

37094-8
377094-8-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JANINE BRUNSON, COLLEEN JOHNSON, AND CHRISTY TUCKER

Appellants,

Vs.

PIERCE COUNTY Et Al.

Respondents

FILED
COURT OF APPEALS
DIVISION II
08 APR 25 PM 2:48
STATE OF WASHINGTON
BY DEPUTY

APPELLANTS' OPENING BRIEF

Appeal from the Honorable Brian Tollefson
Pierce County Superior Court Nos. 06-2-13561-5, 06-2-13560-7, 06-2-13562-3
Entered on November 30, 2007

Gilbert H. Levy, Attorney for Appellants
Suite 330 Market Place One
2003 Western Avenue
Seattle, WA 98121
(206) 443-0670

Table of Contents

I. ASSIGNMENT OF ERROR1

II. STATEMENT OF THE CASE2

 A. Statement Of Procedure.....2

 B. Statement Of Facts.....3

III. ARGUMENT6

 A. Summary Of Argument6

 B. The Auditor’s Decision To Impose A One Year License
 Suspension For A First Offense Was Arbitrary, Capricious And
 An Abuse Of Discretion 7

 C. Imposition Of A One Year License Suspension For A
 First Offense Violates The First Amendment..... 10

 D. License Suspension On The Basis Of Strict Liability
 Violates The First Amendment..... 13

 E. PCC 5.14.240(C) Violates Due Process Because It
 Permits License Revocation On The Basis Of A Preponderance
 Of The Evidence Standards 16

IV. CONCLUSION.....19

V. REQUEST FOR AWARD OF ATTORNEY FEES20

VII. Appendix.....21

 A. Chapter 5.14 Pierce County Code

 B. License Suspension Notice

 C. Bellevue, Sea-Tac and Shoreline License Suspension Ordinances

Table of Authorities

Cases

In O’Day v. King County, 109 Wn.2d 796, 749 P.2d 142 (1988).....6

Davis v. Employment Security Department, 108 Wn.2d 272, 737 P.2d 1262(1987).....8

State v. Roth, 78 Wn.2d 711, 479 P.2d 55 (1971).....8

Gimlett v. Gimlett, 95 Wn.2d 699, 629 P.2d 450 (1981).....8

Norequest/RCA v. Seattle, 72 Wn. App. 467, 865 P.2d 18 (1994).....9

State v. Pettit, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).....9

Bowcutt v. Delta North Corp., 95 Wn.2d. 311, 320, 976 P.2d 643 (1999).9

Colacurcio v. Kent, 163 F.3d 545 (9th Cir. 1998).....11

Ino Ino, Inc. v. Bellevue, 132 Wn.2d 103, 937 P.2d 154(1997).....11

DCR, Inc v. Pierce County, 92 Wn. App. 660, 964 P. 2d 380 (1998).....11

Clark v. Community for Creative Non-Violence, 468 U.S.288, 298, 104 S. Ct. 3065, 82 L. Ed. 2d 672 (1984).....11

United States v. O’Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).....11

<i>City of Renton v. Playtime, Theatres, Inc.</i> 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 2 (1986).....	12
<i>Ward v. Rock Against Racism</i> , 491 US. 781, 791, 109 S. Ct. 2746, 105 S. Ct. 661(1989).....	12
<i>City of Los Angeles v. Alameda Books</i> , 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002).....	12
<i>State v. Bradsaw</i> , 152 Wn.2d 522, 98 P.3d 1190 (2004).....	13
<i>State v. Roth</i> , 78 Wn.2d 711, 479 P.2d 55 (1971).....	14
<i>Stegriy v. King County Board of Appeals</i> , 39 Wn. App. 346, 693 P.2d 183(1984).....	14
<i>State Ex. Rel. Lally v. Gump</i> , 57 Wn.2d 224, 396 P.2d 289(1966).....	14
<i>Sidor v. Public Disclosure Commission</i> , 25 Wn. App. 127, 130, 607 P.2d 859 (1980).....	15
<i>Threesome Entertainment v. Strittmather</i> , 4 F. Supp.2d 710 (N.D. Ohio 1998).....	15
<i>Nguyen v. State Department of Medical Quality Assurance</i> , 144 Wn.2d 516, 29 P.3d 689 (2001).....	17
<i>Ongom v. State Department of Health, Office of Professional Standards</i> , 159. W. 2d 132, 148 P. 2d 1029 (2006).....	18

I. ASSIGNMENT OF ERROR

The Trial Court committed error in upholding the decision of the Pierce County Auditor and the Hearing Examiner to suspend Appellants' adult entertainment license for a period of one year.

Issue Number 1 related to Assignment of Error: Was the decision of the Auditor to impose a one-year license suspension arbitrary, capricious and contrary to law?

Issue Number 2 related to Assignment of Error: Did imposition of a one year license suspension for a first offense violate Appellant's rights under the First and Fourteenth Amendments to the United States Constitution?

Issue Number 3 related to Assignment of Error: Do Pierce County Code Sections 5.14.190 and 5.14.230(B) violate the First and Fourteenth Amendment to the United States Constitution by permitting a one year license suspension on the basis of strict liability?

Issue Number 4 related to Assignment of Error: Does Pierce County Code Section 5.14.240(C) violate the Due Process Clause of the Fourteenth Amendment by permitting suspension of an entertainer's license under a preponderance of the evidence standard?

II. STATEMENT OF THE CASE

A. Statement Of Procedure

Appellants are entertainers at Foxes Nightclub in unincorporated Pierce County. (Johnson CP 1-5), (Brunson CP 262-266), (Tucker 278-282). The business features erotic dancing and nude entertainment. Id. The business and the entertainers are subject to regulation under Chapter 5.14 of the Pierce County Code. Id.¹ Entertainers are required to maintain a license under Chapter 5.14 or be subject to criminal penalties. Id. The Pierce County Auditor's Office issued a notice to each of the Appellant's informing them that their licenses were suspended for a period of one year due to violations of Pierce County Code, (hereinafter "PCC"), 5.14.190. Id. Appellants were alleged to have violated PCC 5.14.190(H), which provides:

All dancing shall occur on a platform for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet to any patron.²

Appellants were also alleged to have violated PCC 5.14.190(I), which provides:

No dancer or employee shall fondle, caress, or touch any patron in a manner, which seeks to arouse or excite the patron's sexual desires.

¹ A true and correct copy of Chapter 5.14 is contained in the Appendix.

² Copies of the license suspension notices are contained in the Appendix.

Appellants were also alleged to have violated PCC 5.14.190(L), which provides:

No dancer shall solicit any pay or gratuity directly from any patron.

Appellants appealed their one-year license suspension to the Pierce County Hearing Examiner. (Johnson CP 1-5), (Brunson CP 262-266), (Tucker 278-282). Following a hearing, the Hearing Examiner issued decisions upholding the one-year license suspensions. Id. Appellants filed timely petitions for review in the Pierce County Superior Court. Id. Later, they filed amended petitions, which included claims under the Federal Civil Rights Act, Title 42 United States Code § 1983. (Johnson CP 7-12), (Brunson CP 267-272), (Tucker CP 284-289). The Superior Court issued an order consolidating the cases for hearing and trial. (CP 29-30). The Superior Court issued a writ of review. (CP 27-28). Following briefing and argument, the Superior Court issued an order denying the petition for writ of review and dismissing Appellants' claims. (CP 254-255). Appellants then filed a timely notice of appeal. (CP 256-259).

B. Statement Of Facts

At the administrative hearing, PCSO Detective Clark testified that on January 20, 2006, he was assisting the Special Investigations Unit,

which was conducting an undercover operation at Foxes. HT 30.³ While acting in an undercover capacity, he was approached by a dancer who identified herself as “Delight.” She took to him to a secluded area in the business and spoke to him for a few minutes. Id. at 31. She said she would dance for him when the song started. Id. She proceeded to sit on his lap and straddle his legs. Id. She rubbed her body up and down against his body. Id. She rubbed her butt, breast and buttocks against his crotch. Id. at 32. She touched her crotch with his hand and charged him \$30.00 for the dance. Id. He later identified “Delight” as Appellant Colleen Johnson. Id. at 33.

Detective Wright obtained a dance from “Christy”. HT 37. She provided him with a dance and rubbed herself against his crotch area. Id. at 38. She said that the dance would cost \$30.00. Id. She rubbed her crotch and buttocks directly against his groin. Id. She licked his ears and touched her crotch against is hand. Id. at 38, 39. He later identified “Christy” as Appellant Christy Dawn Tucker. Id. at 41.

Detective Byron Brockway, while working at Foxes in an undercover capacity, was contacted by “Heaven.” HT 49. “Heaven” agreed to do a dance for \$20.00. Id. at 50. She took him back to a couch area on the north side of the business. Id.. She exposed the top of her left

³ The abbreviation HT refers to the certified transcript of the hearing.

nipple, ground his groin with her leg and rubbed her hand on his groin. *Id.* She rubbed her own groin on his groin area. *Id.* at 51. He gave her \$20.00 and later identified her as Appellant Janine Brunson. *Id.*

Jill Munns testified that she is the Recording Licensing Lead for the Pierce County Auditor's Office. HT 65. She is the person in the Auditor's Office who made the decision as to the length of the license suspensions. *Id.* at 66. In making the decision, she considered no policies or guidelines other than the Pierce County Code. *Id.* at 66, 67. She is aware that under the Code she has the discretion to impose a suspension for less than a year. *Id.* at 67. The factors that she considered in determining the length of the suspension were that in each case there were multiple violations of the Ordinance. *Id.* She did not consider whether Plaintiffs had a criminal record and did not consider any personal information such as whether they had families to support. *Id.* at 68. She was unable to state how many violations would trigger the one-year suspension. *Id.* at 69. She could conceive of no circumstances in which a suspension of less than one year would be appropriate. *Id.* She testified that she would consider any violation of the Code to be a serious matter, such that it would merit a one-year suspension. She testified as follows:

Q: Did you ever consider that a suspension of less than a year would be appropriate to deter future illegal conduct?

A: Well, in reviewing the report, the violations would all be serious, and it should be denied for a year because...(inaudible).

Q: Can you think of any violation that wouldn't be serious?

A. (Inaudible) clearly states (inaudible) basically any violation to the code is serious.

Id. at 71, 72.

Janine Brunson testified that she is the primary support for her family and has four children. HT 76. She supports her children with the income at Foxes and has no prior violations of the Ordinance. Id. at 77.

Colleen Johnson testified that she is the sole provider for her family and has five children. Id. at 82. She has no prior violations of the Ordinance. Id. at 83.

III. ARGUMENT

A. Summary Of Argument

In *O'Day v. King County*, 109 Wn.2d 796, 749 P.2d 142 (1988), the Supreme Court upheld the constitutionality of King County's adult entertainer license suspension provisions in response to a double jeopardy challenge. The Court held that the license suspensions of up to one year are civil remedial measures rather than punitive measures and therefore the constitutional protection against double jeopardy doesn't apply. The Court stated:

We conclude that the County intended to impose sanctions against a dancer's license as a remedial measure, aimed at protecting the younger clientele that frequents soda pop clubs. In addition, we conclude that license suspension or revocation for up to 1 year is not so punitive a sanction as to negate that intention.

The Court in *O'Day* did not consider any of the claims that Appellants are raising in this case and therefore the issues presented herein are not foreclosed by that decision. Appellants maintain that the Trial Court erred in its determination that the actions of the Auditor were not arbitrary and capricious, it erred in its determination that a one year license suspension for a first offense does not violate the First Amendment, it erred in its determination that license suspension on the basis of strict liability does not violate the First Amendment, and it erred in its determination that PCC 5.14.240(C) does not violate the Due Process Clause by permitting the Hearing Examiner to uphold the license suspension on the basis of a preponderance of evidence standard.

B. The Auditor's Decision To Impose A One Year License Suspension For A First Offense Was Arbitrary, Capricious And An Abuse Of Discretion

According to PCC 5.14.230(B), the Auditor "shall revoke or suspend for a specified period of not more than a year" in the case of a dancer who has "violated ... any provision of this Chapter. Thus, while the Auditor is required to take action in the case of a perceived violation,

she has discretion whether to suspend or revoke and discretion as to the period of the suspension. The word "suspension" implies a period of temporary ineligibility whereas "revoke" implies ineligibility that is more permanent. Neither word is defined in the Ordinance. In the absence of a statutory definition, words in a statute are to be given their plain and ordinary meaning.⁴ *Davis v. Employment Security Department*, 108 Wn.2d 272, 737 P.2d 1262 (1987). Where the legislative body uses different terms in a statute, it is presumed that the terms have different meanings. *State v. Roth*, 78 Wn.2d 711, 479 P.2d 55 (1971). Statutes are to be construed wherever possible so that no portion is superfluous. *Gimlett v. Gimlett*, 95 Wn.2d 699, 629 P.2d 450 (1981). In the context of this particular ordinance, the term "suspend" must be construed to mean a period of ineligibility of less than one year since otherwise the term "revoke" is superfluous. The notices that were issued by the Auditor in this case called for suspension rather than revocation. Therefore, the Auditor acted contrary to law in determining that the suspension should last for a year.

The Ordinance contains no guidelines for the exercise of the Auditor's discretion. According to the testimony of the Auditor's

⁴ Webster's New Collegiate Dictionary defines "revoke" as "to nullify by withdrawing, recalling or reversing...". It defines "suspend" as "To bar for a period from a privilege, office, or position..."

representative, her office has no written policies or guidelines determining how she will exercise her discretion. In determining the length of the suspension, she considered only the number of violations and whether the violations were “serious”. She testified that she considered all violations of Ordinance to be serious. She considered no personal information about the Plaintiffs including whether they had criminal histories or had previously violated the Ordinance. She did not consider whether a lesser period of suspension would be sufficient to accomplish the remedial purpose of the Ordinance. Appellants maintain that this constitutes arbitrary and capricious action on the part of the Auditor and an abuse of discretion.

A governmental action is arbitrary and capricious if it is willful and unreasoning action in disregard of facts and circumstances. *Norequest/RCA v. Seattle*, 72 Wn. App. 467, 865 P.2d 18 (1994). Failure to exercise discretion is an abuse of discretion. *State v. Pettit*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980); *Bowcutt v. Delta North Corp.*, 95 Wn.2d 311, 320, 976 P.2d 643 (1999). In *Pettit*, the prosecutor relied on the person’s record alone in deciding whether to file habitual criminal charges.⁵ The Washington Supreme Court held that the failure to consider

⁵ Under the former habitual criminal statute, a person could be charged as an habitual criminal and required to serve a life sentence upon conviction, if he or she had a certain number of prior felony convictions.

anything else about the offender and the decision to file habitual criminal charges in all cases regardless of individual circumstances constituted an abuse of discretion. The Court stated:

In our view, this fixed formula, which requires a particular action in every case upon the happening of a specific series of events, constitutes an abuse of discretionary power lodged in the prosecuting attorney.

The same problem exists with respect to the way that the Auditor exercised her discretion in this case. The Auditor's representative employed a fixed formula in deciding to suspend the licenses for the maximum period without regard to individual facts and circumstances. In particular, she failed to consider the person's prior record with respect to similar violations and whether a lesser sanction would be sufficient to deter future illegal conduct. This constitutes arbitrary and capricious action on the part of the Auditor and an abuse of discretion. The Trial Court committed error in holding to the contrary.

C. Imposition Of A One Year License Suspension For A First Offense Violates The First Amendment

PCC 5.14.230(B) provides:

The Auditor shall revoke or suspend, for a specified period of not more than one year, any dancer/manager license if he/she determines that the licensee or applicant has made a materially false statement in the application for a license which the applicant knows to be false; or violated or permitted violation of any provisions of this Chapter.

The constitutionality of regulations such as PCC § 5.14.230(B) is analyzed under the test applicable to time, place and manner restrictions. *Colacurcio v. Kent*, 163 F.3d 545 (9th Cir. 1998); *Ino Ino, Inc. v. Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997); *DCR, Inc v. Pierce County*, 92 Wn. App. 660, 964 P. 2d 380 (1998). There are two different tests applicable to time, place and manner restrictions, although the Supreme Court has stated that they are similar if not the same. *Clark v. Community for Creative Non-Violence*, 468 U.S.288, 298, 104 S. Ct. 3065, 82 L. Ed. 2d 672 (1984). One is the test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), dealing with regulations applicable to expressive conduct. The Washington Supreme Court, in upholding the “four foot rule” in the Bellevue adult entertainment ordinance, employed the O’Brien test. *Ino Ino, Inc. v. Bellevue*, 132 Wn.2d at 127-133. Under the *O'Brien* test, a regulation is valid 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 restriction on alleged First Amendment freedom is no greater than essential to the furtherance of that interest. On the other hand, the Ninth Circuit in *Colacurcio, supra*, and this Court in *DCR, supra*, applied the time, place and manner test derived from the *City*

of *Renton v. Playtime, Theatres, Inc.* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). Under the *Renton* test, a regulation is valid if it is: (1) content neutral; (2) narrowly tailored to further a significant or substantial governmental interest, and (3) leaves open ample alternative channels of communication.

Under the *Renton* test, a regulation is deemed to be content neutral rather than content based if it is aimed at the eradication of so called “secondary effects” associated with the speech. *Colacurcio v. Kent*, *supra*, at 551. Secondary effects may include but are not limited to threats to public health and safety. *Id.* In the case of adult nightclubs, secondary effects include such activities as illegal sexual conduct, drug dealing and prostitution. *DCR, Inc., supra*, at 678. A regulation is narrowly tailored if it promotes a governmental interest that would be achieved less effectively absent the regulation, and if it does not burden substantially more speech than is necessary to further the government’s interests. *Ward v. Rock Against Racism*, 491 US. 781, 791, 109 S. Ct. 2746, 105 S. Ct. 661 (1989). A City may not pass a regulation that substantially reduces secondary effects if the net effect of the regulation is to substantially reduce speech. See the concurring opinion of Justice Kennedy in *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002)

According to the manner in which it is applied in this case, PCC 5.14.230(B) permits a one year license suspension for a first offense. Appellants maintain that a one-year suspension for a first offense violates the fourth prong of the *O'Brien* test and the narrow tailoring test of *Renton*. The incidental restriction on First Amendment freedoms is greater than essential to achieve the asserted governmental interest. The restrictions burden substantially more speech than is necessary to reduce secondary effects. There is no indication that a lesser sanction for a first offense would not be sufficient to vindicate the County's legitimate interest in eradicating the evils that the Chapter 5.14 was intended to prevent.⁶ A one-year suspension for a first offender therefore violates the First Amendment and the Trial Court committed error in holding to the contrary.

D. License Suspension On The Basis Of Strict Liability Violates The First Amendment

In determining whether the legislature intended to create a strict liability crime, a court considers both the statutory language and the legislative intent. *State v. Bradshaw*, 152 Wn.2d 522, 98 P.3d 1190 (2004). The standards of conduct in PCC 5.14.190, including those specific subsections with which the Appellants were charged, contain no

⁶ Significantly other municipalities with similar licensing schemes impose a graduated series of licensing penalties depending on the number of prior violations. This court is requested to take judicial notice of the applicable sections of the Bellevue, Shoreline and Sea-Tac municipal codes which are captioned in the appendix.

mens rea requirement. PCC 5.14.250 imposes criminal liability on “any person . . . violating any provision of this Chapter”, without regard to a mens rea requirement. PCC 5.14.230(B) provides:

The Auditor shall, revoke or suspend, for a specified period of not more than one year, any dancer/manager license if he/she determines that the licensee or applicant has: made a materially false statement in the license application which the applicant **knows to be false**; or violated or permitted violation of any provisions of this Chapter, (emphasis supplied).

Where different words are used in the same statute or ordinance, it is presumed that a different meaning was intended to attach to each word. *State v. Roth*, 78 Wn.2d 711, 479 P.2d 55 (1971); *Stegriy v. King County Board of Appeals*, 39 Wn. App. 346, 693 P.2d 183 (1984). The use of the phrase “knows to be false” only in connection with providing a false statement in the license application and omitting such language elsewhere indicates a clear intention on the part of the Pierce County Council to impose strict liability with respect to violations of other portions of the Ordinance.

Where a criminal statute impacts freedom of speech, imposition of strict liability violates the First Amendment. *State Ex. Rel. Lally v. Gump*, 57 Wn.2d 224, 396 P.2d 289 (1966). The concern is that those who are potentially subject to the statute may refrain from engaging in protected activity for fear of a criminal sanctions. *Id.* Similarly, while the

States are free to define their own liability standards in defamation cases, imposition of strict liability violates the First and Fourteenth Amendments. *Sidor v. Public Disclosure Commission*, 25 Wn. App. 127, 130, 607 P.2d 859 (1980).

In *Threesome Entertainment v. Strittmather*, 4 F. Supp.2d 710 (N.D. Ohio 1998), the district court was presented with a civil rights challenge to various portions of a local adult nightclub ordinance similar to the Pierce County Ordinance. Under the fourth prong of the *O'Brien* test, the court enjoined enforcement of portions of the ordinance which permitted touching of patrons by semi-nude dancers and which imposed strict liability on those who participated in the operation of an adult cabaret that violated any provision of the ordinance. The court held that these portions imposed greater restrictions than essential to achieve governmental goals because they criminalized otherwise innocent behavior on the basis of strict liability. The Court stated:

Given this rule of statutory construction, the provision that “*No employee...in a state of semi-nudity shall have any physical contact with any other employee or with a customer of such adult cabaret*” imposes strict liability upon employees and patrons; liability is imposed regardless of the employee’s or patrons scienter and regardless of the nature of the contact. (Emphasis added). Thus, the provision criminalizes even inadvertent or accidental touching and could potentially criminalize a handshake or handing over of money. As such, it cannot be said that the provision burdens no more protected expression than is necessary to further Vermilions’s legitimate interests.

Id. at 722.

Like the ordinance sections at issue in *Strittmather*, the Pierce County Ordinance permits imposition of criminal sanctions and license suspension for innocent behavior on the basis of strict liability. If a dancer inadvertently touches a patron on the buttocks, she is subject to criminal sanctions and a one-year license suspension. If unbeknownst to the dancer, the platform is less than eighteen inches off the ground, she is subject to criminal sanctions and a one year license suspension. The restrictions impose a burden on freedom of speech greater than necessary to achieve the County's legitimate goals and therefore violate the First Amendment.

E. PCC 5.14.240(C) Violates Due Process Because It Permits License Revocation On The Basis Of A Preponderance Of The Evidence Standards

PCC 5.14.240(C) provides:

The decision of the Hearing Examine shall be based on the preponderance of the evidence.

In affirming Appellants' license suspension, the Hearing Examiner employed the preponderance standard set forth in the above-quoted section of the Ordinance. Appellants' maintain that this violates their right to procedural Due Process.

In *Nguyen v. State Department of Medical Quality Assurance*, 144 Wn.2d 516, 29 P.3d 689 (2001), the Court overturned the revocation of the appellant's medical license because the Department revoked his license under a preponderance of the evidence standard. The Court stated that the appellant has a liberty and a property interest in his medical license and he cannot be deprived of that interest without due process of law. The Court stated that consistent with due process, the minimum evidentiary standard is dependent upon the nature of the interest at stake. The Court noted that in the case of more important interests, due process requires a higher standard of proof. The Court held that the intermediate clear cogent and convincing standard is generally required in a variety of civil situations to protect more important interests. Interests are considered more important when the proceedings involve more than a money judgment, they are quasi criminal in nature and the proceedings potentially tarnish a person's reputation. The Court held that medical disciplinary proceedings are quasi criminal because they are for the protection of the public, they are brought because of alleged misconduct, and they are unavoidably punitive in nature. The Court held that in general, the clear and convincing standard is required in quasi-criminal proceedings or where the proceedings threaten the individual with a significant deprivation of liberty or with a stigma. The Court stated:

Because of their unique nature, constitutional due process requires quasi-criminal proceedings instigated by the state and involving a stigma more substantial than mere loss of money-be proved by the clear preponderance of evidence standard. (Cites omitted). **It would be incongruous and contrary to both Washington and federal precedent to allow a quasi-criminal prosecution to proceed under the lowest standard of proof.**

Id. at 529, (emphasis supplied).

In *Ongom v. State Department of Health, Office of Professional Standards*, 159. W. 2d 132, 148 P. 2d 1029 (2006), the Court reversed the suspension of a nursing assistant's license where the Department relied on a preponderance of evidence standard. In doing so, the Court overturned the Court of Appeals, which affirmed the suspension on the grounds that a nursing assistant's license was less important than a medical license. The Court stated:

Although undoubtedly a medical license is much more difficult to obtain than a registration to practice as a nursing assistant, each constitutes a lawful entitlement to practice one's chose profession. We cannot say Ms. Ongom's interest in earning a living is any less valuable to her than Dr. Nguyen's interest in pursuing his career as a medical doctor.

Id. at 139.

The Court in *Ongom* also rejected the Department's efforts to distinguish *Nguyen* on the ground that it involved a license revocation whereas the appellant in *Ongom* was only facing a suspension. The Court

held that “The burden of proof does not differ based on the result in a particular proceeding or the nature of the charges.” *Id.* at 140.

This case meets all three parts of the *Nguyen* test for requiring a higher standard of proof. First, more than a money judgment is involved. Second, it is a quasi-quasi criminal proceeding. The suspension is for the protection for of the public. There is an allegation of misconduct. The result from the Plaintiffs’ standpoint is punitive in nature. Third, there is a stigma arising from the suspension. Furthermore, Appellants’ interest in their erotic dancer license is just as important to them as the medical license was in *Nguyen* or the nursing assistant license in *Ongom*. It is the means by which they support their families. PCC 5.14.240(C) is therefore unconstitutional.

IV. CONCLUSION

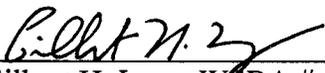
The decision of the Superior Court upholding the decisions of the Pierce County Auditor should be reversed. This Court should find that the actions of the Auditor were arbitrary, capricious and an abuse of discretion and that imposing a maximum one year license suspension without considering the efficacy of lesser sanctions violates the First Amendment. This Court should hold that PCC 5.14.230(B) is unconstitutional under the First Amendment because it permits one-year license suspension on the basis of strict liability regardless of the seriousness of the violation. It

should hold that PCC 5.14 240 CC) Violates the Due Process Clause of the Fourteenth Amendment because it permits license suspension on the basis of a preponderance of the evidence standard.

V. REQUEST FOR AWARD OF ATTORNEY FEES

Having found that PCC 5.14.230(B) and 5.14.240(C) are unconstitutional, this Court should award attorney fees and costs pursuant to Title 42 United States Code § 1988.

Dates this 23 day of April, 2008



Gilbert H. Levy, WSBA # 4805
Attorney for Appellants

VI. APPENDIX

APPENDIX A.

Chapter 5.14

**ADULT ENTERTAINMENT INDUSTRY
LICENSING AND REGULATION**

Sections:

- 5.14.010 Definitions.**
- 5.14.020 Prima Facie Evidence of Erotic Dance Studio.**
- 5.14.030 Studio License - Application to Auditor.**
- 5.14.040 Studio License - Information Required.**
- 5.14.060 Studio License - Transmittal of Application.**
- 5.14.070 Studio License - Issuance.**
- 5.14.080 Studio License - Expiration.**
- 5.14.090 Studio License - Renewal.**
- 5.14.100 Dancer's License - Required.**
- 5.14.110 Manager's License - Required.**
- 5.14.120 Dancer's/Manager's License - Application to Auditor.**
- 5.14.130 Dancer's/Manager's License - Information Required.**
- 5.14.150 Dancer's/Manager's License - Issuance.**
- 5.14.160 Dancer's/Manager's License - Expiration.**
- 5.14.170 Dancer's/Manager's License - Renewal.**
- 5.14.180 Manager on Premises.**
- 5.14.190 Operation Restrictions - Unlawful Acts Designated.**
- 5.14.200 Public Display Prohibited.**
- 5.14.210 Inspection of Records and Premises Authorized.**
- 5.14.220 Standards for Denial of License.**
- 5.14.230 Standards for Revocation - Suspension of License.**
- 5.14.240 Appeal and Hearing.**
- 5.14.250 Violation - Penalty.**
- 5.14.260 Severability.**

5.14.010 Definitions.

In this Chapter, the following definitions shall apply unless the context clearly requires otherwise:

- A. "Auditor" means the Pierce County Auditor and/or his/her employee or agent.
- B. "Dancer" means a person who dances or otherwise performs for or at an erotic dance studio and seeks to arouse or excite the patrons' sexual desires.
- C. "Employee" means any and all persons, including dancers, lessees and independent contractors, who work in or at or render any services to the operation of an erotic dance studio.
- D. "Erotic dance studio" means a fixed place of business which emphasizes and seeks, through one or more dancers, to arouse or excite the patrons' sexual desires.
- E. "Manager" means any person who manages, directs, administers, or is in charge of the affairs and/or conduct of any portion of any activity at an erotic dance studio.

- F. "Sheriff" means the Pierce County Sheriff and his/her agents.
- G. "Verified" means

- 1. Attested to by the applicant or licensee in writing, and
- 2. Notarized.

(Ord. 94-5 § 2 (part), 1994)

5.14.020 Prima Facie Evidence of Erotic Dance Studio.

It shall be prima facie evidence that a business is an erotic dance studio when one or more dancers display or expose, with less than a full opaque covering, that portion of the female breast lower than the upper edge of the areola and/or any portion of the human genitals. (Ord. 94-5 § 2 (part), 1994)

5.14.030 Studio License - Application to Auditor.

Application for erotic dance studio license shall be made to the Auditor. (Ord. 94-5 § 2 (part), 1994)

5.14.040 Studio license - Information Required.

An application for erotic dance studio license shall be verified and shall contain or set forth the following information:

- A. The name, address, telephone number, principal occupation, and age of the applicant;
- B. The name, address, and principal occupation of the managing agent or agents of the business;
- C. The business name, business address, and business telephone number of the establishment or proposed establishment together with a description of the nature of the business and magnitude thereof;
- D. Whether the business or proposed business is the undertaking of a sole proprietorship, partnership, or corporation:
 - 1. If a sole proprietorship, the application shall set forth the name, address, telephone number, and principal occupation of the sole proprietor.
 - 2. If a partnership, the application shall set forth the names, addresses, telephone numbers, principal occupations, and respective ownership shares of each partner, whether general, limited, or silent.
 - 3. If a corporation, the application shall set forth the corporate name, a copy of the articles of incorporation, and the names, addresses, telephone numbers, and principal occupations of every officer, director, and shareholder (having more than 5 percent of the outstanding shares) and the number of shares held by each;
- E. The names, addresses, telephone numbers, and principal occupations of every person, partnership, or corporation having any interest in the real or personal property utilized or to be utilized by the business or proposed business.

(Ord. 94-5 § 2 (part), 1994)

5.14.060 Studio License - Transmittal of Application.

Within seven days of receipt of an application for an erotic dance studio license, the Auditor shall transmit copies of such application to the Sheriff for review and recommendation, and to the Fire Prevention Bureau and the Planning and Land Services Department for review and report as to the Applicant's compliance with all applicable fire, building, and zoning requirements of Pierce County. (Ord. 94-5 § 2 (part), 1994)

5.14.070 Studio License - Issuance.

The Auditor shall issue an erotic dance studio license within 30 days of receipt of both a properly-completed application and application fee, and upon finding that the business complies with all applicable fire, building, and zoning codes. (Ord. 94-5 § 2 (part), 1994)

5.14.080 Studio License - Expiration.

An erotic dance studio license shall expire on December 31st of the year in which it is issued. (Ord. 94-5 § 2 (part), 1994)

5.14.090 Studio License - Renewal.

An erotic dance studio license may be renewed or reinstated after a period of revocation by following the application procedures set forth in Sections 5.14.030 through 5.14.080. (Ord. 94-5 § 2 (part), 1994)

5.14.100 Dancer's License - Required.

No person, whether employee or non-employee, shall dance at an erotic dance studio without a valid dancer's license issued by the Auditor. (Ord. 94-5 § 2 (part), 1994)

5.14.110 Manager's License Required.

No person shall work as a manager at an erotic dance studio without having first obtained a manager's license from the Auditor. (Ord. 94-5 § 2 (part), 1994)

5.14.120 Dancer's/Manager's License - Application to Auditor.

Application for dancer's/manager's licenses shall be made to the Auditor. (Ord. 94-5 § 2 (part), 1994)

5.14.130 Dancer's/Manager's License - Information Required.

An application for dancer's/manager's license shall contain or set forth the following information:

- A. The applicant's signature notarized or certified to be true under penalty or perjury.
- B. The applicant's name, home addresses (current and former), home telephone number, date of birth, and aliases (past or present), photograph, fingerprints, and social security number.
- C. Documentation that the applicant has attained the age of 18 years. Any two of the following shall be accepted as documentation of age:
 1. A valid motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth;
 2. An identification card bearing the applicant's photograph and date of birth issued by a federal or state government agency;
 3. An official passport issued by the United States of America.
 4. A certificate of birth.

D. The business name and address where the applicant intends to dance/work.
(Ord. 94-5 § 2 (part), 1994)

5.14.150 Dancer's/Manager's License - Issuance.

The Auditor shall issue the license promptly upon receipt of both a properly-completed application form and the license fee. (Ord. 94-5 § 2 (part), 1994)

5.14.160 Dancer's/Manager's License - Expiration.

A dancer's/manager's license shall expire one year after the date of issuance. (Ord. 94-5 § 2 (part), 1994)

5.14.170 Dancer's/Manager's License - Renewal.

A dancer's/manager's license may be renewed or reinstated after a period of revocation by following the application procedures set forth in Sections 5.14.120 through 5.14.150. (Ord. 94-5 § 2 (part), 1994)

5.14.180 Manager on Premises.

- A. A licensed manager shall present be on the premises of an erotic dance studio at all times when open for business.
- B. It shall be the responsibility of the manager to verify that any dancer within the premises possesses a current and valid dancer's license.
- C. The manager shall, upon request by any law enforcement officer or business license inspector, make available for inspection the dancers' licenses required to be on the premises as described herein.

(Ord. 94-5 § 2 (part), 1994)

5.14.190 Operation Restrictions - Unlawful Acts Designated.

Violation of any subsection (A.-S.) shall be a separate and distinct offense.

- A. No person, firm, partnership, corporation, or other entity shall advertise, or cause to be advertised, an erotic dance studio without a valid erotic dance studio license issued pursuant to this Chapter.
- B. No later than March 1 of each year, an erotic dance studio licensee shall file a verified report with the Auditor showing the licensee's gross receipts and amounts paid to dancers for the preceding calendar year.
- C. An erotic dance studio licensee shall maintain and retain for a period of two years the names, addresses, and ages of all persons employed as dancers by the licensee.
- D. No erotic dance studio licensee shall employ as a dancer a person under the age of 18 years of age or a person not licensed pursuant to this Chapter.
- E. No person under the age of 18 years shall be admitted into an erotic dance studio.
- F. No erotic dance studio licensee shall serve, sell, distribute, consume, or possess any intoxicating liquor or controlled substance upon the premises of the licensee.
- G. An erotic dance studio licensee shall conspicuously display the studio licenses required by this Chapter.
- H. All dancing shall occur on a platform intended for that purpose which is raised at least 18 inches from the level of the floor and no closer than ten feet to any patron.
- I. No dancer or employee shall fondle, caress, or touch any patron in a manner which seeks to arouse or excite the patrons' sexual desires.
- J. No patron shall fondle, caress, or touch any dancer or employee in a manner which seeks to arouse or excite the patrons' sexual desires.
- K. No patron shall pay or give any gratuity directly to any dancer.
- L. No dancer shall solicit any pay or gratuity directly from any patron.
- M. No dancer or employee shall expose their breasts below the top of the areola or expose any portion of the pubic hair, vulva or genitals, anus and/or buttocks, except upon a stage at least 18 inches above the immediate floor level and removed at least 10 feet from the nearest patron.

- N. The stage or the entire interior portion of cubicles, rooms, or stalls wherein adult entertainment is provided must be visible from the common areas of the premises. Visibility shall not be blocked or obscured by doors, curtains, drapes, or any other obstruction whatsoever.
- O. No activity or dancing occurring on the premises shall be visible at any time from any public place.
- P. No dancer shall be visible from any public place during the hours of their employment, or apparent hours of their employment on the premises.
- Q. A 36" x 24" sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:
THIS EROTIC DANCE STUDIO IS REGULATED BY PIERCE COUNTY.
 - 1. ALL DANCING MUST OCCUR ON STAGE AND NO CLOSER THAN TEN FEET TO ANY PATRON.
 - 2. DANCERS AND EMPLOYEES ARE NOT PERMITTED TO TOUCH, CARESS OR FONDLE ANY PATRON IN A MANNER WHICH SEEKS TO AROUSE OR EXCITE THE PATRONS' SEXUAL DESIRES.
 - 3. PATRONS ARE NOT PERMITTED TO TOUCH, CARESS OR FONDLE ANY DANCER OR EMPLOYEE IN A MANNER WHICH SEEKS TO AROUSE OR EXCITE THE PATRONS' SEXUAL DESIRES.
 - 4. NO MONEY OR GRATUITY MAY BE ACCEPTED OR SOLICITED BY ANY DANCER FROM A PATRON.
- R. Dances/performances/exhibits that are obscene are not permitted. Obscene is defined as:
 - 1. Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; and
 - 2. Whether applying those same contemporary community standards, the average person would find that the work depicts or describes in a patently offensive way, the following sexual conduct:
 - a. ultimate sexual acts, normal or perverted, actual or simulated; or
 - b. masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibitions of the genitals or genital area; or
 - c. violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape, or torture; and
 - 3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
- S. This Chapter shall not be construed to prohibit:
 - 1. Plays, operas, musicals, or other dramatic works which are not obscene;
 - 2. Classes, seminars, and lectures held for serious scientific or educational purposes; or
 - 3. Exhibitions or dances which are not obscene.

(Ord. 94-5 § 2 (part), 1994)

5.14.200 Public Display Prohibited.

No person, firm, partnership, corporation or other entity shall publicly display or expose or cause public display or exposure, with less than a full opaque covering of any portion of a person's genitals, pubic area, or buttocks in an obscene fashion. (Ord. 94-5 § 2 (part), 1994)

5.14.210 Inspection of Records and Premises Authorized.

All books and records required to be kept pursuant to this Chapter shall be open to inspection by the Auditor, Sheriff, Prosecuting Attorney, or agents thereof, during the hours when the erotic dance studio is open for business. The purpose of such inspection shall be to determine if the books and records meet the requirements of this Chapter. (Ord. 94-5 § 2 (part), 1994)

5.14.220 Standards for Denial of License.

The Auditor shall deny any erotic dance studio/dancer/manager license applied for under provisions of this Chapter if he/she determines that the applicant has:

- A. Made a materially false statement in the application for a license which the applicant knows to be false. "Materially false statement" means any false statement, oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the license application;
- B. Proposed a place of business or establishment to be licensed which does not comply with all applicable requirements of the fire, building, and zoning codes of Pierce County.

(Ord. 94-5 § 2 (part), 1994)

5.14.230 Standards for Revocation and Suspension of License.

- A. The Auditor shall revoke or suspend, for a specified period of not more than one year, any erotic dance studio license if he/she determines that the licensee or applicant has: made a materially false statement in the application for a license which the applicant knows to be false; or violated or permitted violation of any provisions of this Chapter.
- B. The Auditor shall revoke or suspend, for a specified period of not more than one year, any dancer/manager license if he/she determines that the licensee or applicant has: made a materially false statement in the application for a license which the applicant knows to be false; or violated or permitted violation of any provisions of this Chapter.

(Ord. 94-5 § 2 (part), 1994)

5.14.240 Appeal and Hearing.

- A. Any applicant/licensee that has had a license denied, revoked or suspended by the Auditor shall have the right to appeal such action to the Pierce County Hearing Examiner, by filing a notice of appeal with the Auditor within ten working days after receiving notice of the action. The matter shall be heard within 90 days by the Hearing Examiner, unless the parties agree otherwise.
- B. The filing of an appeal by an applicant/licensee shall stay the action of the Auditor, pending a resolution of the matter.
- C. The decision of the Hearing Examiner shall be based upon a preponderance of the evidence.
- D. The burden of proof shall be on the Auditor.
- E. The decision of the Hearing Examiner shall be final unless appealed to Superior Court within ten working days from the date the decision is entered by filing an appropriate action and serving all necessary parties.

(Ord. 94-5 § 2 (part), 1994)

5.14.250 Violation - Penalty.

In addition to or as an alternative to any other penalty provided herein or by law, any person, firm, or corporation violating any provision of this Chapter shall be guilty of a misdemeanor, and each such person, firm, or corporation shall be deemed guilty of a separate offense for each and every day during which any violation is committed, continued, or permitted, and upon conviction of any such violation such person, firm, or corporation shall be punished by a fine of not more than \$1,000.00, or by imprisonment for not more than 90 days, or by both such fine and imprisonment; 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 the Sheriff or Prosecuting Attorney or duly appointed agent thereof. (Ord. 94-5 § 2 (part), 1994)

5.14.260 Severability.

If any Section, sentence, clause, or phrase of this Chapter shall be held invalid or unconstitutional, the validity or constitutionality thereof shall not affect the validity or constitutionality of any other Section, sentence, clause, or phrase of this Chapter. (Ord. 94-5 § 2 (part), 1994)

APPENDIX B.



Pierce County

Auditor's Office

Pat McCarthy
Pierce County Auditor

Keri Rawlings-Rooney
Chief Deputy Auditor

Janice Young
Fiscal Manager

Steve Koache
Information Specialist

Lori Augino
Elections Manager

Michael Rooney
Elections Supervisor

Vickie Chasco
Licensing/Recording
Manager

Patti Shay
Licensing Supervisor

Lisa Drury
Recording Supervisor

August 25, 2006

Janine Brunson
8101 116th St E
Puyallup, WA 98375

RE: License Suspension

Dear Ms. Brunson:

Based upon the Criminal Complaint dated December 23, 2005 and the subsequent Court Order dated July 27, 2006, your license as an adult entertainer is hereby **suspended effective August 30, 2006.**

Based upon the conduct described in the aforementioned documents report the period of suspension is for **one (1) year.**

This decision is based on violations of Pierce County Code Section 5.14.190:

**ADULT ENTERTAINMENT – CONDUCT AND OPERATION PCC 5.14.190
(UNLAWFUL ACTS DESIGNATED)**

- (H) All dancing shall occur on a platform intended for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet to any patron.
- (I) No dancer or employee shall fondle, caress, or touch any patron in a manner which seeks to arouse or excite the patrons' sexual desires.
- (L) No dancer shall solicit any pay or gratuity directly from any patron.

You may appeal the decision to suspend your license by filing an appeal in writing, with the Pierce County Auditor within ten days of this notice. (PCC 5.14.240)

Sincerely,

Office of the Auditor
Business License Department

cc: Al Rose, Prosecuting Attorney
Sheriff's Department
Fox's

2401 South 35th Street, Room 200 • Tacoma, WA 98409-7481
www.piercecountywa.org/auditor

Administration
P 253.798.3189
F 253.798.3182

Elections
P 253.798.7430
F 253.798.2761
P 800.446.4979

Recording
P 253.798.7440
F 253.798.2761

Licensing
P 253.798.3649
F 253.798.3701

Delight



Pierce County

Auditor's Office

August 14, 2006

Colleen Ann Johnson
10603 S Sheridan
Tacoma, WA 98444

appeal... + 9/12

Pat McCarthy
Pierce County Auditor

RE: License Suspension

Keri Rawlings-Rooney
Chief Deputy Auditor

Dear Ms. Johnson:

Janice Young
Fiscal Manager

Based upon the Criminal Complaint dated January 23, 2006 and the subsequent Court Order dated July 14, 2006, your license as an adult entertainer is hereby suspended effective August 19, 2006.

Steve Kosche
Information Specialist

Based upon the conduct described in the aforementioned documents report the period of suspension is for one (1) year.

Lori Augino
Elections Manager

This decision is based on violations of Pierce County Code Section 5.14.190:

Michael Rooney
Elections Supervisor

**ADULT ENTERTAINMENT - CONDUCT AND OPERATION PCC 5.14.190
(UNLAWFUL ACTS DESIGNATED)**

Vickie Chasco
Licensing/Recording
Manager

(H) All dancing shall occur on a platform intended for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet to any patron.

Patti Shay
Licensing Supervisor

(I) No dancer or employee shall fondle, caress, or touch any patron in a manner which seeks to arouse or excite the patrons' sexual desires.

Lisa Drury
Recording Supervisor

(L) No dancer shall solicit any pay or gratuity directly from any patron.

You may appeal the decision to suspend your license by filing an appeal in writing, with the Pierce County Auditor within ten days of this notice. (PCC 5.14.240)

Sincerely,

Office of the Auditor
Business License Department

cc: Al Rose, Prosecuting Attorney
Sheriff's Department
Fox's

2401 South 35th Street, Room 200 • Tacoma, WA 98409-7481

www.piercecountywa.org/auditor

Administration
P 253.798.3189
F 253.798.3182

Elections
P 253.798.7430
F 253.798.2761
P 800.446.4979

Recording
P 253.798.7440
F 253.798.2761

Licensing
P 253.798.3649
F 253.798.3701

KASHAMERE



Pierce County

Auditor's Office

August 14, 2006

Christy Dawn Tucker
14618 Kapowsin Highway
Graham, WA 98338

*appeal filed
8/14/06*

Pat McCarthy
Pierce County Auditor

RE: License Suspension

Keri Rawlings-Rooney
Chief Deputy Auditor

Dear Ms. Tucker:

Janice Young
Fiscal Manager

Based upon the Criminal Complaint dated January 24, 2006 and the subsequent Court Order dated July 27, 2006, your license as an adult entertainer is hereby **suspended** effective **August 19, 2006**.

Steve Kosche
Information Specialist

Based upon the conduct described in the aforementioned documents report the period of suspension is for one (1) year.

Lori Augino
Elections Manager

This decision is based on violations of Pierce County Code Section 5.14.190:

Michael Rooney
Elections Supervisor

**ADULT ENTERTAINMENT – CONDUCT AND OPERATION PCC 5.14.190
(UNLAWFUL ACTS DESIGNATED)**

Vickie Chasco
Licensing/Recording
Manager

(H) All dancing shall occur on a platform intended for that purpose which is raised at least eighteen inches from the level of the floor and no closer than ten feet to any patron.

Patti Shay
Licensing Supervisor

(I) No dancer or employee shall fondle, caress, or touch any patron in a manner which seeks to arouse or excite the patrons' sexual desires.

Lisa Drury
Recording Supervisor

(L) No dancer shall solicit any pay or gratuity directly from any patron.

You may appeal the decision to suspend your license by filing an appeal in writing, with the Pierce County Auditor within ten days of this notice. (PCC 5.14.240)

Sincerely,

Office of the Auditor
Business License Department

cc: Al Rose, Prosecuting Attorney
Sheriff's Department
Fox's

2401 South 35th Street, Room 200 • Tacoma, WA 98409-7481

www.piercecountywa.org/auditor

Administration
P 253.798.3189
F 253.798.3182

Elections
P 253.798.7430
F 253.798.2761
P 800.446.4979

Recording
P 253.798.7440
F 253.798.2761

Licensing
P 253.798.3649
F 253.798.3701

APPENDIX C.

.40.275 Suspension or revocation of license/permit – Duration.

A. The City shall suspend any license as required by this chapter for a period of thirty (30) days upon the licensee's first violation of this chapter or other applicable ordinances, statutes, or regulations.

B. The City shall suspend any license required by this chapter for a period of ninety (90) days upon the licensee's second violation within a twenty-four (24) month period of this chapter or other applicable ordinances, statutes or regulations.

C. The City shall revoke any license required by this chapter for a period of two (2) years upon the licensee's third, or any subsequent, violation of this chapter or other applicable ordinances, statutes or regulations.

D. Notwithstanding the other provisions of this chapter, the City shall revoke or deny the renewal of any license required by this chapter for two (2) years if the licensee has made any false or misleading statements or misrepresentations to the City.

E. Application for a new license may be made following the expiration of the applicable revocation period. (Ord. 98-1012 § 1; Ord. 95-1018 § 1)

business upon 24 hours' notice to the licensee.

6. Inspections. In order to ensure compliance with this chapter, all areas of licensed adult cabarets which are open to members of the public shall be open to inspection by city agents and employees during the hours when the premises are open for business. The purpose of such inspections shall be to determine if the licensed premises are operated in accordance with the requirements of this chapter.

D. It is unlawful for any adult cabaret to be operated or otherwise open to the public between the hours of 2:00 a.m. and 10:00 a.m. [Ord. 318 § 1, 2003; Ord. 139 § 1, 1997]

5.10.080 License term – Assignment – Renewals.

A. Licenses shall expire one year from the date of issue.

B. Application for renewal of licenses issued hereunder shall be made to the clerk no later than 30 days prior to the expiration of adult cabaret licenses. The renewal license shall be issued in the same manner and on payment of the same fees as for an original application under this chapter. There shall be assessed and collected by the clerk an additional charge, computed as a percentage of the license fee, on applications not made on or before said date, as set forth in the business license fee schedule in SMC 3.01.035.

C. The clerk shall renew a license upon receipt of a complete application and fee, and subject to compliance with the provisions of SMC 5.10.040 regarding original licenses. [Ord. 451 § 11, 2006; Ord. 318 § 1, 2003; Ord. 150 § 1, 1998; Ord. 139 § 1, 1997]

5.10.090 License suspension and revocation – Hearing.

A. The clerk may suspend or revoke any license issued under the provisions of this chapter at any time where the same was procured by fraud or false representations of fact, or for the violation of, or failure to comply with, the provisions of this chapter or the provisions of any applicable fire, building or zoning code.

B. A license procured by fraud or misrepresentation shall be revoked. Where other violations of this chapter or other applicable ordinances, statutes or regulations are found, the license shall be suspended for a period of 30 days upon the first such violation, 90 days upon the second violation within a 24-month period, and revoked for third and subsequent violations within a 24-month period, not including periods of suspension. "Other applicable ordinances, statutes or regulations" are:

1. A conviction of Chapter 9A.44 RCW, Sex Offenses; or
2. A conviction of Chapter 9A.88 RCW, Indecent Exposure; or
3. A conviction of Chapter 9.68 RCW, Obscenity and Pornography; or
4. A conviction of Chapter 9.68A RCW, Sexual Exploitation of Children; or
5. A conviction of Chapter 69.50 RCW, Washington Uniform Controlled Substances Act.

C. The clerk shall issue and mail to the licensee the decision to suspend or revoke the license at least 14 days prior to the effective date of the action. Such notice shall inform the licensee of the right to appeal the decision to the hearing examiner or other designated hearing body, pursuant to SMC 5.10.060, and shall state the effective date of such revocation or suspension and the grounds for revocation or suspension. The decision of the clerk shall be stayed during the pendency of any appeal to the hearing examiner or superior court. [Ord. 318 § 1, 2003; Ord. 150 § 1, 1998; Ord. 139 § 1, 1997]

5.10.100 Liquor regulations.

5.08.090 License suspension and revocation – Hearing.

A. The clerk may, upon the recommendation of the chief of police or his designee and as provided in subsection B below, suspend or revoke any license issued under the provisions of this chapter at any time where the same was procured by fraud or false representation of fact; or for the violation of, or failure to comply with, the provisions of this chapter or any of the provisions of Chapter 10A.88 BCC or any other similar local or state law by the licensee or by any of his servants, agents or employees when the licensee knew or should have known of the violations committed by his servants, agents or employees; or for the conviction of the licensee of any crime or offense involving prostitution, promoting prostitution, or transactions involving controlled substances (as that term is defined in Chapter 69.50 RCW) committed on the premises, or the conviction of any of his servants, agents or employees of any crime or offense involving prostitution, promoting prostitution, or transactions involving controlled substances (as that term is defined in Chapter 69.50 RCW) committed on the premises in which his cabaret is conducted when the licensee knew or should have known of the violations committed by his servants, agents or employees.

B. A license procured by fraud or misrepresentation shall be revoked. Where other violations of this chapter or other applicable ordinances, statutes or regulations are found, the license shall be suspended for a period of 30 days upon the first such violation, 90 days upon the second violation within a 24-month period, and revoked for third and subsequent violations within a 24-month period, not including periods of suspension.

C. The clerk shall provide at least 10 days' prior written notice to the licensee of the decision to suspend or revoke the license. Such notice shall inform the licensee of the right to appeal the decision to the hearing examiner or other designated hearing body and shall state the effective date of such revocation or suspension and the grounds for revocation or suspension. Such appeals shall be processed under Process II (LUC 20.35.250). The hearing examiner or other hearing body shall render its decision within 15 days following the close of the appeal hearing. Any person aggrieved by the decision of the hearing examiner or other designated hearing body shall have the right to appeal the decision to the superior court by writ of certiorari or mandamus as provided in LUC 20.35.250F. The decision of the clerk shall be stayed during the pendency of any appeal except as provided in subsection D below.

D. Where the Bellevue building official or fire marshal or their designees or the King County health department find that any condition exists upon the premises of a cabaret or adult cabaret which constitutes a threat of immediate serious injury or damage to persons or property, said official may immediately suspend any license issued under this chapter pending a hearing in accordance with subsection C above. The official shall issue notice setting forth the basis for the action and the facts that constitute a threat of immediate serious injury or damage to persons or property, and informing the licensee of the right to appeal the suspension to the hearing examiner or other designated hearing body under the same appeal provisions set forth in subsection C above; provided, however, that a suspension based on threat of immediate serious injury or damage shall not be stayed during the pendency of the appeal. (Ord. 4978 § 24, 1997; Ord. 4735 § 6, 1995; Ord. 4692 § 8, 1994; Ord. 4602 § 7, 1993; Ord. 2070 § 4, 1974; 1961 code § 5.32.080.)

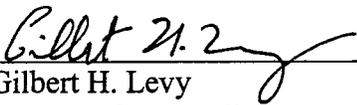
5.08.100 Liquor regulations.

Any license issued pursuant to this chapter shall

CERTIFICATE OF SERVICE

I certify that on this date, I caused to be delivered by legal messenger a true and copy of the foregoing to Deputy Prosecuting Attorney Allen Rose, attorney for the Respondents.

Dated this 23 day of April 2008



Gilbert H. Levy
Attorney for Appellants

FILED
COURT OF APPEALS
DIVISION II
08 APR 25 PM 2:48
STATE OF WASHINGTON
BY  DEPUTY