewing rooms.

Municipal ordinances are interpreted using the same rules as statutes. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). Statutes are to be read in pari materia, meaning that statutes relating to the same subject matter must be construed together as constituting a unified whole. *Hallauer v. Spectrum Prop. Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). If a statute is ambiguous, the courts must construe the statute as to effectuate its legislative intent, while avoiding a literal reading if it would result in unlikely, absurd, or strained consequences. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Zoning ordinances are in derogation of common law and must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose. *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956).

A nonconforming use is defined in the City's code. SVMC 19.20.060(A) provides in part that any use that does not conform to the present regulations of the zoning district shall be deemed a nonconforming use if it was in existence and in continuous use and lawful operation prior to the regulations. A nonconforming use is allowed to continue indefinitely provided that the use is not discontinued or abandoned. SVMC 19.20.060(B). *But see* SVMC 5.10.150 (requiring lawfully operating adult entertainment establishments to conform to 2010 licensing revisions within 90 days).

When HEB began operating its viewing rooms, it was governed by Spokane County's regulations on adult entertainment establishments. One type of adult entertainment establishment under the SCC was an adult arcade establishment. SCC 7.80.040. The SCC defined an "adult arcade establishment" as "a commercial premises to which a member of the public is . . . admitted and where *adult arcade stations, booths, or devices* are used to exhibit or display a graphic . . . videotape, or digital display of specified sexual activity . . . *in a booth setting* to a member of the public on a regular basis or as a substantial part of the premises activity." SCC 7.80.040 (emphasis added).

The SCC defined "adult arcade station" as "an enclosure where a patron . . . would ordinarily be positioned while using an *adult arcade device . . . in a booth.*" SCC 7.80.040 (emphasis added). The definition explicitly excepted from its coverage a private office used by an owner, manager, or employee not held out for use by the public. The SCC defined an "adult arcade device" as "any device which, for payment of a fee . . . is used to exhibit or display a graphic . . . videotape, or digital display of specified sexual activity . . . *in a booth setting.*" SCC 7.80.040.

CA-WA contends that HEB's viewing rooms are not "booths" because the rooms allow for multiple people. *Webster's Third New International Dictionary* defines "booth" as

> **2a:** a temporary structure . . . **b:** a totally or partially enclosed structure often inside a building; *esp*: a small enclosure designed to hold one person at a time usu. to afford privacy or to separate its occupant from patrons or customers . . . **3:** an enclosure of varying size and construction designed to isolate an area and to prevent the functions carried on within it from being interfered with by the surrounding area.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 254 (1993). *Webster's* therefore defines "booth" in a manner that may, but need not, refer to a single-occupancy space.

We therefore must interpret "booth" to effectuate the County's intent. We note that the County sought to regulate a booth, not a theater. We surmise the County's intent was to regulate lewd activities which are more likely to occur in a semi-private space than a semi-public space. The record before us establishes that lewd activities are just as likely to occur in rooms with two or three persons as rooms with only one person. For this reason, we determine that "booth" is not limited to a one-person space. Although CA-WA contends that HEB's viewing rooms allow up to 10 occupants, the record establishes that the rooms typically had only one, two, or three persons in them, thus encouraging lewd conduct because of the room's semi-privacy. We, therefore, determine that HEB's multi-person viewing rooms come within SCC's definition of adult entertainment establishments.

Because HEB did not have a license from Spokane County to operate such a business, it is not a lawful nonconforming use. *See First Pioneer Trading Co. v. Pierce County*, 146 Wn. App. 606, 617, 191 P.3d 928 (2008). In addition, HEB's operation of

an adult entertainment establishment in a B-3 zone was not lawful because it was located within 1,000 feet of property zoned UR-22. Because HEB's viewing rooms were not a lawful operation prior to the existence of the SVMC, HEB's viewing rooms are not a lawful nonconforming use under SVMC 19.20.060(A).

2. *Whether HEB's viewing rooms are subject to the licensing requirement of chapter 5.10 SVMC.*

CA-WA puts forth two arguments why chapter 5.10 SVMC should not apply to HEB's viewing rooms. First, CA-WA contends that chapter 5.10 SVMC should be construed to apply only to enclosures which accommodate a single patron. In support of this argument, CA-WA cites SVMC 5.10.080(C)(6), which allows for only one person in an adult arcade station. SVMC 5.10.080(C)(6) provides:

> 6. No adult arcade station may be occupied by more than one person at any time. Any chair or other seating surface within an adult arcade station shall not provide a seating surface of greater than 18 inches in either length or width. Only one such chair or other seating surface shall be placed in any adult arcade station.

The definitions for adult arcade establishment, adult arcade station, and adult arcade device in chapter 5.10 SVMC are substantially similar to the definitions in SCC 7.80.040. The primary difference is that the SVMC definitions omit references to "booth" or "booth setting." As stated in the analysis of SCC 7.80.040, the definitions did not limit the occupancy in each booth to a single person. The removal of "booth" or

"booth setting" further clarifies that the City intended to regulate lewd conduct beyond that which might occur in a single-occupant enclosure.

The interpretation of "adult entertainment establishment," which includes adult arcade establishments, does not change when read in conjunction with the requirement of SVMC 5.10.080(C)(6) that adult arcade stations be limited to one person. SVMC 5.10.080(C)(6) limits the number of occupants permitted in the enclosure, but does not change the definition of adult entertainment establishment. Instead, SVMC 5.10.080(C)(6) is merely a requirement that the adult arcade establishment must meet to obtain and retain its license.

CA-WA's second argument is that the definition of "adult arcade station" refers to "an area in which an adult arcade device is located," and HEB's viewing rooms do not contain the adult arcade device, i.e., the projector or DVD player. HEB's argument is not well taken. "Adult arcade device" includes a large television screen, one of which is in each viewing room, because the large television screen is a device used to display graphic videotapes or films.

Moreover, CA-WA's contention that HEB's small, enclosed, multi-occupant viewing rooms are outside the scope of the regulations leads to an absurd outcome. Under this interpretation, an operator of adult arcade devices can simply add a second chair to the small partitioned enclosure and evade regulation. This outcome misses the City's intent to regulate the lewd conduct that occurs in a small semi-private room where

sexually explicit videos are shown. Thus, chapter 5.10 SVMC encompasses HEB's multi-occupant viewing rooms.

3. Whether HEB has standing to challenge chapter 5.10 SVMC

CA-WA contends that the trial court erred in determining that HEB lacked standing to challenge chapter 5.10 SVMC. The trial court determined that because HEB's operations are not located on a parcel which it could lawfully operate in accordance with City zoning requirements, that HEB lacked standing to challenge the constitutionality of chapter 5.10 SVMC. CA-WA argues that special standing rules apply to constitutional challenges based on claims of vagueness, over breadth, and impermissible prior restraint, and it can raise these challenges even though it cannot claim it has been affected by the features which it claims are unconstitutional. In support of its argument, CA-WA cites *Ramm v. City of Seattle*, 66 Wn. App. 15, 830 P.2d 395 (1992), *O-Day v. King County*, 109 Wn.2d 796, 749 P.2d 142 (1988), *City of Tacoma v. Luvene*, 118 Wn.2d 826, 827 P.2d 1374 (1992), *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993), *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 891 P.2d 720 (1995), and *Clark v. City of Lakewood*, 259 F.3d 996g (9th Cir. 2001). The City does not directly respond to CA-WA's argument. We therefore will assume for purposes of our analysis that HEB has standing to make facial challenges to the City's licensing ordinance.

4. Whether the City's licensing and zoning ordinances are constitutional

CA-WA asserts various constitutional arguments. As it relates to the City's licensing ordinance, CA-WA makes federal and state facial challenges pertaining to vagueness, over breadth, and prior restraint. As it relates to the City's zoning ordinance, CA-WA argues, under the *Renton*[3] test, that the zoning ordinance is not narrowly tailored (or is over broad), and does not allow for a reasonable opportunity to operate an adult business. In addition, CA-WA argues that the zoning ordinance amounts to a prior restraint under the Washington Constitution.

The City responds by combining the licensing and zoning challenges together, by providing an overview of federal and state constitutional free speech decisional law applicable to sexually oriented businesses, and then addressing the specific issues raised by CA-WA. Because the City does not argue that CA-WA lacks standing to challenge the licensing ordinance, we address CA-WA's challenges to the City's licensing ordinance.

a. *The* Renton *test applied to the City's licensing and zoning ordinances*

Filmed materials showing sexually explicit conduct are pure speech for the purposes of the First Amendment. *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 388, 816 P.2d 18 (1991). Federal law provides the basis for protection of First

[3] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

Amendment speech rights, with necessary consideration given to the greater protections of article I, section 5 of the Washington Constitution when appropriate. *Id.* at 387. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) is the seminal case which sets forth the analytical framework for determining whether a court must apply strict or intermediate scrutiny to the ordinance.

> First, the ordinance cannot be a complete ban on the protected expression. Second, the ordinance must be content-neutral or, if content-based with respect to sexual and pornographic speech, its predominate concern must be the secondary effects of such speech in the community. [And if the first two steps are met], [t]hird, the regulation must pass intermediate scrutiny. It must serve a substantial government interest, be narrowly tailored to serve that interest, and allow for reasonable alternative avenues of communication.

Fantasyland Video, Inc. v. County of San Diego, 505 F.3d 996, 1001 (9th Cir. 2007) (citations omitted).

1. <u>*Not a complete ban*</u>: The first step is whether the City's adult entertainment regulations are "a complete ban on the protected expression." *Id.* Here, neither the zoning regulations nor the licensing regulations are a complete ban. Adult entertainment establishments are allowed in the City, albeit with restrictions. CA-WA does not argue that the restrictions ban adult entertainment establishments altogether. The City's zoning and licensing regulations on adult entertainment pass the first prong under *Renton*.

2. *Content neutral*: The second step requires that "the ordinance must be content-neutral or, if content-based with respect to sexual and pornographic speech, its predominate concern must be the secondary effects of such speech in the community." *Id.* Regulations aimed at controlling the secondary effects of adult entertainment establishments are content neutral. *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1191 (9th Cir. 2004). Courts look to the primary motivation behind the regulation to determine whether the purpose is to remedy the secondary effects associated with sexually oriented businesses. *See id.* Regulations that are designed to combat the undesirable secondary effects of adult entertainment businesses are analyzed as time, place, and manner regulations. *Renton*, 475 U.S. at 46.

Here, the record shows that the City's concern for the secondary effects of the adult entertainment establishments was the primary motivation for enacting both the licensing and the zoning regulations. The record establishes that for the 2010 licensing regulations and the 2007 zoning regulations, the City engaged in a careful review of a variety of materials when considering the secondary effects of adult businesses. The record also contains letters from citizens and police reports that document the unwanted secondary effects from adult businesses specifically in the City of Spokane Valley. These secondary effects include loitering in the area around the businesses, discarding used and contaminated "toys," using private areas of neighboring businesses to have sex,

an increase in crime, multiple incidents of masturbation within the establishment, and observations of prostitution.

The City regulations are explicitly intended to combat the secondary effects of adult entertainment establishment's speech, not to suppress the speech itself. CA-WA presents no evidence that would call this motivation into doubt. Because the regulations are intended to combat the secondary effects of adult entertainment establishments, the regulations are content neutral. Therefore, the City's licensing and zoning regulations of adult entertainment pass the *Renton* test.

3. *Intermediate scrutiny*: The final step requires the regulation to pass intermediate scrutiny. "An ordinance aimed at combating the secondary effects of a particular type of speech survives intermediate scrutiny 'if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication.'" *World Wide Video*, 368 F.3d 1192 (quoting *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1166 (9th Cir. 2003)).

A. *Substantial government interest.* A local government has a substantial interest in attempting to preserve the quality of urban life. *Renton*, 475 U.S. at 50. Specifically, a city has a substantial interest in curbing the secondary effects associated with adult entertainment establishments. *Maripoca County*, 336 F.3d at 1166. For instance, reducing unlawful public sexual activity is a proper concern associated with

the regulation of sexually oriented businesses. *Id.* Additionally, courts have found a substantial interest unrelated to expression in the presence of "[r]ampant masturbation at a commercial property open to the public" because this "may rationally trigger sanitation concerns and impair the right of other patrons to view their materials or read the accompanying articles in peace." *Fantasyland Video*, 505 F.3d at 1003. The "'elimination of pornographic litter, by itself, represents a substantial governmental interest, especially as concerns the protection of minors.'" *World Wide Video*, 368 F.3d at 1195 (quoting *World Wide Video of Wash., Inc. v. City of Spokane*, 227 F. Supp. 2d 1143,1157-58 (E.D. Wash. 2002), *aff'd*, 368 F.3d 1186.

A city is not required to conduct its own study in order to justify a regulation designed to combat the secondary effects of an adult business. *World Wide Video*, 368 F.3d at 1193. A city can rely on evidence produced by other cities if the evidence is relevant to the problem that the city intends to address. *Id.* at 1192. However,

> "The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."

Id. at 1193 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002)) (plurality opinion).

Here, the City had a substantial interest in controlling the secondary effects of the adult entertainment establishments, including public sexual activity. The City produced evidence that justified the need for such regulation. As previously discussed, the record contains indications of pornographic litter, sexual conduct in public places, and increased criminal behavior. Neighboring business owners have observed sexual conduct in vehicles parked adjacent to HEB and used condoms have been found in the parking lots around HEB. CA-WA has not presented evidence to cast doubt on the City's rationale for the regulations.

Additionally, the methods chosen by the City are designed to serve the government interest. Requiring adult businesses to be located in a zone away from places where children gather, such as parks, schools, and churches, serves the purpose of protecting the City from public sexual activity and works to preserve the quality of urban life. The secondary effects that occur both inside and outside of HEB are a substantial government interest for the City to regulate.

B. *Narrowly tailored.* The second prong of intermediate scrutiny asks whether the regulation is "narrowly tailored" to serve the purported government interest. *Fantasyland Video*, 505 F.3d at 1001. This test requires demonstrating that the "'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' and 'the means chosen are not substantially broader than necessary.'" *Id.* at 1004 (internal quotation marks omitted)

(quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)).

"A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech." *Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring). "The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest." *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)).

The necessity for legislation need not be proved absolutely. *Adult Entm't Ctr., Inc. v. Pierce County*, 57 Wn. App. 435, 439, 788 P.2d 1102 (1990). Governments are given broad latitude in experimenting with possible solutions to problems of vital concern. *Id.* Ordinances are not invalid "'simply because there is some imaginable alternative that might be less burdensome on speech.'" *Ward*, 491 U.S. at 797 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985)).

The City's zoning regulations for adult entertainment uses are narrowly tailored to serve the government interest. The regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Without zoning restrictions on where an adult entertainment establishment can be located, the government interest in

reducing the secondary effects of these adult businesses would not be met. By limiting these businesses to areas away from areas where the public congregates, the City can limit the secondary effects of unsanitary situations and pornographic litter, especially as it concerns the protection of minors. The zoning regulations preserve the quality of urban life.

In addition, the City's licensing regulations are narrowly tailored to serve the government interest. The regulations prohibit more than one person in any arcade station or enclosure, and generally set forth limitations where a store manager can assure that patrons do not engage in lewd acts while viewing sexually explicit videos.

CA-WA does not contend that the zoning or licensing regulations will not have this desired effect. Instead, CA-WA argues that the zoning regulations are not narrowly tailored because the regulations encompass other businesses that do not produce adverse secondary effects targeted by the City. For instance, CA-WA contends that the definition for adult arcade establishment applies to ordinary movie theaters where sexually explicit activities or conduct are not the predominant theme of the movie, and to hotels and motels that provide sexually oriented movies to guests on closed circuit televisions. Thus, CA-WA maintains that the means chosen are substantially broader than necessary.

CA-WA's argument mixes questions of over breadth with narrowly tailored. The difference between over breadth and narrowly tailored is whether the regulation is challenged as it applies or on its face. *See Taxpayers for Vincent*, 466 U.S. at 808-10.

"Narrowly tailored" is part of a constitutional challenge that looks at the regulation as applied to the person subject to the ordinance. *See id.* at 803-09. The question is whether the restriction on *the person's* expressive activity is substantially broader than necessary to protect the City's interest in eliminating the secondary effect. *Id.* at 808.

Over breadth is a facial challenge that looks at whether a regulation is written so broadly that it may inhibit the constitutionally protected speech of third parties. *Id.* at 800-01. The doctrine considers that some regulations may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. *Id.* "'Thus, a person whose activity could validly be suppressed under a more narrowly drawn law is allowed to challenge an overbroad law because of its application to others.'" *Id.* at 800 n.19 (quoting John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 425 (1983)). Thus, over breadth usually involves standing issues, as "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on over breadth grounds." *Id.* at 801.

Here, CA-WA does not argue that any portion of the licensing or zoning regulation is not narrowly tailored to its own activities. Rather, CA-WA presents a facial challenge, arguing that parties not before this court—ordinary movie theaters, hotels, and motels—are regulated by the ordinance, and that the ordinance is overly broad because

there is no evidence that such entities contribute to the secondary effects which the ordinances seek to reduce.

Even if a facially over broad challenge was pertinent to the *Renton* test, and we do not believe it is, the challenge would fail. We do not construe ordinary movie theaters, hotels, and motels as being within the definition of "adult entertainment establishment." As mentioned previously, "adult entertainment establishment" includes an "adult arcade establishment." For a business to be an "adult arcade establishment," it must operate an adult arcade station or adult arcade device which is used to display "*specified sexual activities*" or "*sexual conduct*" *on a* "*regular basis*" *or as a* "*substantial part of the premises activity*." SVMC Appendix A; SVMC 5.10.010 (emphasis added). "Specified sexual activities" is defined as (1) human genitals in a state of sexual stimulation or arousal; (2) acts of human masturbation, sexual intercourse, sodomy, oral copulation, or bestiality; or (3) foundling or other erotic touching of human genitals, pubic region, buttocks or female breasts. SVMC 5.10.010. "Sexual conduct" is defined as (1) sexual intercourse within its ordinary meaning, occurring upon any penetrations, however slight; or (2) a penetration of the vagina or anus, however slight, by an object; or (3) a contact between persons involving the sex organs of one person and the mouth or anus of another; or (4) masturbation, manual or instrumental, of oneself or of one person by another; or (5) touching of the sex organs, anus, or female breasts, whether clothed or unclothed, of oneself or of one person by another. SVMC 5.10.010.

The above interplay of definitions convinces us that an ordinary movie theater is not an adult entertainment establishment. The record is devoid of any evidence suggesting that ordinary movie theaters regularly feature films with that type of sexual activity or sexual conduct described within the definition. Nor does this description apply to hotels or motels. The record is similarly devoid of any evidence that televisions within hotel or motel rooms which permit closed-circuit viewing of pornography are actually used for such purposes on a *regular basis*.[4] Mere allegations are insufficient to create a genuine issue of material fact.

C. *Alternative avenues of communication.* The final prong of intermediate scrutiny inquires whether alternative avenues of communication remain available under the challenged regulation. *Fantasyland Video*, 505 F.3d at 1001. This prong analyzes whether local zoning restrictions that affect sexually oriented businesses nevertheless allow such businesses "a reasonable opportunity to open and operate." *Renton*, 475 U.S. at 54.

A city has the initial burden of producing a list of potential relocation sites that reflects the relevant zoning restrictions. *Tollis, Inc. v. County of San Diego*, 505 F.3d 935, 941 (9th Cir. 2007). The burden then shifts to the affected party to demonstrate that the city's list included unavailable sites or was compiled in the absence of reasonableness

[4] "Regular" in this context, means "recurring . . . at fixed, uniform, or normal intervals." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1048 (11th ed. 2003).

and good faith. *Id.* After a list of potential sites is determined, the issue becomes assessing whether the market contains a sufficient number of potential relocation sites for the adult business. *Id.* at 942. The initial calculation of available relocation sites is a factual issue and the sufficiency of the sites for allowing adult expression is a question of law. *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1333-35 (11th Cir. 2000).

For a site to be a considered a sufficient location, "it 'must be considered part of an actual business real estate market for commercial enterprises generally.'" *Tollis*, 505 F.3d at 941 (quoting *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000)). "If in an industrial or manufacturing zone, the site must be 'reasonably accessible to the general public,' 'have a proper infra-structure,' and be suitable for 'some generic commercial enterprise.'" *Id.* (quoting *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir. 1993)). "Finally, the list must account for other relevant zoning restrictions, such as separation requirements, that might affect a site's availability." *Id.* "[T]he economic feasibility of relocating to a site is not a First Amendment concern." *David Vincent*, 200 F.3d at 1334.

A city is not required to make a certain number of sites available for relocation. *Diamond v. City of Taft*, 215 F.3d 1052, 1056 (9th Cir. 2000). To determine if there are a sufficient number of available sites, courts usually look at either the percentage of land within the city available to businesses, or the number of sites compared with the number of adult businesses currently in existence or seeking to open. *Id.* at 1056-57.

CA-WA contends that summary judgment was not appropriate on the alternative avenues of communication prong because a genuine issue of material fact exists as to whether the City presented a reasonable number of potential relocation sites for HEB. CA-WA maintains that nearly one-half of the sites identified by the City were not likely to become available for generic business use in the near future because the property was in a rail yard or taken by a well-established business. Five of the properties were occupied by the railroad and one by the Spokane Transit Authority. Additionally, CA-WA contends that nearly all of the sites the City listed as available were occupied.

The trial court did not err in granting summary judgment. The City presented 54 sites that it found to be available for relocation after making the appropriate deductions for industrial/manufacturing zones and lack of access. In comparison, CA-WA's number of available sites was not much different. CA-WA's experts found 39 properties that met zoning and set back requirements. Thus, for purposes of summary judgment, the parties agreed that at least 39 potential relocation sites existed.

CA-WA's argument that the majority of the parcels were occupied does not necessarily make the parcels unavailable. Parcels only have to be potentially available, not actually available. *McKibben v. Snohomish County*, 72 F. Supp. 3d 1190, 1205, (W.D. Wash. 2014). "[T]he mere fact that a site is currently occupied or not currently for sale or lease does not render it unavailable." *Id.* However, evidence of a long term lease may exclude a potential site from the available market if the plaintiff provides evidence

regarding the length of the lease. *Id.* To designate an occupied business as unavailable, the affected party must offer "sufficient evidence to show that these sites would not reasonably become available to any commercial enterprise." *Diamond*, 215 F.3d at 1056.

CA-WA's declaration from Mr. Crisler was not sufficient to establish that the property would be unavailable to any commercial enterprise. Mr. Crisler determined site availability by obtaining the property profiles from a METROSCAN, talking to the property owner, and visiting the property. Based on the information he gathered, Mr. Crisler rendered his opinion as to which of the sites was subject to a long-term lease and which was unlikely to become available for lease or sale in the reasonable foreseeable future. However, Mr. Crisler's opinion is insufficient to establish that these properties are not part of the relevant commercial market. He did not present the length of leases or indicate how far into the future the owner's intentions not to sell extended. Current occupancy alone is not grounds for unavailability. The 39 sites identified by CA-WA and the City are part of the relevant market for commercial enterprises. The 39 available sites allowed CA-WA a sufficient opportunity to relocate. We conclude that the City's licensing and zoning ordinances satisfy First Amendment concerns under the *Renton* analysis.

b. *Whether the City's ordinances are a prior restraint*

1. *Examination of licensing ordinances SVMC 5.10.080(C)(6) and SVMC 5.10.080(D)(3)*

CA-WA contends that two of the City's licensing ordinances constitute a prior restraint because one or both effectively puts adult theaters and its viewing rooms out of business. SVMC 5.10.080(C)(6) requires adult arcade stations to be limited to one occupant, and SVMC 5.10.080(D)(3) requires all adult arcade stations to be "open to the public room so that the area inside is fully and completely visible to the manager." The City responds that adult theaters are not within the scope of chapter 5.10 SVMC because "enclosure," within the definition of "adult arcade station," should be construed broader than single occupancy, but narrower than a semi-public area.

We reject the City's argument. A business is regulated under chapter 5.10 SVMC if it is an adult entertainment establishment, and a business qualifies as an "adult entertainment establishment" if it operates an "adult arcade establishment." An adult arcade establishment, in turn, is defined to include businesses which use either an adult arcade station *or an adult arcade device*. Because the definition of "adult arcade device" does not have an enclosure limitation, and because an adult theater uses a large movie screen to display films of sexual activities or sexual conduct on a regular basis or as a substantial part of its activity, an adult theater uses an adult arcade device, and therefore is an adult arcade establishment and within the scope of chapter 5.10 SVMC.

We agree with CA-WA that SVMC 5.10.080(C)(6)'s limitation of one person per theater prevents adult theaters from operating in Spokane Valley.[5] But we disagree that SVMC 5.10.080(D)(3) prevents viewing rooms from operating in Spokane Valley. Rather, viewing rooms may operate provided that various reasonable safeguards are in place to prevent lewd conduct from occurring within the viewing area.

The fact that semi-private viewing of erotic materials must occur in individual viewing areas rather than in a theater setting does not render the licensing ordinance unconstitutional. The determinative question is not whether the regulation prohibits an adult theater. Rather, the determinative question is whether forbidding adult theaters unconstitutionally interferes with the communication of the erotic message. Stated another way, one does not have a constitutional right to view graphic films; rather, the actors and the businesses which make and produce graphic films have a constitutional right to communicate their erotic messages.

There is no evidence in the record that prohibiting adult theaters would interfere with actors and businesses making and producing graphic films. Modern technology has replaced adult theaters first with VHS, and now with DVD's, allowing actors and the businesses which make and produce graphic films to market their protected messages in

[5] The City asserts that it never intended that chapter 5.10 SVMC apply to adult theaters. Nevertheless, until the definition of adult arcade establishment is narrowed, the specter of this application exists and warrants further discussion by this court.

ways not possible 25 years ago. During oral argument, counsel for CA-WA was questioned why adult theaters and viewing rooms continue to exist, given the widespread availability of graphic videos which can be viewed free over one's computer or smartphone. Counsel responded that perhaps some people do not want to view graphic content in the vicinity of family members. Under our construction of the City's licensing ordinance, people still can view graphic content in a semi-private setting, away from family members, but they may do so only under conditions which minimize lewd conduct.

2. *Examination of the zoning ordinance under Washington constitutional standards applicable to prior restraints*

CA-WA contends that the time, place, and manner restrictions in chapter 19.80 SVMC amount to prior restraint through zoning. CA-WA argues that SVMC's zoning regulations effectively ban all adult entertainment establishments in instances where the approved zones have no properties readily available for lease or purchase. According to CA-WA, this total ban is so restrictive that it is a prior restraint under the enhanced protection of the Washington Constitution.

The text and history of article I, section 5 of the Washington Constitution dictate enhanced protection under the Washington Constitution in the context of adult entertainment regulations that impose prior restraints. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 116-17, 937 P.2d 154 (1997). The strict standard under the Washington

Constitution is that prior restraint of constitutionally protected expression is per se unconstitutional. *O'Day*, 109 Wn.2d at 803-04.

Prior restraints are defined as "'official restrictions imposed upon speech or other forms of expression in advance of actual publication.'" *City of Seattle v. Bittner*, 81 Wn.2d 747, 756, 505 P.2d 126 (1973) (quoting Thomas I. Emerson, 20 *Law and Contemporary Problems* 648 (1955)). Before applying the highly protective rules against prior restraint, courts must first determine whether the challenged rule affects expression. "Regulations that sweep too broadly chill protected speech prior to publication and this may rise to the level of a prior restraint." *O'Day*, 109 Wn.2d at 804.

However, time, place, and manner restrictions on adult entertainment are not prior restraints and do not merit the more rigorous analysis afforded under the Washington Constitution for pure speech in a traditional public forum. *Ino Ino*, 132 Wn.2d at 121. The exact causal relationship between a regulation and a targeted adverse secondary effect does not need to be proved under a prior restraint analysis. *Id.* at 127. It is enough that a regulation is related to an overall problem a city seeks to correct. *Id.*

The requirement that CA-WA relocate HEB is not a prior restraint. The zoning regulations here are content neutral and valid time, place, and manner restrictions. The City has a legitimate concern about the secondary effects of adult entertainment businesses. The regulations are narrowly tailored while still allowing speech in the approved zones. Also, we decline to find that the zoning regulation operates as a prior

restraint simply because CA-WA's expert opined that there were no available sites for immediate relocation. First, immediate availability is not required under the federal constitution or the state constitution. More importantly, CA-WA has not established that the property is not reasonably available. Instead, 39 properties have been identified as potential relocation sites. The zoning regulations in chapter 19.80 SVMC do act as a prior restraint on CA-WA's speech.

c. *Whether the licensing ordinance is over broad under the Washington Constitution*

CA-WA cites *Renton*, 475 U.S. at 46-47, to advance its argument that a regulation is overbroad if it targets businesses which have not been shown to produce adverse secondary effects. Specifically, CA-WA argues that the licensing ordinance impermissibly targets theaters that show sexually oriented movies on a part-time basis, theaters showing movies wherein the sexual conduct or specified sexual activities are not the predominant theme of the movie, and hotels and motels that provide sexually oriented movies to guests on closed circuit television.

"An overly broad statute that sweeps within its proscriptions protected expression is unconstitutional under both the Washington and United States Constitutions." *O'Day*, 109 Wn.2d at 803. "[W]here a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *World*

Wide Video, 368 F.3d at 1198 (quoting *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990)).

We previously rejected CA-WA's over breadth challenge under the First Amendment, concluding that the licensing ordinance did not apply to ordinary theaters or hotels and motels showing adult movies over closed circuit televisions. Although the licensing ordinance applies to adult theaters, CA-WA concedes that the City's legislative record includes secondary effects attributable to adult theaters. Therefore, because the licensing ordinance does not seek to regulate activities that have not been shown to have adverse secondary effects, the licensing ordinance is not overbroad.

d. *Whether the definition of adult arcade establishment in chapter 5.10 SVMC is unconstitutionally vague*

CA-WA contends that the definition for adult arcade establishment is void for vagueness in violation of the due process clause. CA-WA maintains that definition is unclear as to what constitutes showing movies on a "regular basis" or as a "substantial" part of the premises activity, and that the section fails to specify what percentage of sexual content in a particular movie would trigger applicability of the code.

For a regulation to be void for vagueness under the due process clause of the Fourteenth Amendment, the regulation must be so unclear that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990) (quoting *Burien Bark*

Supply v. King County, 106 Wn.2d 868, 871, 725 P.2d 994 (1986)). The test does not demand impossible standards of specificity, and if persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding possible areas of disagreement, the ordinance is sufficiently definite. *Id.*

The language used in the enactment is afforded a sensible, meaningful, and practical interpretation. *Id.* at 180; *see State v. Dixon*, 78 Wn.2d 796, 805, 479 P.2d 931 (1971). "Vagueness doctrine cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms." *Gammoh v. City of La Habra*, 395 F.3d 1114, 1121 (9th Cir. 2005). In determining whether a challenged ordinance is sufficiently definite, the language of the ordinance is not examined in a vacuum. Rather, the context of the entire enactment is considered. *City of Seattle v. Huff*, 111 Wn.2d 923, 929, 767 P.2d 572 (1989). "[O]therwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Gammoh*, 395 F.3d at 1120.

In *Gammoh*, the court held that subjective terms in a definition for cabaret dancer did not void the entire regulation in which the definition applied. *Id.* The court examined whether the subjective terms when used in combination with other terms gives notice of what is being regulated and whether the prohibited conduct is defined objectively. *Id.* Using these methods, the court determined that the definition of "adult cabaret dancer" was not vague even though it contained subjective terms such as "sexually oriented

dancer," "exotic dancer," "regular basis," and "focuses or emphasizes." *Id.* The Court found that a combination of features defined an adult cabaret dancer and the definition as a whole gave performers ample guidance on who is and who is not subject to the regulation. *Id.* The court also found despite the subjective terms, the targeted conduct prohibiting cabaret dancers from performing two feet from a patron was objectively defined. *Id.*

The challenged definitions are not unconstitutionally vague. An adult arcade establishment is defined by a combination of objective, defined, and subjective terms. Below, we italicize the terms which are further defined in the City's definition of "adult arcade station" to show the particularity that the City used to assist businesses in knowing whether their activities were regulated. According to the definition, an "adult arcade establishment" is (1) a commercial premises (2) where a member of the public is admitted (3) where *adult arcade station* or *adult arcade devices* are used to (4) exhibit or display a graphic picture, view, film, videotape, or digital display of (5) a *specified sexual activity* or *sexual conduct* to a member of the public, (5) on a regular basis or as a substantial part of the premises activity. SVMC 5.10.010. When considered together, the objective, defined, and subjective terms give sufficient notice of what constitutes an adult arcade establishment. A person of ordinary intelligence can tell that a business that is open to the public and regularly shows digital displays of explicit sexual activity is subject to the licensing regulations. Precise specificity is not required.

The inclusion of the subjective terms, "regular basis" and "substantial," does not make the entire adult arcade establishment definition void for vagueness. Prior cases have upheld the use of the terms "significant or substantial" in this context. *World Wide Video,* 368 F.3d at 1198. Further, although Appendix A of the SVMC does not define "regular" or "substantial," the appendix directs courts to interpret undefined words using *Webster's New Collegiate Dictionary. Merriam-Webster's Collegiate Dictionary* defines "regular" to mean "recurring . . . at fixed, uniform, or normal intervals," and defines "substantial" to mean "being largely but not wholly that which is specified." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1048, 1245 (11th ed. 2003). The combination of subjective with objective and defined terms gives a sufficiently clear picture of an adult arcade establishment and the business activity that is the subject of the licensing requirement.

CONCLUSION

In summary, we conclude that HEB's viewing rooms are not a lawful nonconforming use, that the City's licensing and zoning regulations apply to HEB, and that those regulations are not unconstitutional.

Affirm.

No. 33140-7-III
City of Spokane v. Hollywood Erotic Boutique

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

APPENDIX B

FILED
Dec. 15, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

CITY OF SPOKANE VALLEY, a Washington non-charter city,	)	**No. 33140-7-III**
Respondent,	)	
v.	)	
BRIAN DIRKS and CHRISTINE DIRKS, husband and wife; and MARESSA DIRKS and JOHN DOE DIRKS, wife and husband; and CA-WA CORP., a California corporation, d/b/a HOLLYWOOD EROTIQUE BOUTIQUE, a/k/a HOLLYWOOD EROTIC BOUTIQUE,	)	**ORDER DENYING MOTION FOR RECONSIDERATION; ORDER AMENDING OPINION**
Appellants.	)	

The court has considered appellant's motion for reconsideration and the response thereto and is of the opinion the motion should be denied.

IT IS ORDERED the motion for reconsideration of this court's decision of October 22, 2015, is hereby denied.

IT IS FURTHER ORDERED that the opinion filed on October 22, 2015, is amended as follows:

The three full paragraphs on pages 35 and 36 shall be deleted and the following shall be inserted in their place:

> We agree with CA–WA that SVMC 5.10.080(C)(6)'s limitation of one person per theater could theoretically prevent auditorium adult theaters from operating in Spokane Valley.[1] But we disagree that SVMC 5.10.080(D)(3) prevents viewing rooms from operating in Spokane Valley. "However, a regulation does not qualify as a prior restraint if it merely restricts the time, place, or manner of expression." *World Wide Video of Wash., Inc. v. City of Spokane*, 125 Wn. App. 289, 304, 103 P.3d 1265 (2005). Rather, viewing rooms may operate provided that various reasonable safeguards are in place to prevent lewd conduct from occurring within the viewing area. *See Adult Entm't Ctr.*, 57 Wn. App. at 442 (individuals have no constitutional right "to engage in sexual activity in a public place").
>
> The fact that semi-private viewing of erotic materials must occur in individual viewing areas rather than in a theater setting does not render the licensing ordinance unconstitutional. The determinative question is not whether the regulation prohibits auditorium adult theaters. Rather, the determinative question is whether theoretically forbidding auditorium adult theaters unconstitutionally interferes with the communication of the erotic message.
>
> There is no evidence in the record that theoretically prohibiting auditorium adult theaters would interfere with actors and businesses making and producing graphic films. *See Northend Cinema, Inc. v. City of Seattle*, 90 Wn.2d 709, 717, 585 P.2d 1153 (1978) (prior restraint not present where "appellants make no showing that the market for distribution and exhibition of these films is in fact restrained under the ordinance"). Modern technology has replaced adult theaters first with VHS, and now with DVD's, allowing actors and the businesses which make and produce graphic films to market their protected messages in ways not possible 25 years ago. During oral argument, counsel for CA–WA was questioned why adult theaters and viewing rooms continue to exist, given the widespread availability of graphic videos which can be viewed free over one's computer or smartphone. Counsel responded that perhaps some people do not want to view graphic content in the vicinity of family members. Under our construction of the City's licensing ordinance, people still can view graphic content in a semi-private setting, away from family members, but they may do so only under conditions which minimize lewd conduct.

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[1] The City asserts that it never intended that chapter 5.10 SVMC apply to adult theaters. Nevertheless, until the definition of adult arcade establishment is narrowed, the specter of this application exists and warrants further discussion by this court.

PANEL: Judges Lawrence-Berrey, Siddoway, and Fearing

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

APPENDIX C

FILED
Dec. 15, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

CITY OF SPOKANE VALLEY, a Washington non-charter city,	**No. 33140-7-III**
Respondent,	
v.	
BRIAN DIRKS and CHRISTINE DIRKS, husband and wife; and MARESSA DIRKS and JOHN DOE DIRKS, wife and husband; and CA-WA CORP., a California corporation, d/b/a HOLLYWOOD EROTIQUE BOUTIQUE, a/k/a HOLLYWOOD EROTIC BOUTIQUE,	**ORDER DENYING MOTION TO PUBLISH**
Appellants.	

The court has considered appellant's motion to publish the court's opinion of October 22, 2015, the response thereto, and the record and file herein

IT IS ORDERED the motion to publish this court's decision of October 22, 2015, is hereby denied.

PANEL: Judges Lawrence-Berrey, Siddoway, and Fearing

FOR THE COURT:

Laurel H. Siddoway, CJ

LAUREL H. SIDDOWAY
CHIEF JUDGE

APPENDIX D

7.80.040 - Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

"Adult arcade device," sometimes also known as "panoram," "preview," "picture arcade," "adult arcade," or "peep show," means any device which, for payment of a fee, membership fee, or other charge, is used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, or live adult entertainment in a booth setting. All such devices are denominated under this chapter by the term "adult arcade device." The term "adult arcade device" as used in this chapter does not include other games which employ pictures, views, or video displays, or gambling devices which do not exhibit or display adult entertainment.

"Adult arcade establishment" means a commercial premises to which a member of the public is invited or admitted and where adult arcade stations, booths, or devices are used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, or live adult entertainment in a booth setting to a member of the public on a regular basis or as a substantial part of the premises activity.

"Adult arcade station" or "booth" means an enclosure where a patron, member, or customer would ordinarily be positioned while using an adult arcade device or viewing a live adult entertainment performance, exhibition, or dance in a booth. Adult arcade station or booth refers to the area in which an adult arcade device is located and from which the graphic picture, view, film, videotape, digital display of specified sexual activity, or live adult entertainment is to be viewed. These terms do not mean such an enclosure that is a private office used by an owner, manager, or person employed on the premises for attending the tasks of his or her employment, if the enclosure is not held out to any member of the public for use, for hire, or for a fee for the purpose of viewing the entertainment provided by the arcade device or live adult entertainment, and not open to any person other than employees.

"Adult entertainment establishment" collectively refers to adult arcade establishments and live adult entertainment establishments, as defined herein.

"Applicant" means the individual or entity seeking an adult entertainment establishment license.

"Applicant control person" means all partners, corporate officers and directors and other individuals in the applicant's business organization who hold a significant interest in the adult entertainment business, based on responsibility for management of the adult entertainment establishment.

"Employee" means a person, including a manager, entertainer or an independent contractor, who works in or at or renders services directly related to the operation of an adult entertainment establishment.

"Entertainer" means any person who provides live adult entertainment within an adult entertainment establishment as defined in this section, whether or not a fee is charged or accepted for entertainment.

"Hearing examiner" means the chief administrative officer of Spokane County or his/her designee.

"Licensing administrator" means the director of the division of building and planning of Spokane County and his/her designee and is the person designated to administer this chapter.

"Liquor" means all beverages defined in RCW Section 66.04.200.

"Live adult entertainment" means:

(1) An exhibition, performance or dance conducted in a commercial premises for a member of the public where the exhibition, performance, or dance involves a person who is nude or seminude. Adult entertainment shall include, but is not limited to performances commonly known as "strip tease";

(2) An exhibition, performance or dance conducted in a commercial premises where the exhibition, performance or dance is distinguished or characterized by a predominant emphasis on the depiction, description, simulation or relation to the following "specified sexual activities":

(A) Human genitals in a state of sexual stimulation or arousal,

(B) Acts of human masturbation, sexual intercourse, sodomy, oral copulation, or bestiality,

(C) Fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts; or

(3) An exhibition, performance or dance that is intended to sexually stimulate a member of the public. This includes, but is not limited to, such an exhibition, performance, or dance performed for, arranged with, or engaged in with fewer than all members of the public on the premises at that time, whether conducted or viewed in an arcade booth or otherwise, with separate consideration paid, either directly or indirectly, for the performance, exhibition or dance and that is commonly referred to as table dancing, couch dancing, taxi dancing, lap dancing, private dancing, or straddle dancing.

"Live adult entertainment establishment" means a commercial premises to which a member of the public is invited or admitted and where an entertainer provides live adult entertainment, in a setting which does not include arcade booths or devices, to a member of the public on a regular basis or as a substantial part of the premises activity.

"Manager" means a person who manages, directs, administers or is in charge of the affairs or conduct, or the affairs and conduct, or of a portion of the affairs or conduct occurring at an adult entertainment establishment.

"Member of the public" means a customer, patron, club member, or person, other than an employee, who is invited or admitted to an adult entertainment establishment.

"Nude" or "seminude" means a state of complete or partial undress in such costume, attire or clothing so as to expose any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva, or genitals, or human male genitals in a discernibly turgid state, even if completely and opaquely covered.

The words "open to the public room so that the area inside is fully and completely visible to the manager" mean that there may be no door, curtain, partition, or other device extending from the top of the door frame of an arcade booth or station, with the exception of a door which is completely

transparent and constructed of safety glass as specified in the Uniform Building Code, so that the activity and occupant inside the enclosure are fully and completely visible by direct line of sight to the manager located at the manager's station which shall be located at the main entrance way to the public room.

"Operator" means a person operating, conducting or maintaining an adult entertainment establishment.

"Person" means an individual, partnership, corporation, trust, incorporated or unincorporated association, marital community, joint venture, governmental entity, or other entity or group of persons however organized.

"Premises" means the land, structures, places, the equipment and appurtenances connected or used in any business, and any personal property or fixtures used in connection with any adult entertainment establishment.

"Sexual conduct" means acts of:

(1) Sexual intercourse within its ordinary meaning, occurring upon any penetration, however slight; or
(2) A penetration of the vagina or anus, however slight, by an object; or
(3) A contact between persons involving the sex organs of one person and the mouth or anus of another; or
(4) Masturbation, manual or instrumental, of oneself or of one person by another; or
(5) Touching of the sex organs, anus, or female breast, whether clothed or unclothed, of oneself or of one person by another.

"Specified sexual activities" refers to the following:

(1) Human genitals in a state of sexual stimulation or arousal;
(2) Acts of human masturbation, sexual intercourse, sodomy, oral copulation, or bestiality; or
(3) Fondling or other erotic touching of human genitals, pubic region, buttocks or female breasts.

"Transfer of ownership or control" of an adult entertainment establishment means any of the following:

(1) The sale, lease or sublease of the business;
(2) The transfer of securities that constitute a controlling interest in the business, whether by sale, exchange, or similar means;
(3) The establishment of a trust, gift, or other similar legal device that transfers the ownership or control of the business; or
(4) Transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

(Res. 97-1052 Attachment A (§ 4), 1997)

APPENDIX E

Chapter 19.80
ADULT USES

Sections:

19.80.010 Purpose.

In the development and adoption of this chapter, the City recognized that there are adult entertainment uses which, due to their very nature, have serious objectionable operational characteristics, particularly when located in close proximity to residential neighborhoods and schools, thereby having a deleterious impact upon the quality of life in the surrounding areas. It has been acknowledged by courts and communities across the nation that state and local governmental entities have a special concern in regulating the operation of such businesses under their jurisdiction to ensure the adverse secondary effects of the establishments are minimized.

This chapter is intended to protect the general public health, safety and welfare of the citizenry of the City of Spokane Valley through the regulation of the operations and licensing of the adult entertainment devices, premises and personnel of adult entertainment establishments. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any constitutionally protected sexually oriented or explicit communicative materials, or communicative performances. The regulations set forth herein are intended to prevent and control health, safety and welfare issues, the decline in neighborhood conditions in and around adult entertainment establishments, and to prevent dangerous and unlawful conduct associated with these facilities. This chapter may not be construed as permitting or promoting obscene conduct or materials. (Ord. 07-015 § 4, 2007).

19.80.020 License required.

Licensing requirements for adult uses are contained in Chapter 5.10 SVMC. (Ord. 07-015 § 4, 2007).

19.80.030 Adult use development standards.

A. There shall be five existing acres of contiguous (includes across streets) zoning classified Community Commercial or Regional Commercial.

B. The use shall be located or maintained at least 1,000 feet from the nearest property line of the use listed in subsections (B)(1) through (6) of this section. Distance shall be measured from the nearest property line of the adult retail use establishment or adult entertainment establishment(s) to the nearest property line of the following pre-existing uses:

1. Public library;

2. Public playground or park;

3. Public or private school and its grounds of kindergarten to twelfth grade;

4. Nursery school, mini-day care center or day care center;

5. Church, convent, monastery, synagogue or other place of religious worship;

6. Another adult use subject to the provisions of this section.

C. An adult retail use establishment or adult entertainment establishment(s) shall not be located within 1,000 feet of an urban growth area boundary or within 1,000 feet of any of the following zones:

1. R-1, Single-Family Residential Estate district;

2. R-2, Single-Family Residential Suburban district;

3. R-3, Single-Family Residential district;

4. R-4, Single-Family Residential Urban district;

5. MF-1, Multifamily Medium Density Residential district;

6. MF-2, Multifamily High Density Residential district;

7. MUC, Mixed Use Center district;

8. CMU, Corridor Mixed Use district;

9. CC, City Center district; or

10. NC, Neighborhood Commercial district. (Ord. 07-015 § 4, 2007).

The Spokane Valley Municipal Code is current through Ordinance No. 15-027, passed December 15, 2015.
Disclaimer: The City Clerk's Office has the official version of the Spokane Valley Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

APPENDIX F

APPENDIX A
DEFINITIONS

A. General Provisions.

1. For the purpose of this code, certain words and terms are herein defined. The word "shall" is always mandatory. The word "may" is permissive, subject to the judgment of the person administering the code.

2. Words not defined herein shall be construed as defined in Webster's New Collegiate Dictionary.

3. The present tense includes the future, and the future the present.

4. The singular number includes the plural and the plural the singular.

5. Use of male designations shall also include female.

B. Definitions.

AASHTO: American Association of State Highway and Transportation Officials.

Abandoned: Knowing relinquishment by the owner, of right or claim to the subject property or structure on that property, without any intention of transferring rights to the property or structure to another owner, tenant, or lessee, or of resuming the owner's use of the property. "Abandoned" shall include but not be limited to circumstances involving tax forfeiture, bankruptcy, or mortgage foreclosure.

Accessory: A building, area, part of a building, structure or use which is subordinate to, and the use of which is incidental to, that of the main building, structure or use on the same lot.

ADA: Americans with Disabilities Act.

Adequate public facilities: Facilities which have the capacity to serve development without decreasing levels of service below locally established minima.

Administrative exception: A minor deviation from standards pursuant to Chapter 19.140 SVMC.

Adult entertainment: Includes the following:

• **Adult arcade device:** Sometimes also known as "panoram," "preview," or "picture arcade."

• **Adult arcade establishment:** A commercial premises to which a member of the public is invited or admitted and where adult arcade stations, booths, or devices are used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, or live adult entertainment in a booth setting to a member of the public on a regular basis or as a substantial part of the premises' activity.

• **Adult arcade or peep show:** Any device which, for payment of a fee, membership fee, or other charge, is used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, or live adult entertainment in a booth setting. All such devices are denominated under this chapter by the term "adult arcade device." The term "adult arcade device" as used in this code does not include other games which employ pictures, views, or video displays, or gambling devices which do not

exhibit or display adult entertainment.

• **Adult arcade station or booth:** An enclosure where a patron, member, or customer would ordinarily be positioned while using an adult arcade device or viewing a live adult entertainment performance, exhibition, or dance in a booth. "Adult arcade station" or "booth" refers to the area in which an adult arcade device is located and from which the graphic picture, view, film, videotape, digital display of specified sexual activity, or live adult entertainment is to be viewed. These terms do not mean such an enclosure that is a private office used by an owner, manager, or person employed on the premises for attending the tasks of his or her employment, if the enclosure is not held out to any member of the public for use, for hire, or for a fee for the purpose of viewing the entertainment provided by the arcade device or live adult entertainment, and not open to any person other than employees.

• **Adult entertainment establishment:** Collectively refers to adult arcade establishments and live adult entertainment establishments licensed pursuant to Chapter 5.10 SVMC.

• **Applicant:** An individual or entity seeking an adult entertainment establishment license.

• **Applicant control person:** All partners, corporate officers and directors and other individuals in the applicant's business organization who hold a significant interest in the adult entertainment business, based on responsibility for management of the adult entertainment establishment.

• **Employee:** Any person, including a manager, entertainer or an independent contractor, who works in or at or renders services directly related to the operation of an adult entertainment establishment.

• **Entertainer:** Any person who provides live adult entertainment within an adult entertainment establishment as defined in this section, whether or not a fee is charged or accepted for entertainment.

• **Licensing administrator:** The director of the community development department of the City of Spokane Valley and his/her designee and is the person designated to administer this code.

• **Liquor:** All beverages defined in RCW 66.04.010(25).

• **Live adult entertainment:**

1. An exhibition, performance or dance conducted in a commercial premises for a member of the public where the exhibition, performance, or dance involves a person who is nude or seminude. Adult entertainment shall include, but is not limited to, performances commonly known as "strip teases";

2. An exhibition, performance or dance conducted in a commercial premises where the exhibition, performance or dance is distinguished or characterized by a predominant emphasis on the depiction, description, simulation or relation to the following "specified sexual activities":

a. Human genitals in a state of sexual stimulation or arousal;

b. Acts of human masturbation, sexual intercourse, sodomy, oral copulation, or bestiality;

c. Fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts; or

3. An exhibition, performance or dance that is intended to sexually stimulate a member of the

public. This includes, but is not limited to, such an exhibition, performance, or dance performed for, arranged with, or engaged in with fewer than all members of the public on the premises at that time, whether conducted or viewed in an arcade booth or otherwise, with separate consideration paid, either directly or indirectly, for the performance, exhibition or dance and that is commonly referred to as table dancing, couch dancing, taxi dancing, lap dancing, private dancing, or straddle dancing.

• **Live adult entertainment establishment:** A commercial premises to which a member of the public is invited or admitted and where an entertainer provides live adult entertainment, in a setting which does not include arcade booths or devices, to a member of the public on a regular basis or as a substantial part of the premises' activity.

• **Manager:** Any person who manages, directs, administers or is in charge of the affairs or conduct, or the affairs and conduct, or of a portion of the affairs or conduct occurring at an adult entertainment establishment.

• **Member of the public:** A customer, patron, club member, or person, other than an employee, who is invited or admitted to an adult entertainment establishment.

• **Nude or seminude:** A state of complete or partial undress in such costume, attire or clothing so as to expose any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva, or genitals, or human male genitals in a discernibly turgid state, even if completely and opaquely covered.

• **"Open to the public room so that the area inside is fully and completely visible to the manager":** Premises where there is no door, curtain, partition, or other device extending from the top of the door frame of an arcade booth or station, with the exception of a door which is completely transparent and constructed of safety glass as specified in the International Building Code, so that the activity and occupant inside the enclosure are fully and completely visible by direct line of sight to the manager located at the manager's station which shall be located at the main entrance way to the public room.

• **Operator:** Any person operating, conducting or maintaining an adult entertainment establishment.

• **Person:** Any individual, partnership, corporation, trust, incorporated or unincorporated association, marital community, joint venture, governmental entity, or other entity or group of persons however organized.

• **Premises:** The land, structures, places, equipment and appurtenances connected or used in any business, and any personal property or fixtures used in connection with any adult entertainment establishment.

• **Sexual conduct:** Acts of:

1. Sexual intercourse within its ordinary meaning, occurring upon any penetration, however slight; or

2. A penetration of the vagina or anus, however slight, by an object; or

3. A contact between persons involving the sex organs of one person and the mouth or anus of another; or

4. Masturbation, manual or instrumental, of oneself or of one person by another; or

5. Touching of the sex organs, anus, or female breast, whether clothed or unclothed, of oneself or of one person by another.

• **Specified sexual activities:** Refers to the following:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse, sodomy, oral copulation, or bestiality; or

3. Fondling or other erotic touching of human genitals, pubic region, buttocks or female breasts.

• **Transfer of ownership or control:** Of an adult entertainment establishment means any of the following:

1. The sale, lease or sublease of the business;

2. The transfer of securities that constitute a controlling interest in the business, whether by sale, exchange, or similar means;

3. The establishment of a trust, gift, or other similar legal device that transfers the ownership or control of the business; or

4. Transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

Adult entertainment and retail: An adult entertainment or adult retail use establishment. See "Entertainment, use category."

Adult entertainment establishment: Collectively refers to adult arcade establishments and live adult entertainment establishments, as defined herein.

Adult retail use establishment: A retail use establishment which, for money or any other form of consideration, devotes a significant or substantial portion of stock in trade to the sale, exchange, rental, loan, trade, or transferring of adult-oriented merchandise. The retail use establishment may permit patrons to view the adult-oriented merchandise for possible purchase or rental, but such on-premises viewing shall not be in exchange for money or any other form of consideration.

Affordable housing: Where the term "affordable" is used, it refers to the federal definition of affordability stating that annual housing costs shall not exceed one-third of a family's annual income. When establishing affordability standards for moderate- to extremely low-income families and individuals, the median household income is the amount calculated and published by the United States Department of Housing and Urban Development each year for Spokane County.

Agricultural: Relating to the science or art of cultivating soil or producing crops to be used or consumed directly or indirectly by man or livestock, or raising of livestock.

Agricultural processing: The series of operations taken to change agricultural products into food and consumer products. Uses include creameries. See "Industrial, light use category."

APPENDIX G

Chapter 5.10
ADULT ENTERTAINMENT ESTABLISHMENTS

Sections:

5.10.010 Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

"Adult arcade device," sometimes also known as "panoram," "preview," "picture arcade," "adult arcade," or "peep show," means any device which, for payment of a fee, membership fee or other charge, is used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activities or sexual conduct. All such devices are denominated under this chapter by the term "adult arcade device." The term "adult arcade device" as used in this chapter does not include other games which employ pictures, views, or video displays, or gambling devices which do not exhibit or display adult entertainment.

"Adult arcade establishment" means a commercial premises, or portion of any premises, to which a member of the public is invited or admitted and where adult arcade stations or adult arcade devices are used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activities or sexual conduct to a member of the public on a regular basis or as a substantial part of the premises activity.

"Adult arcade station" means any enclosure where a patron, member, or customer would ordinarily be positioned while using an adult arcade device. "Adult arcade station" refers to the area in which an adult arcade device is located and from which the graphic picture, view, film, videotape, or digital display of specified sexual activities or sexual conduct is to be viewed. These terms do not mean such an enclosure that is a private office used by an owner, manager, or person employed on the premises for attending to the tasks of his or her employment, if the enclosure is not held out to any member of the public for use, for hire, or for a fee for the purpose of viewing the entertainment provided by the arcade device, and not open to any person other than employees.

"Adult entertainment establishment" collectively refers to adult arcade establishments and live adult entertainment establishments, as defined herein.

"Applicant" means the individual or entity seeking an adult entertainment establishment license.

"Applicant control person" means all partners, corporate officers and directors and other individuals in the applicant's business organization who hold a significant interest in the adult entertainment business, based on responsibility for management of the adult entertainment establishment.

"Employee" means a person, including a manager, entertainer or an independent contractor, who works in or at or renders services directly related to the operation of an adult entertainment establishment.

"Entertainer" means any person who provides live adult entertainment within an adult entertainment establishment as defined in this section, whether or not a fee is charged or accepted for entertainment.

"Hearing examiner" means the individual designated by the city council who has the powers and duties as set forth in SVMC 18.20.030 or his/her designee.

"Licensing administrator" means the community development director and his/her designee(s) and is the person designated to administer this chapter. In the event of any appeal to the hearing examiner under this chapter, the licensing administrator shall prepare and/or ensure the submittal of the department reports required under SVMC 17.90.060(A) and Appendix B, Section C.

"Liquor" means all beverages defined in RCW 64.04.010.

"Live adult entertainment" means:

1. An exhibition, performance or dance conducted in a commercial premises for a member of the public where the exhibition, performance, or dance involves a person who is nude or seminude. Adult entertainment shall include but is not limited to performances commonly known as "strip tease";

2. An exhibition, performance or dance conducted in a commercial premises where the exhibition, performance or dance is distinguished or characterized by a predominant emphasis on the depiction, description, or simulation of or relation to the following specified sexual activities:

a. Human genitals in a state of sexual stimulation or arousal;

b. Acts of human masturbation, sexual intercourse, sodomy, oral copulation, or bestiality;

c. Fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts; or

3. An exhibition, performance or dance that is intended to sexually stimulate a member of the public. This includes, but is not limited to, such an exhibition, performance, or dance performed for, arranged with, or engaged in with fewer than all members of the public on the premises at that time, whether conducted or viewed directly or otherwise, with separate consideration paid, either directly or indirectly, for the performance, exhibition or dance and that is commonly referred to as table dancing, couch dancing, taxi dancing, lap dancing, private dancing, or straddle dancing.

"Live adult entertainment establishment" means a commercial premises to which a member of the public is invited or admitted and where an entertainer provides live adult entertainment, in a setting which does not involve adult arcade stations or devices, to a member of the public on a regular basis or as a

substantial part of the premises activity.

"Manager" means a person who manages, directs, administers or is in charge of the affairs or conduct, or the affairs and conduct, or of a portion of the affairs or conduct occurring at an adult entertainment establishment.

"Member of the public" means a customer, patron, club member, or person, other than an employee, who is invited or admitted to an adult entertainment establishment.

"Nude" or "seminude" means a state of complete or partial undress in such costume, attire or clothing so as to expose any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva, or genitals, or human male genitals in a discernibly turgid state, even if completely and opaquely covered.

The words "open to the public room so that the area inside is fully and completely visible to the manager" mean that there may be no door, curtain, partition, or other device extending from the top and/or any side of the door frame of an arcade station, so that all portions of every arcade station and all of the activity and all occupants inside every arcade station are fully and completely visible at all times by direct line of sight to persons in the adjacent public room, including the manager.

"Operator" means a person operating, conducting or maintaining an adult entertainment establishment.

"Person" means an individual, partnership, corporation, trust, incorporated or unincorporated association, marital community, joint venture, governmental entity, or other entity or group of persons however organized.

"Premises" means the land, structures, places, the equipment and appurtenances connected or used in any business, and any personal property or fixtures used in connection with any adult entertainment establishment.

"Sexual conduct" means acts of:

1. Sexual intercourse within its ordinary meaning, occurring upon any penetration, however slight; or

2. A penetration of the vagina or anus, however slight, by an object; or

3. A contact between persons involving the sex organs of one person and the mouth or anus of another; or

4. Masturbation, manual or instrumental, of oneself or of one person by another; or

5. Touching of the sex organs, anus, or female breast, whether clothed or unclothed, of oneself or of one person by another.

"Specified sexual activities" refers to the following:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse, sodomy, oral copulation, or bestiality; or

3. Fondling or other erotic touching of human genitals, pubic region, buttocks or female breasts.

"Transfer of ownership or control" of an adult entertainment establishment means any of the following:

1. The sale, lease or sublease of the business;

2. The transfer of securities that constitute a controlling interest in the business, whether by sale, exchange, or similar means;

3. The establishment of a trust, gift, or other similar legal device that transfers the ownership or control of the business; or

4. Transfer by bequest or other operation of law upon the death of the person possessing the ownership or control. (Ord. 12-004 § 1, 2012; Ord. 10-006 § 3, 2010).

5.10.020 License required.

A. A person may not conduct, manage or operate an adult entertainment establishment unless the person is the holder of a valid license obtained from the City.

B. An entertainer, employee, or manager may not knowingly work in or about, or knowingly perform a service or entertainment directly related to the operation of, an unlicensed adult entertainment establishment.

C. An entertainer may not perform in an adult entertainment establishment unless the person is the holder of a valid license obtained from the City.

D. A manager may not work in an adult entertainment establishment unless the person is a holder of a valid license obtained from the City. (Ord. 10-006 § 4, 2010).

5.10.030 License prohibited to certain classes.

No license shall be issued to:

A. A natural person who has not attained the age of 21 years, except that a license may be issued to a person who has attained the age of 18 years with respect to adult entertainment establishments where no intoxicating liquors are served or provided;

B. A person whose place of business is conducted by a manager or agent, unless the manager or agent has obtained a manager's license;

C. A partnership, unless all the members of the partnership are qualified to obtain a license. The license shall be issued to the manager or agent of the partnership;

D. A corporation, unless all the officers and directors of the corporation are qualified to obtain a license. The license shall be issued to the manager or agent of the corporation. (Ord. 10-006 § 5, 2010).

5.10.040 Applications.

A. Adult Entertainment Establishment License.

1. An application for an adult entertainment establishment license must be submitted to the licensing administrator in the name of the person or entity proposing to conduct the adult entertainment establishment on the business premises and must be signed by the person and

certified as true under the penalty of perjury. An application must be submitted on a form supplied by the licensing administrator, which must require the following information:

a. For the applicant and for each applicant control person, provide: names, any aliases or previous names, driver's license number, if any, Social Security number, if any, and business, mailing, and residential addresses, and business telephone number;

b. If a partnership, whether general or limited; and if a corporation, date and place of incorporation; evidence that the partnership or corporation is in good standing under the laws of Washington; and the name and address of the registered agent for service of process;

c. Whether the applicant or a partner, corporate officer, or director of the applicant holds another license under this chapter, or a license for similar adult entertainment or sexually oriented business from another city, county or state and, if so, the name and address of each other licensed business;

d. A summary of the business history of the applicant and applicant control persons in owning or operating the adult entertainment or other sexually oriented business, providing names, addresses and dates of operation for such businesses, and whether any business license or adult entertainment license has been revoked or suspended and the reason for the revocation or suspension;

e. For the applicant and all applicant control persons, all criminal convictions or forfeitures within five years immediately preceding the date of the application, other than parking offenses or minor traffic infractions, including the dates of conviction, nature of the crime, name and location of court and disposition;

f. For the applicant and all applicant control persons, a description of business, occupation or employment history for the three years immediately preceding the date of the application;

g. Authorization for the City of Spokane Valley, and its agents and employees to seek information to confirm any statements set forth in the application;

h. The location and doing-business-as name of the proposed adult entertainment establishment, including a legal description of the property, street address, and telephone number, together with the name and address of each owner and lessee of the property;

i. Two two-inch by two-inch photographs of the applicant and applicant control persons, taken within six months of the date of application showing only the full face;

j. A complete set of fingerprints for the applicant and each applicant control person, taken by the law enforcement agency for the jurisdiction, or such other entity as authorized by the law enforcement agency;

k. A scale drawing or diagram showing the configuration of the premises for the proposed adult entertainment establishment, including a statement of the total floor space occupied by the business, and marked dimensions of the interior of the premises. Performance areas, seating areas, manager's office and stations, restrooms, adult arcade stations and adult arcade devices, overhead lighting fixtures, walls and doorways, and service areas shall be clearly

marked on the drawing. An application for a license for an adult entertainment establishment must include building plans that demonstrate conformance with all applicable building code requirements.

Upon request, a prelicensing conference will be scheduled with the licensing administrator, or his/her designee, and pertinent government departments to assist the applicant in meeting the regulations and provisions of this chapter, as well as the other City code provisions. No alteration of the configuration of the interior of the adult entertainment establishment or enlargement of the floor space occupied by the premises may be made after obtaining a license, without the prior approval of the licensing administrator or his/her designee. Approval for such enlargement may only be granted if the premises and proposed enlargement first meet the qualifications and requirements of this chapter, all other City code provisions, and all other applicable statutes or laws.

2. An application will be deemed complete upon the applicant's submission of all information requested in subsection (A)(1) of this section, including the identification of "none" where that is the correct response. The licensing administrator may request other information or clarification in addition to that provided in a complete application if necessary to determine compliance with this chapter.

3. A nonrefundable license fee must be paid at the time of filing an application in order to defray the costs of processing the application.

4. Each applicant shall verify, under penalty of perjury, that the information contained in the application is true.

5. If, subsequent to the issuance of an adult entertainment establishment license for a business, a person or entity acquires a significant interest based on responsibility for management or operation of the business, notice of such acquisition shall be provided in writing to the licensing administrator, no later than 21 calendar days following the acquisition. The notice required must include the information required for the original adult entertainment establishment license application.

6. The adult entertainment establishment license, if granted, must state on its face the name of the person or persons to whom it is issued, the expiration date, the doing-business-as name and the address of the licensed adult entertainment establishment. The license must be posted in a conspicuous place at or near the entrance to the adult entertainment establishment so that it can be easily read when the business is open.

7. A person granted an adult entertainment establishment license under this chapter may not operate the adult entertainment establishment under a name not specified on the license, nor may a person operate an adult entertainment establishment or any adult arcade device under a designation or at a location not specified on the license.

8. Upon receipt of the complete application and fee, the licensing administrator shall provide copies to the police, fire and planning departments for their investigation and review to determine compliance of the proposed adult entertainment establishment with the laws and regulations which each department administers. Each department shall, within 15 days of the date of such application, inspect the application and premises and shall make a written report to the licensing administrator whether such application and premises comply with the laws administered by each

department. A license may not be issued unless each department reports that the applicant and premises comply with the relevant laws.

If the premises are not yet constructed, the departments shall base their recommendation as to premises compliance on their review of the drawings submitted in the application. An adult entertainment establishment license approved before the premises construction is undertaken must contain a condition that the premises may not open for business until the premises have been inspected and determined to be in conformance with the drawings submitted with the application. The police, fire, and planning departments shall recommend denial of a license under this subsection if any of them find that the proposed adult entertainment establishment is not in conformance with the requirements of this chapter or other applicable law. The department shall cite in a recommendation for denial the specific reason for the recommendation, including applicable laws.

9. No adult entertainment establishment license may be issued to operate an adult entertainment establishment in a location which does not meet the requirements set forth in Chapter 19.80 SVMC unless otherwise exempt.

10. The exterior design and/or signs of the adult entertainment establishment must meet the requirements set forth in Chapter 22.110 SVMC.

11. The licensing administrator shall issue and mail to the applicant an adult entertainment establishment license within 30 calendar days of the date of filing a complete license application and fee, unless the licensing administrator determines that the applicant has failed to meet any of the requirements of this chapter, or failed to provide any information required under this section, or that the applicant has made a false, misleading or fraudulent statement of material fact on the application for a license. The licensing administrator shall grant an extension of time in which to provide all information required for a complete license application upon the request of the applicant.

12. If the licensing administrator finds that the applicant has failed to meet any of the requirements for issuance of an adult entertainment establishment license, the licensing administrator shall deny the application in writing and shall cite the specific reasons for the denial, including applicable laws. If the licensing administrator fails to issue or deny the license within 30 calendar days of the date of filing of a complete application and fee, the applicant shall be permitted, subject to all other applicable laws, to operate the business for which the license was sought until notification by the licensing administrator that the license has been denied, but in no event may the licensing administrator extend the applicant review time for more than an additional 20 days.

B. Adult Arcade Device License. In addition to the provisions set forth in subsection A of this section, the following conditions apply to adult arcade establishments:

1. It is unlawful to exhibit or display to the public any adult arcade device, or to operate any adult arcade station within any adult arcade establishment without first obtaining a license for each such device for a specified location or premises from the City, to be designated an "adult arcade device license."

2. The adult arcade device license shall be securely attached to each such device, or the arcade station, in a conspicuous place. (Ord. 11-010 § 2 (Exh. A), 2011; Ord. 10-006 § 6, 2010).

5.10.050 Adult entertainment establishment manager and entertainer licenses.

A. A person may not work as a manager, assistant manager or entertainer at an adult entertainment establishment without a manager's or an entertainer's license from the licensing administrator. An applicant for a manager's or entertainer's license must complete an application on forms provided by the licensing administrator containing the information identified in this subsection. A nonrefundable license fee must accompany the application. The licensing administrator shall provide a copy of the application to the police department for its review, investigation and recommendation. An application for a manager's or entertainer's license must be signed by the applicant and certified to be true under penalty of perjury. The manager's or entertainer's license application must require the following information:

1. The applicant's name, home address, home telephone number, date and place of birth, fingerprints taken by the police department (or such other entity as authorized by the police department or licensing administrator), Social Security number, and any stage names or nicknames used in entertaining;

2. The name and address of each adult entertainment establishment at which the applicant intends to work;

3. Documentation that the applicant has attained the age of 18 years. Any two of the following are acceptable as documentation of age:

a. A motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth;

b. A state-issued identification card bearing the applicant's photograph and date of birth;

c. An official passport issued by the United States of America;

d. An immigration card issued by the United States of America; or

e. Any other identification that the licensing administrator determines to be acceptable and reliable;

4. A complete statement of all convictions of the applicant for any misdemeanor or felony violations in the jurisdiction or any other city, county or state within five years immediately preceding the date of the application, except parking violations or minor traffic infractions;

5. A description of the applicant's principal activities or services to be rendered at the adult entertainment establishment;

6. Two two-inch by two-inch color photographs of applicant, taken within six months of the date of application showing only the full face;

7. Authorization for the City, its agents and employees to investigate and confirm any statements in the application.

B. Every entertainer shall provide his or her license to the adult entertainment establishment manager on duty on the premises prior to his or her performance. The manager shall retain the licenses of the entertainers readily available for inspection by the City, its agents, and employees, at any time during business hours of the adult entertainment establishment.

C. The licensing administrator may request additional information or clarification when necessary to determine compliance with this chapter.

D. The contents of an application for an entertainer's license and any additional information submitted by an applicant for an entertainer's license are confidential and will remain confidential to the extent authorized by Chapter 42.56 RCW and other applicable law. Nothing in this subsection prohibits the exchange of information among government agencies for law enforcement or licensing or regulatory purposes.

E. The licensing administrator shall issue and mail to the applicant an adult entertainment establishment manager's or entertainer's license within 14 calendar days from the date the complete application and fee are received unless the licensing administrator determines that the applicant has failed to provide any information required to be supplied according to this chapter, has made any false, misleading or fraudulent statement of material fact in the application, or has failed to meet any of the requirements for issuance of a license under this chapter. If the licensing administrator determines that the applicant does not qualify for the license applied for, the licensing administrator shall deny the application in writing and shall cite the specific reasons therefor, including applicable law.

F. An applicant for an adult entertainment establishment manager's or entertainer's license shall be issued a temporary license upon receipt of a complete license application and fee. Such temporary license shall automatically expire on the fourteenth calendar day following the filing of the complete license application and fee unless the licensing administrator has failed to approve or deny the license application, in which case the temporary license shall be valid until the licensing administrator approves or denies the application, or until the final determination of any appeal from a denial of the application. In no event may the licensing administrator extend the application review time for more than an additional 20 calendar days. (Ord. 10-006 § 7, 2010).

5.10.080 Standards of conduct, personnel, and operation of adult entertainment establishments.

A. All employees of an adult entertainment establishment must adhere to the following standards of conduct while in any area in which a member of the public is allowed to be present:

1. An employee may not be unclothed or in such less than opaque and complete attire, costume or clothing so as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, except upon a stage at least 18 inches above the immediate floor level and removed at least eight feet from the nearest member of the public.

2. An employee mingling with a member of the public may not be unclothed or in less than opaque and complete attire, costume or clothing as described in subsection (A)(1) of this section, nor may a male employee appear with his genitals in a discernibly turgid state, even if completely and opaquely covered, or wear or use any device or covering that simulates the same.

3. An employee mingling with a member of the public may not wear or use any device or covering exposed to view which simulates the breast below the top of the areola, vulva, genitals, anus, a portion of the pubic region, or buttocks.

4. An employee may not caress, fondle or erotically touch a member of the public or another

employee. An employee may not encourage or permit a member of the public to caress, fondle or erotically touch that employee.

5. An employee may not perform actual or simulated acts of sexual conduct as defined in this chapter, or an act that constitutes a violation of Chapter 7.48A RCW, the Washington moral nuisance statute, or any provision regulating offenses against public morals.

6. An employee mingling with a member of the public may not conduct any dance, performance or exhibition in or about the nonstage area of the adult entertainment establishment unless that dance, performance or exhibition is performed at a distance of at least four feet from the member of the public for whom the dance, performance or exhibition is performed. The distance of four feet is measured from the torso of the dancer to the torso of the member of the public.

7. A tip or gratuity offered to or accepted by an entertainer may not be offered or accepted before any performance, dance or exhibition provided by the entertainer. An entertainer performing upon any stage area may not accept any form of gratuity offered directly to the entertainer by a member of the public. A gratuity offered to an entertainer performing upon any stage area or in any booth or arcade device must be placed into a receptacle provided for receipt of gratuities by the management of the adult entertainment establishment or provided through a manager on duty on the premises. A gratuity or tip offered to an entertainer conducting a performance, dance or exhibition in or about the nonstage area of the live adult entertainment establishment must be placed into the hand of the entertainer or into a receptacle provided by the entertainer, and not upon the person or into the clothing of the entertainer.

B. This chapter does not prohibit:

1. Plays, operas, musicals, or other dramatic works that are not obscene;

2. Classes, seminars and lectures which are held for serious scientific or educational purposes and which are not obscene; or

3. Exhibitions, performances, expressions or dances that are not obscene.

The exemptions in this subsection B do not apply to sexual conduct defined in this chapter or the sexual conduct described in RCW 7.48A.010(2)(b)(ii) and (iii). Whether or not activity is obscene shall be judged by consideration of the standards set forth in RCW 7.48A.010(2).

C. At an adult entertainment establishment the following are required:

1. Admission must be restricted to persons of the age of 18 years or older. An owner, operator, manager or other person in charge of the adult entertainment establishment may not knowingly permit or allow any person under the age of 18 years to be in or upon the premises whether as an owner, operator, manager, patron, member, customer, agent, employee, independent contractor, or in any other capacity. This section is not intended to be used in a prosecution of a minor on or within an adult entertainment establishment.

2. Neither the performance of any live adult entertainment, nor any display of specified sexual activities or sexual conduct, nor any photograph, drawing, sketch or other pictorial or graphic representation of any such performance, activities and/or conduct may take place or be located so

as to be visible to minors who are or may be outside of the adult entertainment establishment.

3. A member of the public may not be permitted at any time to enter into any of the nonpublic portions of the adult entertainment establishment, which includes but is not limited to: the dressing rooms of the entertainers, other rooms provided for the benefit of employees, or the kitchen or storage areas. However, a person delivering goods and materials, food and beverages, or performing maintenance or repairs to the premises or equipment on the premises may be permitted into nonpublic areas to the extent required to perform the person's job duties.

4. Restrooms may not contain video reproduction equipment and/or adult arcade devices and each restroom may not be occupied by more than one person at any time.

5. All ventilation devices or openings between adult arcade booths must be covered by a permanently affixed louver or screen. Any portion of a ventilation opening cover may not be located more than one foot below the top of the adult arcade station walls or one foot from the bottom of adult arcade station walls. There may not be any other holes or openings between the adult arcade stations.

6. No adult arcade station may be occupied by more than one person at any time. Any chair or other seating surface within an adult arcade station shall not provide a seating surface of greater than 18 inches in either length or width. Only one such chair or other seating surface shall be placed in any adult arcade station. No person may stand or kneel on any such chair or other seating surface.

7. There must be permanently posted and maintained in at least two conspicuous locations on the interior of all adult arcade establishments a sign stating substantially the following:

OCCUPANCY OF ANY STATION (VIEWING ROOM) IS AT ALL TIMES LIMITED TO ONE PERSON.

THERE MAY BE NO CRIMINAL ACTIVITY IN THE STATIONS, OR ANYWHERE ELSE ON THE PREMISES, INCLUDING BUT NOT LIMITED TO: SEXUALLY EXPLICIT CONDUCT (RCW 9.68A.011), ACTS OF LEWDNESS, INDECENT EXPOSURE, PROSTITUTION, DRUG ACTIVITY, OR SEXUAL CONDUCT, AS DEFINED HEREIN.

VIOLATORS ARE SUBJECT TO CRIMINAL PROSECUTION.

Each sign must be conspicuously posted and not screened from the patron's view. The letters and numerals must be on a contrasting background and be no smaller than one inch in height.

8. When doors are permitted in areas of the adult entertainment establishment that are available for use by persons other than the owner, manager, operator, or their agents or employees, those doors may not be locked during business hours.

9. No person may engage in any conduct, or operate or maintain any warning system or device of any nature or kind, for the purpose of alerting, warning, or aiding and abetting the warning of any patrons, members, customers, owners, operators, managers, employees, agents, independent contractors, or any other persons in the adult entertainment establishment, that police officers or county health, code enforcement, fire, licensing, or building inspectors are approaching or have entered the premises.

10. No person in an adult entertainment establishment may masturbate, or expose to view any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, penis, vulva or genitals.

D. The responsibilities of the manager of an adult entertainment establishment shall include:

1. A licensed manager shall be on duty at an adult entertainment establishment at all times adult entertainment is being provided or members of the public are present on the premises. The full name and license of the manager shall be prominently posted during business hours. The manager shall be responsible for verifying that any person who provides adult entertainment within the premises possesses a current and valid entertainer's license.

2. The licensed manager on duty shall not be an entertainer.

3. The manager licensed under this chapter shall maintain visual observation from a manager's station of each member of the public and each entertainer at all times any entertainer is present in the public or performance areas of the adult entertainment establishment. Where there is more than one performance area, or the performance area is of such size or configuration that one manager is unable to visually observe, at all times, each entertainer, each employee and each member of the public, a manager licensed under this chapter shall be provided for each public or performance area or portion of a public or performance area visually separated from other portions of the adult entertainment establishment. All adult arcade stations must open to the public room so that the area inside is fully and completely visible to the manager. No curtain, door, wall, merchandise, display rack, or other enclosure, material, or application may obscure in any way the manager's view of any portion of the activity or occupants of the adult entertainment establishment.

4. The manager shall be responsible for and shall ensure that the actions of members of the public, the adult entertainers, and all other employees shall comply with all requirements of this chapter. (Ord. 10-006 § 8, 2010).

5.10.090 Premises – Specifications.

A. Live Adult Entertainment Establishment Premises. The performance area of the live adult entertainment establishment where adult entertainment is provided shall be a stage or platform at least 18 inches in elevation above the level of the patron seating areas, and shall be separated by a distance of at least eight feet from all areas of the premises to which a member of the public has access. A continuous railing affixed to the floor and measuring at least three feet in height and located at least eight feet from all points of the performance area must be installed on the floor of the premises to separate the performance area and the public seating areas. The stage and the entire interior portion of all rooms or other enclosures wherein the live adult entertainment is provided must be visible from the common areas of the premises and from at least one manager's station. Visibility shall be by direct line of sight and shall not be blocked or obstructed by doors, curtains, drapes, walls, merchandise, display racks or other obstructions.

B. Adult Arcade Entertainment Establishment Premises. All adult arcade stations must open to the public room so that the area inside is fully and completely visible by direct line of sight to the manager. All adult arcade stations shall be maintained in a clean and sanitary condition at all times. All floors, walls and ceilings shall consist only of hard, cleanable surfaces. All adult arcade stations shall be

thoroughly cleaned with a diluted bleach solution whenever necessary for the removal of any potentially infectious materials (including, without limitation, semen, blood and vaginal secretions), but at least once daily. A record of such cleaning, listing the date and time, shall be posted in each adult arcade station. Any such potentially infectious materials, together with any cleaning rags, cloths or other implements, and any condoms, needles, or other items that may contain such potentially infectious materials, shall be placed in a properly labeled medical waste bag and disposed of pursuant to applicable laws or regulations.

C. Lighting. Sufficient lighting must be provided and equally distributed throughout the public areas of the entertainment establishment so that all objects are plainly visible at all times. A minimum lighting level of 30 lux horizontal, measured at 30 inches from the floor and on 10-foot centers, is required for all areas of the adult entertainment establishment where members of the public are permitted.

D. Signs. A sign at least two feet by two feet with letters at least one inch high, which are on a contrasting background, shall be conspicuously displayed in the public area(s) of the adult entertainment establishment stating the following:

> THIS ADULT ENTERTAINMENT ESTABLISHMENT IS REGULATED BY THE LAWS OF THE CITY OF SPOKANE VALLEY. ENTERTAINERS ARE:
>
> A. NOT PERMITTED TO ENGAGE IN ANY TYPE OF SEXUAL CONDUCT.
>
> B. NOT PERMITTED TO APPEAR SEMI-NUDE OR NUDE, EXCEPT ON STAGE.
>
> C. NOT PERMITTED TO ACCEPT TIPS OR GRATUITIES IN ADVANCE OF THEIR PERFORMANCE.
>
> D. NOT PERMITTED TO ACCEPT TIPS DIRECTLY FROM PATRONS WHILE PERFORMING UPON ANY STAGE AREA OR IN ANY ARCADE STATION OR BOOTH.

E. Recordkeeping Requirements. All papers, records and documents required to be kept pursuant to this chapter must be open to inspection by the licensing administrator during the hours when the licensed premises are open for business, upon two days' written notice to the licensee. An adult entertainment establishment shall maintain and retain for a period of two years the name, address and age of each person employed or otherwise retained or allowed to perform on the premises as an entertainer, including independent contractors and their employees. The purpose of the inspection shall be to determine whether the papers, records and documents meet the requirements of this chapter.

F. Inspections. Prior to the issuance of a license, the applicant must be qualified according to the provisions of all applicable City ordinances and the laws of the United States and of the state of Washington. The premises must meet the requirements of all applicable laws, ordinances, and regulations including but not limited to the International Building Code and the City's zoning code. All premises and devices must be inspected prior to issuance of a license.

Upon request, the licensing administrator will schedule a prelicensing conference with all pertinent City departments to assist the applicant in meeting the regulations and provisions of this chapter.

In order to ensure compliance with this chapter, all areas of a licensed adult entertainment establishment that are open to members of the public must be open to inspection by agents and employees of the jurisdiction during the hours when the premises are open for business. The purpose of such inspections must be to determine if the licensed premises are operated in accordance with the requirements of this

chapter. It is expressly declared that unannounced inspections of adult entertainment establishments are necessary to ensure compliance with this chapter.

G. Hours of Operation. An adult entertainment establishment may not be operated or otherwise open to the public between the hours of 2:00 a.m. and 10:00 a.m. (Ord. 10-006 § 9, 2010).

5.10.100 License fees, term, expiration, assignment, and renewals.

A. A license issued under this chapter expires on the thirty-first day of December of each year. A license fee may not be prorated, except that if the original application is made subsequent to June 30th, then one-half of the annual fee may be accepted for the remainder of such year.

B. Application for renewal of a license issued under this chapter must be made to the licensing administrator no later than 30 calendar days before the expiration for an adult entertainment establishment license, and no later than 14 calendar days before the expiration for an adult entertainment establishment manager's and entertainer's license. The licensing administrator shall issue the renewal license in the same manner and on payment of the same fees as for an original application under this chapter. The licensing administrator shall assess and collect an additional fee, computed as a percentage of the license fee, on an application not made on or before such date, as follows:

Calendar Days Past Due	Percent of License Fee
7 – 30	25%
31 – 60	50%
61 and over	75%

C. The licensing administrator shall renew a license upon application unless the licensing administrator is aware of facts that would disqualify the applicant from being issued the license for which he or she seeks renewal; and further provided, that the application complies with all the provisions of this chapter as now enacted or as the same may hereafter be amended.

D. License fees shall be adopted by the city council through a separate resolution.

E. Adult entertainment establishments which offer both live adult entertainment and adult arcade devices or stations shall be required to pay the fees associated with both live adult entertainment establishments and adult arcade establishments.

F. Licenses issued under this chapter may not be assigned or transferred to other owners, operators, managers, entertainers, premises, devices, persons or businesses.

G. A reinspection fee equal to the amount in effect for original application for any license shall be charged if the applicant requests approval for a proposed enlargement or alteration of the interior of the adult entertainment establishment, or if the applicant requests the licensing administrator make an inspection of the premises in addition to the usual prelicensing inspection. (Ord. 10-006 § 10, 2010).

5.10.110 Suspension or revocation of licenses.

The license administrator may, upon 14 calendar days' written notice delivered to the license holder, temporarily suspend or permanently revoke any license issued pursuant to this chapter where one or

more of the following conditions exist:

A. The license application, or any report or record required to be filed with the City, includes one or more false, misleading, or fraudulent statements of material fact; or

B. The building, structure, equipment or location of the business for which the license was issued does not comply with the requirements or standards of the chapter, the applicable building or zoning codes, or other applicable law; or

C. The licensee, his or her employee, agent, partner, director, officer or manager has knowingly allowed or permitted, in or upon the premises of any adult entertainment establishment, any violations of this chapter or acts made unlawful under this chapter. (Ord. 10-006 § 11, 2010).

5.10.120 Appeal and hearing.

Any person aggrieved by the action of the license administrator in refusing to issue or renew any license under this chapter, or in temporarily suspending or permanently revoking any license under this chapter, shall have the right to appeal such action to the City's hearing examiner under SVMC 17.90.040 through 17.90.060, except to the extent that such sections relate only to land use matters under this code. Notwithstanding the provisions of SVMC 17.90.060(A) and Appendix B, Section E, all testimony at any hearing affecting a license under this chapter shall be taken under oath. The filing of such appeal shall stay the action of the license administrator.

Any person aggrieved by the decision of the hearing examiner shall have the right to appeal the decision to the Spokane County superior court by writ of certiorari filed and served upon the City within 14 calendar days after the date of the hearing examiner's decision. The filing of such appeal shall stay the action of the hearing examiner. (Ord. 10-006 § 12, 2010).

5.10.150 Compliance by existing adult entertainment establishments.

Any adult entertainment establishment lawfully operating on the effective date of the ordinance codified in this chapter that is in violation of the specifications for the premises of adult entertainment establishments set forth in SVMC 5.10.090 must correct any configuration and bring the adult entertainment establishment into full compliance with those premises specifications not later than 90 calendar days after the effective date of the ordinance codified in this chapter. All other provisions of this chapter are operative and enforceable on the effective date. (Ord. 10-006 § 13, 2010).

5.10.160 Penalties.

A person violating this chapter is guilty of a misdemeanor. Any person violating any of the provisions of this chapter shall be deemed guilty of a separate offense for each and every day or portion thereof during which any violation is committed, continued, authorized, or permitted; provided, no person shall be deemed guilty of any violation of this chapter if acting in an investigative capacity pursuant to the request or order of law enforcement. All violations of this chapter are hereby determined to be detrimental to the public health, safety and general welfare and are hereby declared public nuisances. (Ord. 10-006 § 14, 2010).

5.10.170 Additional remedies.

Any license issued under this chapter shall be subject to the rules of the Washington State Liquor

Control Board relating to the sale of intoxicating liquor. If there is a conflict between this chapter and the applicable rules of the Washington State Liquor Control Board, the rules of the Washington State Liquor Control Board shall govern.

The remedies provided herein for violations of the provisions of this chapter, whether civil or criminal, are cumulative and in addition to any other remedy provided by law. The remedies are not exclusive, and the City may seek any other legal or equitable relief. An adult entertainment establishment operated or maintained contrary to the provisions of Chapter 7.48A RCW, Moral Nuisance, is unlawful and a public and moral nuisance, and the City may in addition to any other remedies commence an action to enjoin, abate or remove any such nuisance. (Ord. 10-006 § 15, 2010).

The Spokane Valley Municipal Code is current through Ordinance No. 15-027, passed December 15, 2015.
Disclaimer: The City Clerk's Office has the official version of the Spokane Valley Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

OFFICE RECEPTIONIST, CLERK

To: Sarah May Johnson
Subject: RE: Submission for Filing: City of Spokane Valley v. Brian Dirks et al.: Petition for Review

Received on 01-12-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sarah May Johnson [mailto:ghlevylaw.assistant@gmail.com]
Sent: Tuesday, January 12, 2016 4:35 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Submission for Filing: City of Spokane Valley v. Brian Dirks et al.: Petition for Review

Please accept for filing the attached document "Petition for Review by the Washington Supreme Court". A Certificate of Service is attached at the end of the Petition and the Appendices (A through G) are attached to the end of the Petition, after the Certificate of Service.

The Case and Filing Party Information is as follows:

City of Spokane Valley v. Brian Dirks, Christine Dirks, Maressa Dirks and CA-WA Corp, a California Corporation doing business as Holly Wood Erotique Botique

Court of Appeals Number: 33140-7-III

Filing Party: Sarah May Johnson, Assistant to Attorney Gilbert H. Levy (WSBA #4805)

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Thank you very much,

Sarah

--
Sarah May Johnson
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