

No. 94626-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ERIC FORBES et al.,

Appellants

vs.

PIERCE COUNTY et al.,

Respondents.

APPELLANTS' OPENING BRIEF

Judgment of the Pierce County Superior Court in Cause No. 15-2-06771-6
Honorable Susan Serko, Presiding

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I. INTRODUCTORY STATEMENT

This is an appeal from a decision of the Pierce County Superior Court rejecting Appellants' constitutional challenge to provisions of Pierce County's adult entertainment ordinance that provide for license revocation and criminal penalties on the basis of strict liability. Appellants maintain that these provisions violate Article 1, Sections 3, and 5 of the Washington Constitution and that the trial court erred as a matter of law in rejecting their challenge.

II. ASSIGNMENT OF ERROR

Assignment of Error No. 1: The Superior Court erred in determining that the license revocation provisions in PCC § 5.14.230 do not provide for strict liability.

Issue Related to Assignment of Error No. 1: Do the license suspension provisions in PCC § 5.14.230 provide for strict liability in that they contain no *mens rea* requirement?

Assignment of Error No. 2: The Superior Court erred in determining that Appellants are not entitled to enhanced protection under Article 1, Section 5 of the Washington Constitution.

Issue No. 1 Related to Assignment of Error No. 2: Does an analysis of the six non-exclusive factors of *State v. Gunwall*, 106 Wash.

2d 54, 720 P. 2d 808 (1986) call for enhanced protection under the Free Speech clause of the State Constitution in this case?

Issue No. 2 related to Assignment of Error No. 2: Do the license revocation/suspension and criminal penalty provisions of Chapter 5.14 of the Pierce County Code constitute a prior restraint on freedom of expression?

Assignment of Error No. 3: Superior Court erred in holding that managers at erotic dance studios are not engaged in protected expression.

Issue related to Assignment of Error No. 3: Are managers at erotic dance studios engaged in constitutionally protected expression or in the alternative are they entitled to Article 1, Section 5 protection in order to protect the free speech rights of others?

Assignment of Error No. 4: The Superior Court erred in holding that the license revocation/suspension and criminal penalty provisions of Chapter 5.14 of the Pierce County Code do not violate Article 1, Section 5 of the Washington Constitution.

Issue No. 1 related to Assignment of Error No. 4: In a free speech challenge to a local ordinance, does the government carry the burden of proof?

Issue No. 2 related to Assignment of Error No. 4: Are the ordinance sections challenged in this case subject to the strict scrutiny test or

are they subject to mid-level scrutiny commonly associated with time, place and manner regulations?

Issue No. 3 related to Assignment of Error No. 4: Are the license revocation/suspension and criminal penalty provisions of PCC Chapter 5.14 unconstitutional under the strict scrutiny test because they do not constitute the least restrictive means capable of achieving the goals of the legislation?

Issue No. 4 related to Assignment of Error No. 4: Are the license revocation/suspension and criminal penalty provisions of PCC Chapter 5.14 unconstitutional under the mid-level scrutiny test because they are not narrowly tailored in furtherance of a substantial governmental interest?

Assignment of Error No. 5: The Superior Court erred in determining that the license revocation/suspension and criminal penalty provisions of PCC Chapter 5.14 do not violate Article 1, Section 3 - the Due Process clause of the Washington Constitution.

Issue related to Assignment of Error No. 5: In creating a conclusive presumption of knowledge and in punishing those lacking guilty knowledge and who are diligent in their efforts to comply with the requirements of the Ordinance, do the license revocation/suspension provisions and criminal penalty provisions of PCC Chapter 5.14 violate the Due Process Clause of the Washington Constitution?

III. STATEMENT OF THE CASE

A. Statement of Procedure

Dreamgirls of Tacoma LLC is a Washington limited liability corporation that operates Dreamgirls at Fox's, (hereinafter "Fox's"), a nightclub located at 10707 Pacific Highway South in unincorporated Pierce County. CP 301-302.¹ The business features erotic dancing and nude entertainment and is subject to regulation as an "Erotic Dance Studio" under Chapter 5.14 of the Pierce County Code.² Chapter 5.14 requires special business licenses for operators of Erotic Dance Studios, as well as managers who work there and dancers who perform there. Pierce County Code, (hereinafter "PCC"), 5.14.190 contains specific standards of conduct for operators, managers and dancers. Failure to comply with the standards of conduct may result in license revocation and/or imposition of criminal penalties. Chapter 5.14 is administered by the Auditor's Office.

¹ The abbreviation "CP" refers to the Clerk's papers.

² A true and correct copy of Chapter 5.14 is contained in Appendix A.

In 2014, Plaintiff Eric Forbes was listed as the license holder of the business. CP 118.³ On August 28, 2014, the Auditor issued a notice and order to Mr. Forbes advising that the business, managers and dancers had violated various sections of PCC 5.14.190.⁴ CP. 125-130. Mr. Forbes appealed the notice and order to the Hearing Examiner who thereafter conducted a hearing. CP 464-614. Following the hearing, the Hearing Examiner issued a decision upholding the notice and order. CP 76-92.⁵ Mr. Forbes and Dreamgirls of Tacoma LLC filed a petition for a writ of review in Pierce County Superior Court seeking reversal of the Hearing Examiner's decision. CP 38-63. The petition contained an additional claim for injunctive and declaratory relief alleging that various sections of Chapter 5.14 violated the Free Speech and Due Process clauses of the Washing Constitution. Id. Plaintiffs thereafter filed an amended petition for writ of review and complaint for injunctive and declaratory relief. CP.28-34. Alex Helgeson, a manager, and Sabina Zembas, a dancer, were joined as plaintiffs in the amended pleading. Id.

Heather Blakeway is a dancer at Fox's and Ashley Richardson is employed there as a manager. CP 2, 39. On March 24, 2016, the Auditor

³ Throughout this brief, Appellants Forbes et al. shall be generally referred to as "Plaintiffs" and Respondents Pierce County et al. shall be generally referred to as "Defendants" or "the County".

⁴ The notice order is a precursor to license suspension and is appealable to the Hearing Examiner. See PCC Section 5.02.195 contained in Appendix B.

⁵ A copy of the Hearing Examiner's decision is attached hereto as Appendix C.

issued a notice and order to Blakeway advising that her dancer's license was suspended for thirty days. CP 245-246. The grounds for the suspension were that Blakeway had allegedly performed offstage and had permitted a patron to be seated closer than 10 feet from the stage while she was performing there in violation of PCC 5.14.190(H). Id. On that same day, the Auditor issued a notice and order to Richardson informing her that her license was suspended for thirty days. CP 284-285. The grounds for the suspension were that Richardson had allegedly permitted violations of PCC 5.14.190(H). Id. Blakeway and Richardson appealed their license suspensions to the Hearing Examiner. CP 241, 283. Their appeals were heard in a consolidated hearing. CP 351-463. In conjunction with the hearing, the parties submitted briefs on the question of whether the license suspension provisions of Chapter 5.14 contain a *mens rea* requirement. CP 223-237. Following the hearing, the Hearing Examiner issued decisions upholding the license suspensions although the length of the suspensions was reduced. CP 217-222, 258-264.⁶ In upholding the suspensions, the Hearing Examiner ruled, "As stated in the brief provided by Pierce County, *Mens Rea* is a criminal concept and has no application to a civil code violation." CP 219, 260.

⁶ The Hearing Examiner's decisions in the Blakeway and Richardson administrative appeals are attached hereto as Appendices D and E.

Blakeway and Richardson filed petitions for writs of review in the Pierce County Superior Court. CP 1-27, 38-63. The petitions contained claims for injunctive and declaratory relief based upon alleged constitutional violations, federal and State. Id. Thereafter, Blakeway and Richardson filed amended petitions which deleted the federal claims. CP 28-34, 64-70.

The Superior Court issued writs of review in all three cases directing the Hearing Examiner to certify and file the administrative records in Superior Court. CP 339-341, 344-346. On stipulation of the parties, the Superior Court issued an order consolidating all three cases into a single proceeding. CP 342-343. Also, by stipulation, the parties agreed to limit issues in the consolidated proceeding to three: (1) Whether there was sufficient evidence to support the decisions of the Hearing Examiner; and (2) Whether Chapter 5.14 of the Pierce County Code provides strict liability – civil and criminal – for owners, managers and dancers; and (3) Assuming that it does, whether strict liability comports with the Washington Constitution. CP 347-349. All other claims were dismissed without prejudice. Id.

The parties filed cross motions for summary judgment. CP 615-639, 687-787. After hearing argument, the Superior Court granted the Defendants' Motion for Summary Judgment and Plaintiffs' Motion for

Summary Judgment was denied. CP 820-828.⁷ The Superior Court's order disposed of all issues in the case. Id. Plaintiffs thereafter filed a timely notice of appeal. CP 829-840.

B. Statement of Facts

1. Hearing Testimony in the Forbes Appeal

Deputy Brian Stepp testified that he went into Fox's in an undercover capacity on 8/7/14. CP 468-469. He received an off-platform dance commonly known as a "lap dance" from "Roselyn".⁸ During the dance, she exposed her breasts and pubic area. CP 472. He paid her \$40.00 for the dance. Id. No one interfered to stop the dance and no one informed him that dancing was supposed to take place on a stage. CP 473-474. He testified that he doesn't know Eric Forbes and doesn't know if he was present at the club. CP 478-479.

Deputy Robert Shaw testified that he entered Fox's on 8/7/14. CP479. He received a lap dance from "Leighty" during which she exposed intimate body parts. CP 481. He paid her \$100.00. CP 482. No one interfered to stop the dance and he did not see any managers or bouncers. CP 484. He doesn't know Eric Forbes and doesn't know if he was present in the club. CP 489.

⁷ A copy of the Superior Court's order on summary judgment is attached as Appendix F.

⁸ Dancers use pseudonyms commonly known as stage names in order to protect their privacy and prevent patrons from contacting them outside the club.

Deputy William Brand testified that he entered the club on 8/7/14. CP 491. He received a lap dance from “Sherry” during which she straddled his legs and gyrated up and down on his groin. CP 495. No one approached him to stop the dance. CP 497. He doesn’t know Eric Forbes and doesn’t know if he was present in the club on that date. CP 501. He also went into the club on 5/22/14. CP 502. He received a lap dance from “Pandora” who straddled him and ground on his genitals. CP 503. No one approached to stop the dance. CP 504. There was no indication that Eric Forbes was present. CP 507.

Deputy Shaun Darby testified that he entered the club on 8/7/14. CP 544. He received a lap dance from “Brandy”. CP 546. She straddled him and ground on his lap. Id. No one interfered with the dance and no one was present on the floor. Id. His understanding is that Eric Forbes is the previous or present owner of the club. CP 549. However, he wouldn’t recognize Mr. Forbes and doesn’t know if he was present. CP 549-550.

Deputy Tom Oleson testified that he entered the club on 5/22/14. CP 552. He received a lap dance form “Bonnie” who ground on his lap and exposed intimate body parts. CP 554. He noticed a sign that said “Table dances \$20.00”. CP 555, HR 92. The manager in the club did not put a stop to the dance. Id. He doesn’t know Eric Forbes and doesn’t know if he was present in the club. CP 559.

Deputy Darrin Rayner testified that he entered the club on 8/9/14. CP 561. He received a lap dance from “Doll Face” who ground her breasts in his face. CP 563. HR 99. Neither the manager nor anyone else put a stop to the dance. CP 564.

Stacy McFarlane testified that she is the licensing lead for the Auditor’s Office. CP 528. She conducted an inspection at the club on 7/8/14 along with Whitney Rhodes and Casey Kaul. Id. She noticed a dancer sitting on a patron. CP 529. “Sophia” led a customer to a booth for a lap dance. CP 530, 531. She made full body contact during the dance. Id. No one intervened during the dance and she did not see a manager on the floor. CP 532. The manager – Kevin Loomis – was in the office with Casey Kaul but they came out when the dance was still going on. Id.

McFarlane also conducted an inspection on 6/18/14. CP 533-534. The business was dark and the objects in the club were not plainly visible. Id. She witnessed a dancer straddling a customer. CP 534-535. HR 71. The dancer ground her crotch on the customer’s crotch and rubbed her breasts in his face. CP 535. No one intervened in the dance. Id. The manager was in the office and a DJ and a waitress were on the floor. CP 536. She doesn’t know Eric Forbes and doesn’t know if he was present during her two inspections. CP 540.

Whitney Rhodes testified that she is the Assistant to the Auditor. CP 506. She participated in an inspection on 7/8/14. Id. The lighting was better since the last time she was in the club. CP 510. She noticed a dancer who was dancing off-platform. CP 511. The manager's name was Kevin Loomis. CP 512. When Loomis was in the office assisting with the license check, there were no additional managers on floor. CP 513. When Loomis emerged from the office he did not put a stop to the lap dance. CP 514.

Rhodes participated in another inspection on 6/8/14. CP 515. The business was dark and her eyes had to adjust before she could see anything. Id. The lighting was much better on 7/8/14. Id. She observed a lap dance by "Scarlet" and no one put a stop to the dance. CP 517-518. She did not see a manager in the business enforcing the rules. CP 518. She has seen Eric Forbes' name on the license but has never met him. CP 525. He was not present when she visited the club. Id.

Casey Kaul testified that she is the Licensing Supervisor for the Auditor's Office. CP 568. She was part of an inspection team on 7/8/14. CP 569. It was a compliance check to make sure that the employees and the business were following the ordinance. Id. Kaul and Whitney Rhodes went into the office to check licenses while Stacy McFarlane stayed outside. CP 571. Kaul saw "Sophia" take a customer to the booth area

and grind on his leg. CP 575. Kevin Loomis was the manager that day.

CP 576. No one told “Sophia” to stop. Id.

Kaul went into the business on 6/18/14. CP 576. It was very dark inside. CP 577. Loomis was able to turn up the lights. CP 579. The DJ announced that “Strawberry” was available for a one-on-one dance. CP 582. She testified that Eric Forbes was the license holder. CP 593. However, she wouldn’t recognize Forbes if she saw him and doesn’t know if he was present during her inspections. CP 594-595.

2. Testimony in Blakeway and Richardson Appeals

Stacy McFarlane testified that she did a compliance check at Fox’s on 3/16/16. CP 368. She was greeted by Ashley Richardson and they went into the office to do license verification. CP 369. Upon emerging from the office, she noticed that Heather Blakeway was performing on stage. CP 370. She noticed that someone was seated too close to the stage and she mentioned this to Richardson. CP 371. Richardson did not tell the customer to move his chair. CP 372. On cross-examination, McFarlane testified that Richardson had violated PCC 5.14.190(H), which provides that dancing shall take place no closer than 10 feet to the nearest patron. CP 376. While Richardson was assisting McFarlane, she could have acted to correct the seating arrangement. CP 377.

Whitney Rhodes testified that she accompanied Stacy McFarlane to Fox's on 3/16/16. CP 377. When she entered the club, she noticed that a lap dance was taking place. CP 379. A patron was seated in a booth and a dancer was straddling him while dancing. Id. A person serving drinks tapped the dancer on the shoulder and whispered something in her ear. CP 380. The dancer got up from the customer and went on stage. Id. Rhodes later identified the dancer as Heather Blakeway. Id. She testified that there was a security person at the door and someone else was serving drinks. CP 383. Ashley Richardson was in the office with Stacy. Id. No one else was walking the floor to monitor the entertainers' activities. Id. The security person was in a position to see the lap dance but did not put a stop to it. Id. There was a patron seated within arms-length of the stage. CP 385. Heather Blakeway did not tell him to move away from the stage. Id.

On cross-examination, Rhodes testified that Stacy was in the officer during the lap dance. CP 391. The person serving drinks was not a licensed manager and Rhodes did not know what her responsibilities are within the business. CP 392. She answered the same way with respect to the security person. CP 394. Blakeway continued to dance when the customer moved up to the stage. CP 401. Id. While this was going on, neither the drink server nor the security person intervened. CP 402.

Casey Kaul testified that she would have expected Blakeway to stop dancing when the customer moved close to the stage. CP 407. Blakeway was cited for two violations – performing off-platform and permitting a customer to be seated closer than 10 feet from the stage. Id. Blakeway could have stopped dancing, moved away from the patron, told the manager, or told the patron to move. CP 409. Richardson likewise failed to comply with the Code. Id. Her job is to ensure compliance and make sure that other staff members understand the requirements of the ordinance. CP 410.

On cross-examination, Kaul testified that Richardson is presumed to have knowledge of the violations regardless of individual circumstances. CP 423. If Richardson is in the office helping with a license check and Heather Blakeway performs a lap dance, Richardson has violated the ordinance even if she doesn't know about it. CP 423-424. Richardson is liable if her employees or contractors fail to correct a violation. CP 424. She is liable if the stage is only 17 inches from the floor or if a customer moves his chair closer than ten feet from the stage. CP 426.

3. Additional Facts on Summary Judgment

There are three sections of PCC Chapter 5.14 at issue in this case –
PCC §§ 5.14.180, 5.14.230 and 5.14.250.

PCC § 5.14.180(D) provides:

The manager shall be responsible for ensuring that the studio is in compliance with the operational restrictions set forth in PCC 5.14.190.

PCC § 5.14.180(E) provides:

The manager shall be responsible for ensuring that all dancers comply with the operational restrictions set forth in PCC 5.14.190.

PCC § 5.14.230(A) provides:

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 the license which the applicant knows to be false; or violated or permitted violation of any provisions of this Chapter.

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.

PCC § 5.14.250 provides in part:

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....The manager on duty and/or licensee shall be held strictly liable for any violation of the requirements set forth in PCC 5,14.180 and/or 5.14.190.

Chapter 5.14 superseded a previous adult entertainment ordinance and was adopted as Ordinance 94-5 in 1994. CP 652-666. According to the preamble, it was adopted to deter criminal activity in the adult entertainment industry including prostitution, narcotics transactions, breaches of the peace and the “influence of organized crime”. CP 652-654. The version of PCC § 5.14.180 that was adopted as part of Ordinance 94-5 did not impose duties on managers to require the business and dancers to comply with the standards of conduct in § 5.14.190. Under that version, managers were only required to be present on the premises at all times during business hours, verify that dancers had current and valid licenses, and make the licenses available for inspection by law enforcement officers or business license inspectors. CP 660. PCC § 5.14.230 was also adopted as part of Ordinance 94-5 and it remains unchanged. CP 665. There is no mention of strict liability either in the preamble to Ordinance 94-5 or in the legislative history that the County

presented in support of its motion for summary judgment. CP 652-654, 716-787.

Chapter 5.14 was amended in 2012 as Ordinance 2012-51. CP

719. The preamble to that Ordinance contains the following findings:

Whereas past efforts to regulation and enforce the operational restrictions contained in Chapter 5.14 were insufficient to prevent illegal activity from occurring within erotic dance studios; and

Whereas, managers and license holders should be held accountable when they fail to operate erotic dance studios in a safe and legal manner or when they fail to stop illegal behavior within the studio.

Id.

The current version of § 5.14.180 was adopted as part of the 2012 amendment. CP 725. It requires managers to insure that the business and dancers will comply with the standards of conduct in PCC § 5.14.190. PCC § 5.14.250 was adopted as part of the 1994 ordinance. The 2012 amendment added the following sentence to the end of that section:

The manager on duty and/or licensee shall be held strictly liable for any violation of the requirements of set forth in PCC 5.14.180 and 5.14.190.

Id.

At the time that the County Council adopted the 2012 amendment, a number of cities and counties throughout the State had adopted adult entertainment ordinances which subjected owners and managers to license

suspension or revocation for failure to prevent ordinance violations on the part of employees and entertainers. CP 678-686. See King County Code § 6.09.180(A)(2)(c); Snohomish County Code 6.25.135(1)(b); Spokane County Code 7.80.130(a)(2); Bellevue City Code 5.08.090(A); and Kent City Code 5.10.200 (A).⁹ The distinguishing feature of these other ordinances is that owners and managers are held liable for the conduct of others only in the event that they “knew or should have known” of the other person’s violation. *Id.* In adopting the 2012 amendment to Chapter 5.14, there is no indication that the Council considered whether a “knew or should have known” standard would be insufficient to accomplish the legislative goals. CP 719. Likewise, in moving for summary judgment and in resisting the Plaintiff’s motion, Defendants failed to present evidence that a “knew or should have known” standard would not be effective in accomplishing those goals. CP 719-787.

IV. ARGUMENT

A. Argument Related to Assignment of Error No 1: PCC §§ 5.14.230 and 5.14.250 Provide for Strict Liability Meaning No *Mens Rea* Requirement

PCC § 5.14.250 specifically provides for strict liability so the only question is whether strict liability is likewise provided in § 5.14.230. In upholding the license suspensions in the Blakeway and Richardson

⁹ These code sections are contained in Appendix G.

appeals, the Hearing Examiner ruled that, “There is no requisite mental state in a civil infraction hearing”. CP 23, 60. In entering its summary judgment order, the Superior Court held that PCC § 5.14.230 does not impose strict liability on dancers and managers, but at the same time concluded:

“Strict liability” and “mens rea” are concepts that apply in criminal law and torts, both of which involve wrongful or morally culpable conduct. **The concepts of “strict liability” and “mens rea” are inapplicable in the regulatory context of licensing requirements.**

CP 825, 826, (emphasis supplied).

With all due respect, the Superior Court’s ruling is nonsense. It appears to be saying that the ordinance does not provide for license suspension on the basis of strict liability but at the same time there is no *mens rea* requirement. This convoluted reasoning overlooks the simple proposition that the terms are synonymous – strict liability means no *mens rea* requirement. Black’s Law Dictionary defines strict liability as:

Liability that does not depend on actual negligence or intent to harm but that is based on an absolute duty to make something safe.

Black’s Law Dictionary, Ninth Edition.

The plain text of § 5.14.230 unequivocally demonstrates that when the Council adopted the regulation, it intended that license suspension could be imposed on those who violate or permit violations without regard

to their mental state. Subsections (A) and (B) provide that an applicant is subject to license suspension if he or she makes a materially false statement “which the applicant knows to be false”, but there is no similar knowledge requirement in the case of a licensee “who has violated or permitted violation of any provision of this Chapter”. The primary object of statutory construction is to carry out the intent of the legislature.

Dominick v. Christensen, 81 Wash. 2d 25, 26, 548 P. 2d 541 (1976). An expression of one thing in a statute excludes others not expressed. *Id.* A court will not read into a statute matters that are not there or modify a statute by construction. *Id.* Here, the inclusion of a knowledge requirement for those making false statements in their license applications but the omission of such a requirement in the case of those who violate or permit violations shows that the Council intended that a mental state such as knowledge would not need to be proved with respect to the latter class of individuals. This is strict liability in no uncertain terms.

B. Argument as to Assignment of Error No. 2: The Superior Court Erred in Determining that Plaintiffs are not Entitled to Enhanced Protection Under the Free Speech Clause of the State Constitution.

1. Analysis of the *Gunwall* Factors Calls for Enhanced Protection.

In determining whether the State Constitution is interpreted more broadly than the federal constitution, a court must look at the specific

context in which the challenge is raised. *Ino Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 115, 937 P. 2d 154, 162 (1997). In making this determination, a court must consider the six non-exclusive criteria of *State v. Gunwall*, 106 Wash. 2d 54, 720 P. 2d 808 (1986). In *Ino Ino*, the Court conducted a *Gunwall* analysis to address the general question of whether the free speech clause of the State Constitution provides greater protection for nude dancing than the First Amendment. However, Court in *Ino Ino* did not consider whether a municipality could suspend nude dancing licenses or impose criminal sanctions on the basis of strict liability. The *Gunwall* analysis here generally tracks *Ino Ino*. However, the context is different and a different analysis is required.

Textual Language

Article 1, Section 5 of the Washington Constitution provides:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

The Court in *Ino Ino* stated that the textual language does not favor enhanced protection for nude dancing because it does not refer to expressive conduct. *Ino Ino* at 117.

Differences in Text

The Court in *Ino Ino* noted that the differences in text do not support enhanced protection in the case of time place and manner

restrictions that do not involve traditional speech in a public forum but that they do support greater protection against restrictions on nude dancing that amount to a prior restraint. *Ino Ino* at 119.

Constitutional History

The Court in *Ino Ino* stated that there is no indication that the drafters of the State Constitution intended greater protection for nude dancing. *Ino Ino* at 120.

Pre-existing Case Law

In *Seattle v. Bittner*, 81 Wash. 2d 747, 505 P. 2d 126 (1973), the Court held that denial of a license to an adult movie theater based upon past convictions of obscenity was an impermissible prior restraint. The Court reasoned that the constitution does not permit a licensing agency to deny the right to exercise a fundamental freedom based on abuse of that right in the past.

In *JJR, Inc. v. Seattle*, 126 Wash. 2d 1, 891 P. 2d 720 (1995), the Court held that a license suspension scheme applicable to nude dancing is a prior restraint under Article 1, Section 5 of the Washington Constitution because it operates as a restraint on future expression. The Court declined to categorically invalidate the licensing scheme at issue in that case because nude dancing is less protected than other forms of expression. However, it held that a prior restraint on nude dancing must take place

under exacting procedural safeguards. The Court invalidated Seattle's license suspension provision because it failed to require a stay of enforcement pending judicial review.

In *Ino Ino, supra*, the Court held:

Respondents fail to show that the sexually explicit dance at issue in this case warrants application of the more protective time, place and manner analysis developed under art. I, § 5 of the state constitution. Nor is greater protection indicated with regard to claims of overbreadth **not rising to the level of prior restraint**. Therefore, we will evaluate Respondents' claims of overbreadth and challenges to time, place or manner regulations by applying federal constitutional law. **However, the text and history of Const. art. I, § 5 dictate enhanced protection under the state constitution in the context of adult entertainment regulations that impose prior restraints.** *Ino Ino* at 121 (Emphasis supplied).

Citing *JJR*, the Court in *Ino Ino* invalidated that portion of the ordinance that required applicants for a manager's license at nude dancing establishments to wait fourteen days before they could receive their license. *Ino Ino* at 123. The Court reasoned that this amounted to a restraint on future expression because, under the ordinance, the business could not operate without a licensed manager.

In *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215 (1959) the Supreme Court invalidated a criminal statute which penalized a bookseller for the possession of obscene material on the basis of strict liability. The Court recognized that states may generally impose strict liability for

criminal statutes but not where strict liability may inhibit constitutionally protected expression. The Court noted that the danger of strict liability is that it would encourage book sellers to self-censor constitutionally protected material for fear of prosecution.

In Washington, *Smith v. California* was applied to invalidate a statute which prohibited possession of obscene material with intent to sell on the basis of strict liability – there was no requirement that the defendant have knowledge of the character of the material. *State Ex. Rel. Lally v. Gump*, 57 Wash, 2d 224, 228, 356 P. 2d 289 (1960). The Court stated, “We hold that RCW 9.68.010, as amended by Laws of 1959, Chapter 260, § 1, p. 123 tends to restrict the freedom of expression protected by the Fourteenth Amendment to the United States Constitution and is therefore void.” *Id.* In *Tacoma v. Lewis*, 9. Wash. App. 421, 513 P. 2d 85 (1973) the Court declined to invalidate an ordinance prohibiting the sale of obscene material based because the prosecutor agreed that a *mens rea* requirement should be read into the ordinance and because the trial court gave an instruction requiring proof of knowledge as an element of the crime.

In *O’Day v. King County*, 109 Wash. 2d 796, 803-804,749 P. 2d 142 (1988), the Court observed:

Washington's free speech guarantee requires us to pay especially close attention to allegations of overbreadth. Article 1, Section 5 establishes freedom of speech as a preferred right. (Cites omitted). Unlike the First Amendment, article 1, section 5 categorically rules out prior restraints on constitutionally protected speech under any circumstances. (Cite omitted). **Regulations that sweep too broadly chill protected speech prior to publication and thus may rise to the level of a prior restraint.** (Emphasis supplied).

In *Backpage.com LLC V. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012), Judge Martinez issued a preliminary injunction against a Washington statute that criminalized publishing an advertisement for a commercial sex act involving a minor regardless of whether the publisher had knowledge that the person depicted in the advertisement is a minor. The statute provided an affirmative defense if the advertiser obtained some form of identification from the individual featured in the ad. The Court held that the plaintiffs had shown a likelihood of success on the merits. Given the volume of internet business, it was literally impossible for the advertiser to check everyone's identification and individuals advertising on the internet might not wish to compromise their privacy by providing identification. In granting the injunction, the Court stated, "The Constitution prohibits the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech." *Id.* at 1275.

Structural Differences

The Court in *Ino Ino* recognized that the federal constitution is a grant of enumerated powers whereas the State Constitution operates as a limitation on the plenary powers of government. This simply requires Washington courts to engage in independent analysis of State constitutional claims and extend greater protection when warranted. *Ino Ino* at 121.

Matters of State and Local Concern

The Court in *Ino Ino* stated that adult entertainment has been traditionally been regulated by local governments. However, this does not necessarily suggest enhanced protection for sexually explicit dance. *Ino Ino* at 121.

Conclusion of the *Gunwall* Analysis

The result here is dictated by the differences in text of the Washington Constitution and by pre-existing case law. According to this Court's decisions in *Ino Ino* and *O'Day*, Article 1, Section 5 provides enhanced protection if the regulations at issue amount to a prior restraint. PCC §§ 5.14.230 and 5.14.250 amount to a prior restraint for the reasons discussed below.

2. PCC §§ 5.14.230 and 5.14.250 Impose a Prior Restraint on Freedom of Expression.

In *JJR, Inc. v. Seattle*, this Court rejected the City's argument that license revocation or suspension is a post publication sanction rather than a prior restraint. The Court stated:

Seattle argues that license revocation and suspension operate as a postpublication sanction similar to the one upheld in *Bering v. Share*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. denied*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). Seattle maintains that like the anti-abortion picketers in *Bering*, nude dancers who abuse their free speech rights can be deprived of them. However, *Bering* recognized that postpublication sanctions take only one of two forms: "(1) an award of damages in a tort action, or (2) an injunctive order prohibiting further dissemination of speech." *Bering*, 106 Wash.2d at 243, 721 P.2d 918. **License revocation and suspension fall outside this limited definition of postpublication sanctions.** Moreover, the picketers in *Bering* were prohibited from protesting directly in front of a medical clinic, but were still permitted to engage in demonstrations nearby. **License revocation, in comparison, amounts to the total suppression of protected expression.**

126 Wash. 2d at 7, (emphasis supplied).

The Court then concluded:

Neither party disputes that a licensee may not engage in future performances of nude dance in Seattle with a revoked or suspended license. Under Const. art. 1, § 5, when a municipality prevents individuals from performing protected nude expression, and establishments from showcasing nude dance, **this amounts to a prior restraint of protected expression.**

Id., (Emphasis supplied).

JJR is directly on point in holding that license revocation or suspension is a prior restraint and therefore enhanced protection under

Article 1, Section 5 is required. This gives rise to the need for special safeguards to insure protection of free speech rights. The safeguard called for in *JJR* was a stay of the license suspension pending judicial review. However, there is in nothing in *JJR* to suggest that a stay pending review is the only safeguard required by the State Constitution or that other safeguards may not be necessary depending on the threat to free speech presented by a particular regulation. See *Ino Ino, supra*, at 121-123 holding that a fourteen-day waiting period prior to issuance of a manager's licenses constitutes an impermissible prior restraint under Article 1, Section 5.

PCC § 5.14.250 – the criminal penalty provision – has a chilling effect on protected expression and is a form of over breadth amounting to a prior restraint. See *O'Day v. King County, supra*. In imposing strict liability, it punishes those who are diligent in attempting to comply with the ordinance along with those who do nothing to require compliance. A manager attending to other duties is guilty of a crime when a dancer fails to prevent a patron from approaching closer than ten feet to the stage. So too is the business operator who may be away on business in another state. Persons otherwise inclined to become dancers, managers and operators at erotic dance studios may refrain from engaging in protected activity for fear that they could wind up doing jail time for the conduct of others over

which they have no control. The criminal penalty provision makes all licensees the guarantor of compliance on the part of all other licensees and thereby criminalizes a substantial amount of constitutionally protected expression.

C. Argument as to Assignment of Error No 3: Managers at Erotic Dance Studios are Engaged in Constitutionally Protected Expression or They Must Receive Protection in Order to Protect the Free Speech Rights of Others.

In its order on summary judgment, the Superior Court stated, “Managers, including Ashley Richardson, do not engage in constitutionally protected dance.” CP 827. While that statement may be literally true that does not mean that managers are not entitled to free speech protection. In *Dream Palace v. Maricopa County*, 384 F. 3d 990, 1011-1013 (9th Cir. 2004), the district court declined to issue an injunction preventing the county from disclosing the names and personal information of dancers and managers employed at adult nightclubs pursuant to the State’s public disclosure law. The Court of Appeals reversed and directed the district court to issue the injunction. The Court of Appeals agreed with the appellants that public disclosure of their names and private information of dancers and managers would subject them to harassment and would thereby have a chilling effect on their First Amendment rights. *Id.* at 1011. In arriving at this decision, the Court of Appeals made no

distinction between managers and dancers whose information was subject to disclosure.

In *Ino Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 121-123, 937 P. 2d 154, 166 (1997), appellants challenged that portion of the City's ordinance that required a fourteen-day waiting period prior to the issuance of a manager's license and did not provide for a temporary license during the waiting period. The appellants maintained that this portion of the ordinance constituted an impermissible prior restraint. The Supreme Court agreed, stating:

We find that a 14-day delay in issuing a manager's license is similar to the revocation and suspension of an operator's license in *JJR, Inc.* **The delay in issuing a manager's license suppresses future expression because the City permits nude dancing only if licensed managers are present.** Although in *JJR, Inc.*, we stated that a provision revoking or suspending licenses was constitutional if it provided for a stay pending judicial review, no such procedural safeguards would cure the constitutional infirmities of BCC § 5.08.040(C)(3). *JJR, Inc.*, 126 Wash.2d at 10-11, 891 P.2d 720. Therefore, we hold that the City's failure to provide managers with temporary licenses during the 14-day delay constitutes a prior restraint in violation of the Washington Constitution. (Emphasis supplied).

Thus, managers are either protected in their own right, or they are protected in order to protect the free speech rights of others since, under the ordinance, the business cannot provide erotic entertainment and dancers cannot perform in the absence of licensed managers. In either

case, it matters not whether managers are personally engaging in “constitutionally protected erotic dance”.

D. Argument as to Assignment Error Number 4: The Superior Court Erred in Holding that the License Revocation and Criminal Penalty Provisions of PCC Chapter 5.14 do not Violate Article 1, Section 5 of the Washington Constitution

1. The Standard of Review is *De Novo* and the County Bears the Burden of Proof.

The free speech protections of Article 1, Section 5 extend to local ordinances. *State v. Immelt*, 173 Wash. 2d 1, 6, 267 P. 3d 1 (2011), (holding unconstitutional an ordinance banning horn-honking except for certain specific reasons). The interpretation of constitutional provisions and legislative enactments presents a question of law, which is reviewed *de novo*. *Id.* Generally, legislative enactments are presumed constitutional and the party challenging the legislation bears the burden of proving its unconstitutionality. *Id.* However, in a free speech context, the State usually bears the burden of justifying a restriction on speech. *Id.* See also *City of Lakewood v. Willis*, 186 Wash. 2d 210, 216, 375 P. 3d 1056, 1059 (2016).

2. The Regulations at Issue in this Case are Subject to Strict Scrutiny.

Under the First Amendment, any prior restraint comes into court bearing a heavy presumption against its constitutional validity. *Bantam*

Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S. Ct. 631, 640 (1963). Prior restraints are subject to strict scrutiny under the First Amendment because of the peculiar dangers presented by such restraints. *Levine v. U.S. District Court for the Central District of California*, 764 F. 2d 590, 594 (9th Cir. 1985). The Washington Constitution, which is generally more protective than the First Amendment, likewise calls for strict scrutiny since prior restraints are per se unconstitutional under Article 1, Section 5. *JJR, Inc. v. Seattle, supra*, at 6. The license revocation/suspension and criminal penalty provisions of Chapter 5.14 are subject to strict scrutiny because, as argued above, they constitute a prior restraint.

Under the strict scrutiny test, the government carries the burden of showing that the restrictions serve a compelling governmental interest and are the least restrictive means for achieving the government's objective. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); and see also *Munns v. Martin*, 131 Wash. 2d 192, 198, 930 P. 2d 318 (1997). The strict scrutiny test contrasts with the mid-level scrutiny commonly applicable to so called time, place and manner regulations. The time, place and manner test is set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2476 (1984) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). Under the *Ward/Renton* test, a regulation must be content

neutral, narrowly tailored to serve a substantial governmental interest, and leave open alternative avenues of communication. *Ward, supra*, at 791.

3. The License Revocation/Suspension and Criminal Penalty Provisions of PCC Chapter 5.14 Cannot Survive Strict Scrutiny

In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S. Ct. 3172 (1986), the Supreme Court was quick to point out that a nuisance abatement closure (predicated upon prostitution activities) would not violate the prior restraint doctrine under *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625 (1931) because, *inter alia*, “the order would impose no restraint at all on the dissemination of particular materials, since respondents *are free to carry on their book selling business at another location...*”. *Id.* at 705. (emphasis added). Here, however, those individuals who, and those businesses that, fall under the strict liability provisions of the ordinance may *not* in fact carry on their constitutionally protected activities “at another location” anywhere in the county. Rather, they are banned from exercising their free speech rights for the entire area up to a year. More importantly, however, upon remand from the Supreme Court, the New York Court of Appeals, utilizing the state’s freedom of expression provision that is similar to Article 1, § 5, concluded that contrary to the U.S. Supreme Court, that the state was required to “**prove that in seeking to close the store it has chosen a course no broader**

than necessary to accomplish its purpose.” *People ex. rel. Arcara v. Cloud Books*, 68 N.Y. 2d 553, 557-58 (1986) (emphasis added). As the Court of Appeals went on to point out, “the crucial factor in determining whether State action affects freedom of expression is the impact of the action on protected activity and not the nature of the activity which prompted the government to act. **The test, in traditional terms, is not who is aimed at but who is hit.**” *Id.* at 558 (emphasis added).

Here, the County failed to prove that it had chosen a course no broader than necessary and that other less restrictive measures would not suffice. The County has no prior experience with a “knew or should have known standard” commonly found in similar regulations so is not in a position to say, based on its own experience, that a standard of that nature would not be sufficient. No consideration of this alternative standard was given when the ordinance was adopted in 1994 or when the ordinance was amended in 2012. The County presented no evidence in response to Plaintiffs’ summary judgment motion that a “knew or should have known” standard was inadequate. It therefore failed to sustain its burden of proof.

4. Even Under Mid-Level Scrutiny the Regulations are Defective Because they are not Narrowly Tailored to Further a Substantial Governmental Interest.

In *Millennium Restaurant Group, Inc. v. City of Dallas*, 191 F. Supp. 2d 802 (N.D. Texas 2002), a local ordinance authorized the chief of

police to revoke an adult entertainment license if two or more persons had been convicted of crimes on the premises within a twelve-month period. Revocation of the license was mandatory and proof of knowledge or negligence was not required. The Court held that the ordinance was an unconstitutional prior restraint because it restrained future speech based on past misconduct. *Id.* at 807. In addition, it held that the ordinance was unconstitutional under the four-part test of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673 (1968), which applies to restrictions on expressive conduct. Under the *O'Brien* test, a regulation is constitutional if: (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the asserted 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 the governmental interest. *O'Brien* at 377. The Court in *Millennium Restaurants* held that the strict liability provision of the city's ordinance failed the third and fourth prong of the of the *O'Brien* test. With respect to prong three, the Court stated, "The court finds that the strict liability feature of the ordinance is constitutionally suspect because it is not related to or further the governmental interest of assuring law abiding licensees." *Millennium Restaurants* at 808. With respect to prong four, the Court stated:

Revocation of a business license based on two convictions of employees for public lewdness over a one year period, without requiring any knowledge on the part of management, is a greater restriction on free expression than is essential to furtherance of the governmental interest because the predicate offenses do not intend to show that management is careless, reckless or incompetent. Id.

The *O'Brien* test is used for restrictions applicable to expressive conduct.¹⁰ It was employed by this Court in *Ino Ino, supra*, to measure the constitutionality of that portion of the local ordinance which required a six-foot set-back between patrons and entertainers. *Ino Ino* at 125-133. Other courts also apply the *Renton* test in evaluating time place and manner restrictions. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 122 S. Ct. 728 (2002); *Fantasy Land Video, Inc. v. County of San Diego*, 505 F. 3d 996, 1001 (9th Cir. 2007). Under the *Renton* test, a regulation must be narrowly tailored to serve a substantial governmental interest, and allow for reasonable alternative avenues of communication. Id.¹¹ The Ninth Circuit has stated that there is no substantive difference between the *O'Brien* and *Renton* tests and a given result under one

¹⁰ The government carries the burden of proof with respect to all four elements of the *O'Brien* test. *Porter v. Bowen*, 496 F. 2d 1009, 1021 (9th Cir. 2007).

¹¹ The government bears the burden of proving that its regulation is narrowly tailored in furtherance of a substantial governmental interest. *Klein v. City of San Clemente*, 584 F. 3d 1196, 1200 (9th Cir. 2009). See also *Collins v. Tacoma*, 121 Wash. 2d 737, 759, 854 P. 2d 1046 (1993).

necessarily dictates an identical outcome under the other. *Clark v. City of Lakewood*, 259 F. 3d 996, 1005, n.3 (9th Cir. 2000).

The requirement of narrow tailoring was explained in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2476 (1984) as follows:

...the requirement if narrow tailoring is satisfied “so long as the ...regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.” (Cite omitted). To be sure, this standard does not mean that a time, place and manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.*****So long as the means chosen are not substantially broader than necessary to achieve the government’s interest**, however, the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.

Id. at 799, 800. (Emphasis supplied).

In *Cincinnati v. Discovery Network, Inc.* 507 U.S. 410, 113 S. Ct. 1505 (1993), the Supreme Court overturned a ban on commercial news racks on First Amendment grounds. The Court held that the city failed to show that there was a “reasonable fit” between the legislative goals and the means chosen to achieve those goals – a requirement for upholding regulations affecting commercial speech. In arriving at this conclusion, the Court considered evidence that the goal of the legislation – prevention

of litter – could be achieved just as effectively with less burdensome measures. The Court stated:

...while we have rejected the “least-restrictive-means” test for judging restrictions on commercial speech, so too have we rejected the mere rational-basis review. A regulation need not be “absolutely the least severe that will achieve the desired end”, (Cite omitted), **but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the “fit” between ends and means is reasonable.**

Id. at f.n. 13, (Emphasis supplied).

Other courts have applied this analysis in deciding whether regulations are narrowly tailored under *Ward*. In *Klein v City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009), the Court of Appeals stated:

To satisfy the “narrowly tailored” aspect of this test, the restriction “need not be the least restrictive means of [serving the government’s interest],” but it also may not “burden substantially more speech than is necessary to further” that interest. (Citing *Ward*). The existence of “numerous and obvious less-burdensome alternatives” is relevant to assessing whether the restriction on speech reasonably fits the interest asserted. (Citing *Discovery Network*).

The same analysis was employed in *Berger v. Seattle*, 569 F. 3d 1029, 1041 (9th Cir. 2009); *Comite de Jornalero de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948-949 (9th Cir. 2011); and *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1205 (C.D. Cal. 1997).

More recently, the Supreme Court has *enhanced* the burden on government to *prove* the narrowly tailoring component even with intermediate scrutiny. In *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), the Supreme Court applied the *Ward* test in considering the constitutionality of a statute providing that no one could go within 35 feet of an abortion clinic except for persons entering or leaving the facility, employees of the facility, law enforcement officers or persons using public sidewalks to get from one place to another. The Court held that the statute was not narrowly tailored under *Ward* because there were other less burdensome means available of accomplishing the goals of the legislation and the State failed to demonstrate that the other available means would not be effective. Writing for the majority, Chief Justice Roberts stated, “To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier.” *Id.* at 2540. He went on to state, “Given the vital First Amendment interests at stake, it is not enough for Massachusetts to say that other approaches have not worked.” *Id.* Because the buffer zone requirement was not so narrowly tailored, the Supreme Court reversed the First Circuit’s determination that the statute was constitutional. *Id.* at 2541.

Similarly, in *McCutcheon v. FEC.*, 134 S. Ct. 1434 (2014) the Court addressed a First Amendment challenge to aggregate limits on political campaign contributions. *Id.* at 1442. The Court stated that, “[e]ven when the Court is not applying strict scrutiny, we still require ‘a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’ ...that employs not necessarily the least restrictive means but ...a means narrowly tailored to achieve the desired objective.” *Id.* at 1456-57 (citations omitted). The Court reversed the lower court there as well.

Plaintiffs maintain that the regulations at issue here are a prior restraint rather than time place and manner restrictions and do not concede the appropriateness of intermediate scrutiny. However, *McCullen* and *McCutcheon* clearly demonstrate that even under intermediate scrutiny, the burden rests firmly on the government to demonstrate that the regulations do not burden substantially more speech than necessary, that there is a reasonable fit between means and ends, and that the goals of the regulation cannot be achieved with obviously less burdensome measures.

The 2012 amendments to Chapter 5.14 were intended to make managers and owners responsible for dancer conduct and the operation of the business and to prevent them from avoiding responsibility by feigning ignorance. At the time, the County had no experience with “knew or

should have known” – a standard adopted by a number of other municipalities throughout the State and one that would be no less effective in accomplishing the legislative goals. “Should have known” is a simple negligence standard and is relatively easy to prove. It requires managers and owners to be proactive in preventing ordinance violations and to take immediate action when they know or have reason to believe that ordinance violations are taking place. Under this standard, managers who are required to be present at all times when the business is open cannot avoid liability by ignoring the obvious. Owners cannot avoid liability if they fail to adopt practices and policies designed to prevent ordinance violations from taking place. But what the “knew or should have known” standard does not do is to establish criminal liability and impose a one-year prior restraint on individuals engaged in undeniably protected expression who are simply unaware of ordinance violations, are not willfully blind to the conduct of others, and who have no reason to know that any such violation is taking place. Defendants have failed to carry their burden of demonstrating that the goals of legislation cannot be accomplished just as effectively by use of this standard and have therefore failed to prove that the strict liability provisions are narrowly tailored to further a substantial governmental interest.

E. Argument as to Assignment of Error Number 5: the Strict Liability Provisions of Chapter 5.14 offend the Due Process Clause of the Washington Constitution

Article 1, Section 3 of the Washington Constitution provides:

No person shall be deprived of life, liberty or property
without Due Process of law

In *Lee v. Newport*, 947 F. 2d 945 (6th Cir. 1991), (Unpublished),

the local ordinance permitted suspension or revocation of an adult nightclub license for crimes committed on the premises. The club owner had her license revoked because two of her employees were convicted of prostitution. The club owner testified that she did not know about the prostitution and had been diligent in attempting to prevent it. The Court observed that the ordinance creates a presumption of knowledge and it eliminates the knowledge requirement. The Court held that the ordinance violates Due Process because it excludes consideration of an element relevant to the question of whether a license should be suspended or revoked. The Court stated:

Consequently, the provisions of the ordinance now under review cannot pass constitutional scrutiny under the rational relation test and thus violate the due process clause of the Fourteenth Amendment. These provisions permit the City to deprive an operator of a protected property interest without any relation to the evils at which the ordinance is allegedly aimed and, having no requirement that the operator know or should know from the circumstances that violations of City ordinances or State statutes are occurring on the licensed premises, the ordinance precludes the

licensee from showing that the licensee had no knowledge of any such violations. The ordinance thus constitutes an improper imposition of strict liability or creates an irrebuttable presumption and is overbroad.

Lee v. Newport was followed in *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 386 (E.D. Kentucky 1992) and *In Wal Juice Bar, Inc. v. City of Oak Grove*, 2008 WL 1730293 (W.D. Kentucky 2008).

In both cases, local ordinances provided license suspensions for adult entertainment businesses based upon strict liability in the event of employee misconduct. In both cases, courts invalidated the ordinance on Due Process grounds citing *Lee*. In *Eastbrook Books, Inc. v. Shelby County, Tennessee*, 568 F. 3d 360 (6th Cir. 2009) the Court of Appeals held that the license suspension provision did not offend Due Process because it only applies if an operator has a duty to supervise the premises and he or she “knew or should have known” of the violation.

In *Blue Moon Enterprises, Inc. v. Pinellas County Department of Consumer Protection*, 97 F. Supp. 2d 1134 (M.D. Fla. 2000), the ordinance permitted adult entertainment license suspension for employee misconduct on the basis of strict liability. The court observed that the ordinance holds operators and employees vicariously liable for employee violations even if they have no power to prevent the violation or knowledge that it has occurred. This was held to offend Due Process.

Soundgarden v. Eikenberry, 123 Wash. 2d 750, 871 P. 2d 1050 (1994) involved a constitutional challenge to a State statute that required labeling of sound recordings that were designated “erotic material” and made it crime to sell such recordings to minors. Procedurally under the statute, the State could bring a civil action against a single distributor to have a particular sound recording declared “erotic material”. Once a particular sound recording was declared erotic material, anyone selling that particular recording to minors was subject to a criminal penalty regardless of whether the individual selling the material was a party to the previous civil proceeding. For these individuals, the criminal statute was a strict liability crime – they would have no ability to prove in a criminal proceeding that they were unaware of the “erotic material” designation or that they did not know the character of the material. The Court concluded:

The procedures under RCW 9.68.060 are unconstitutional. The statute constitutes a prior restraint as applied to adults. It is overbroad because it reaches conduct which is constitutionally protected.....**It further violates due process by imposing criminal penalties without providing sufficient notice of which materials have been adjudged to be “erotic” and without providing that a defendant must have “knowledge” that the materials sold are erotic.** *Id.* at 777, (Emphasis supplied).

The Due Process problems with strict liability are illustrated by the testimony provided in the Richardson/Blakeway administrative hearing by Auditor’s representative Casey Kaul. According to her testimony, if a

manager is busy in the office assisting the inspector with license checks, and an entertainer performs a lap dance unbeknownst to the manager, the manager is nevertheless subject to license suspension and criminal penalties. This offends Due Process because it excludes consideration of an element relevant to the question of whether a license should be suspended or revoked. Under PCC 5.14.180(D), managers are responsible for compliance on the part of the business even though they are not the business owners and have no control over the lighting fixtures or the height of the stage. Entertainers are responsible for the conduct of other entertainers, even though they have no supervisory responsibility and exercise no control of one another. Owners are responsible for the conduct of managers and entertainers, regardless of whether they are on the premises when the violations occur and regardless of whether they have developed policies and procedures to prevent violations. The strict liability provisions offend Due Process because they amount to a conclusive presumption of knowledge and impose criminal penalties on those who are innocent of any misconduct.

V. CONCLUSION

The judgment of the Superior Court should be reversed. The case should be remanded to the trial court with instructions to vacate the

judgment in favor of the Defendants and enter judgment in favor of the Plaintiffs.

Dated this 18th day of September, 2017

/s/Gilbert H. Levy
Gilbert H. Levy, WSBA 4805
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on September 18, 2017, I caused to be electronically filed the foregoing document with the Clerk of Court using the Washington State Court's Secure Access eFiling Portal system, which will send notification of such filing to the attorney(s) of record.

/s/Gilbert H. Levy
Gilbert H. Levy, WSBA #4805
Attorney for Appellants

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 Responsibilities.
- 5.14.190 Operation Restrictions -- Unlawful Acts Designated.
- 5.14.200 Public Display Prohibited.
- 5.14.210 Inspection of Records and Premises Authorized.
- 5.14.230 Standards for Revocation -- Suspension of License.
- 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 PCC 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 and mailing addresses, telephone number, date of birth, and aliases (past or present), photograph, fingerprints, physical identifying information, and dancer's stage name.
 - 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.
 - E. Information regarding the applicant's criminal history.
- (Ord. 2012-51 § 3 (part), 2012; Ord. 94-5 § 2 (part), 1994)

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

The Auditor shall issue a temporary license promptly upon receipt of both a properly-completed application form and the license fee. An annual license shall not be issued until the Sheriff has completed an investigation of the applicant, made his recommendation as to approval or disapproval of the application, and all costs associated with the investigation have been paid by the applicant. (Ord. 2009-47 § 3, 2009; 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 PCC 5.14.120 through 5.14.150. (Ord. 94-5 § 2 (part), 1994)

5.14.180 Manager Responsibilities.

- 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.
- D. The manager shall be responsible for ensuring that the studio is in compliance with the operational restrictions set forth in PCC 5.14.190.
- E. The manager shall be responsible for ensuring that all dancers comply with the operational restrictions set forth in PCC 5.14.190.

(Ord. 2012-51 § 3 (part), 2012; 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/performance/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. The interior of the studio shall be sufficiently illuminated so that all objects are plainly visible at all times the premises is open for business. The minimum illumination level shall be 30 lux at 30 inches above the floor in all areas open to or used by customers.

T. 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. 2012-51 § 3 (part), 2012; 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)

5.14.230 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)

5.14.250 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. The manager on duty and/or licensee shall be held strictly liable for any violation of the requirements set forth in PCC 5.14.180 and/or 5.14.190. (Ord. 2012-51 § 3 (part), 2012; 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)



The Pierce County Code is current through 2016-17s, passed April 26, 2016.

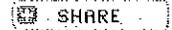
Disclaimer: The Pierce County Council has the official version of the Pierce County Code. Users should contact the Code Reviser for ordinances passed subsequent to the ordinance cited above.

County Website: <http://www.co.pierce.wa.us/>

County Telephone: (253) 798-7777

Code Publishing Company

APPENDIX B

5.02.195 Notice and Order.

The Auditor or his/her agent may issue a notice and order directed to the person whom the Auditor or his/her agent has determined to be in violation of any of the terms and provisions of this Title. The notice and order shall contain:

- A. The street address, when available, or a description sufficient for identification of the premises upon which the violation occurred;
- B. A statement that the Auditor or his/her agent has found a violation of this Title or the terms of any license with a brief and concise description of the violation;
- C. A statement of any corrective action required to be taken;
- D. If the Auditor or his/her agent has decided to assess a civil penalty, the order shall so state along with the payment due date;
- E. A statement that failure to comply with the instructions outlined in the notice and order will constitute sufficient grounds for suspension or revocation of the license;
- F. A statement advising:
 1. that the licensee may appeal the notice and order in accordance with PCC 5.02.120, and;
 2. that the failure to file a timely and complete appeal will constitute a waiver of all rights to an appeal.

The notice and order, and any amended notice and order, shall be served upon the person either personally or by mailing a copy of such notice and order by regular and certified mail with return receipt requested to such person at his address as it appears on the license.

(Ord. 2011-44 § 1 (part), 2011)

APPENDIX C

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BEFORE THE PIERCE COUNTY HEARING EXAMINER

IN RE THE APPEAL OF ERIC FORBES
OF NOTICE AND ORDER TO CORRECT
DATED AUGUST 28, 2014

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came before Pierce County Hearing Examiner Stephen K. Causseaux, Jr., on the 14th day of January, 2015, upon an appeal of a Notice and Order to Correct issued to Eric Forbes by Casey Kaul, Recording/Licensing Supervisor, Pierce County Auditor's Office. Cort O'Connor, Deputy Prosecuting Attorney, represented the Pierce County Auditor, and Gilbert H. Levy, attorney at law, represented Eric Forbes. Stacy MacFarlane, Casey Kaul, and Whitney Rhodes, Pierce County Auditor's Office, appeared and testified. Pierce County Sheriff Detectives Brian Stepp, Shaun Darby, and Robert Shaw appeared and testified. Pierce County Deputy Sheriffs Thomas Oleson, William Brand, and Darrin Rayner appeared and testified. Neither Eric Forbes nor anyone on his behalf appeared and testified.

FINDINGS OF FACT

1. On November 1, 2013, Eric Forbes personally applied to the Pierce County Auditor's Office for an Erotic Dance Studio License pursuant to Chapter 5.14 of the Pierce County Code (PCC). The Pierce County Auditor's Office issued

1 Pierce County Adult Entertainer Establishment License Number 26527 to Eric
2 R. Forbes doing business as Dreamgirls of Tacoma, LLC, with an effective
3 date of December 31, 2013, and an expiration date of December 31, 2014.
4 Mr. Forbes is the license holder for the adult entertainment business known as
5 Dreamgirls at Fox's located at 10701 Pacific Avenue, Tacoma, Washington, in
6 unincorporated Pierce County.
7

8 2. Based upon violations noted in two, license compliance inspections conducted
9 by Casey Kaul, Recording/Licensing Supervisor; Stacy McFarlane, Licensing
10 Lead; and Whitney Rhodes, Assistant to the Auditor, and three, undercover,
11 compliance investigations conducted by the Pierce County Sheriff's Office, Ms.
12 Kaul mailed a Notice and Order to Correct dated August 28, 2014, to Mr.
13 Forbes by both certified and first class mail to the address shown on his
14 license application. Said Notice and Order advised Mr. Forbes that seven
15 violations of Chapter 5.14 of the Pierce County Code (PCC) occurred at
16 Dreamgirls at Fox's between April-August 2014. The Notice and Order further
17 advised Mr. Forbes of the actions necessary to correct the violations. A cover
18 letter from Julie Anderson, Pierce County Auditor, of even date accompanied
19 the Notice and Order and further specified the code violations and advised of
20 license suspensions of managers and dancers working at Dreamgirls. The
21 Notice and Order to Correct did not suspend Mr. Forbes' license and did not
22 impose any penalties.
23

24 3. By letter dated September 3, 2014, Gilbert H. Levy, attorney at law, entered a
25 Notice of Appearance for Dreamgirls of Tacoma, LLC, and timely appealed the

1 Notice and Order to Correct.

2 4. A hearing to consider Mr. Forbes'/Dreamgirls' appeal was convened on
3 January 14, 2014, at the Pierce County Annex. At said hearing Pierce County
4 established the following facts by a preponderance of the evidence.

5 5. On June 18, 2014, at approximately 5:40 p.m. Stacy MacFarlane, Casey Kaul,
6 and Whitney Rhodes, arrived at Dreamgirls at Fox's to perform a licensing
7 compliance inspection. Kevin Loomis greeted them and identified himself as
8 the on-duty manager. Ms. Kaul followed Mr. Loomis into the business office to
9 verify his license and the licenses of all dancers presently working. Ms.
10 MacFarlane and Ms. Rhodes remained in the dance/table area of the facility.
11 Ms. MacFarlane noted a dancer that she later identified as Chelsea Hicks lead
12 a male customer to the rear of the club to a seating area near an ATM/server
13 station. She observed Ms. Hicks sit on the customer's lap and begin dancing,
14 first facing him and then rotating her body so that her back side was against
15 him. Ms. MacFarlane brought this activity to the attention of Ms. Rhodes who
16 also observed the activity. At the conclusion of the activity (dance) Ms.
17 Rhodes observed the customer remove what appeared to be money from his
18 wallet and hand it directly to the dancer whom she also later identified as
19 Chelsea Hicks.
20

21
22 6. Chelsea Hicks testified that she was working in Dreamgirls at Fox's on June
23 18, 2014, and that she observed the Auditor's representatives enter the club.
24 She noted that they were carrying clipboards, and therefore she was careful to
25 follow the rules. However, she also testified that lap dances take place in the

1 area of the facility described by Ms. MacFarlane and Ms. Rhodes. The
2 Examiner upheld the Auditor's suspension of Ms. Hicks' Dancer License but
3 modified the length of suspension to ten days. Ms. Hicks did not appeal.

4 7. On July 8, 2014, Ms. MacFarlane, Ms. Kaul, and Ms. Rhodes entered the
5 Dreamgirls at Fox's business at approximately 4:55 p.m. to conduct a licensing
6 compliance inspection. After having to wait for approximately five minutes,
7 Kevin Loomis appeared and identified himself as the on-duty manager. Prior
8 to leaving the business Ms. MacFarlane, Ms. Kaul, and Ms. Rhodes all
9 observed "Sophia" (the stage name for Sonya Combs) approach a customer,
10 take his hand, lead him to the rear of the club, and perform a lap dance.
11 "Sophia" straddled the customer, first facing forward and then backward,
12 making full body contact and grinding her body into his crotch area. Thus, at
13 both inspections the Auditor's representatives observed lap dances occurring
14 at the club when Kevin Loomis was present as the onsite manager. Mr.
15 Loomis made no effort to correct the dancers' activity that violated PCC
16 5.14.190.

17
18 8. On the July 8, 2014, inspection both Ms. Rhodes and Ms. Kaul noted signs
19 posted on mirrors around the interior of the club that read "\$20 dances". In
20 addition, Ms. Kaul heard the disc jockey announce that "Strawberry" was
21 available for one on one lap dances. The signs were posted and the disc
22 jockey made the lap dance announcement when Mr. Loomis was working as
23 manager. Mr. Loomis made no effort to correct the dancers, remove the signs,
24 or correct the disc jockey. He, as manager, allowed the violations to continue.
25

1 The Examiner suspended Sonya Combs' license for a period of ten days and
2 she did not appeal. The Examiner upheld the Auditor's decision to suspend
3 the license of Kevin Loomis for 30 days, but the appeal period has not expired.

4
5 9. Section 5.14.190(S) PCC provides as follows:

6 The interior of the studio shall be sufficiently illuminated so that all
7 objects are plainly visible at all times the premises is open for business.

8 The minimum illumination level shall be 30 lux at 30 inches above the
9 floor in all areas open to or used by customers.

10 In their June 18 and July 8, 2014, inspections the Auditor's representatives
11 brought a light meter for the purpose of ensuring compliance with the above
12 PCC section. Upon entering the club on June 18 the premises were so dark
13 that all three representatives could not see initially and could not identify tables
14 or other items in the club. The club was so dark that the representatives could
15 not see the light meter to take readings. When the lights were turned up Ms.
16 Kaul took four readings that varied between 6.8 and 16 lumens. Following
17 conversion, the readings would not have approached the minimum, 30 lux
18 requirement. However, the Auditor's Office interprets PCC 5.14.190(S) as
19 providing alternative requirements. The Auditor's Office considers the club in
20 compliance with said subsection if it is illuminated such that all objects are
21 plainly visible. On June 18, 2014, following the turning up of the lights the
22 inspectors found the club in compliance. On the July 8, 2014, inspection, the
23 light meter once again did not show a reading of 30 lux at any place in the
24 club. However, the inspectors considered the club in compliance as all objects
25

1 were plainly visible. Thus, regardless of the light meter readings, the club was
2 initially not in compliance with subsection S on June 18, 2014, but was
3 subsequently brought into compliance on that date. The club was in
4 compliance on July 8, 2014.

5
6 10. Detectives Darrin Rayner and Shaun Darby entered Dreamgirls at Fox's at
7 approximately 9:00 p.m. on April 9, 2014, for the purpose of performing an
8 undercover compliance check to assure the business was in compliance with
9 PCC 5.14. After paying the cover charge they seated themselves at a table
10 near the middle of the dance floor about 25 feet from the main stage. Within
11 minutes dancers contacted Detective Rayner and asked if he wanted a private
12 dance. One dancer stood behind him, rubbing his shoulders and later a
13 second dancer, "Doll Face", sat on his leg and discussed the tattoos she had
14 all over her body. At her suggestion Detective Darby paid \$20 directly to "Doll
15 Face" to perform a dance for Detective Rayner as a gift. Doll Face led
16 Detective Rayner to the VIP area at the rear of the club and began a lap dance
17 by sitting on his lap and gyrating her buttocks into his crotch. She also moved
18 his hands to her waist and leaned against his chest. Following his return to
19 the table the first dancer approached and once again offered him a lap dance.
20 Detective Rayner later identified Doll Face as a licensed dancer from the
21 photograph on her Adult Entertainer License.
22

23 11. On May 22, 2014, at approximately 11:50 p.m. Deputies Thomas Olesen and
24 Brian Thompson entered Dreamgirls at Fox's for the purpose of performing an
25 undercover compliance check to assure that the business was in compliance

1 with PCC 5.14. Following payment of cover charges the Deputies sat at a
2 table and were soon thereafter approached by female dancers. A dancer who
3 called herself "Bonnie" asked Deputy Olesen if would like a dance in the VIP
4 section of the club. When he asked the price, she quoted several prices
5 depending upon the number of songs. Bonnie led him to the VIP section and
6 he sat in a large booth where she danced on his lap, ground her pelvic area
7 into his, exposed her breasts, and placed her hands in his crotch area. At the
8 end of the dances he asked the price and she told him \$80 for three dances.
9 He paid her directly and she accepted the money. The Deputy also noted a
10 sign near the door of Dreamgirls advertising dances for \$20. During his time
11 at the club he also observed Deputy Brian Thompson receive a lap dance. He
12 observed no managers on the club floor. He later identified the dancer as
13 Ashley Svencia from the photograph on her Adult Entertainer License.
14

- 15 12. On May 22, 2014, Pierce County Deputy Sheriffs William Brand and Tony
16 Messineo entered Dreamgirls at Fox's at approximately 10:20 p.m. for the
17 purpose of conducting an undercover, compliance investigation. After paying
18 the cover charge they sat at a table in front of the south stage. Soon, multiple
19 dancers approached them, engaged in small talk, and asked if they wanted
20 private dances. The dancer who introduced herself as "Pandora" asked
21 Deputy Brand if he wanted a dance and he agreed. She led him to the booth
22 area at the north end of the club where he noted dancers performing private
23 lap dances for other customers. "Pandora" danced by facing Deputy Brand
24 and grinding herself onto his genitals. At the end he asked the cost of the
25

1 dance and she told him \$20. He then paid her \$20 directly. During his time in
2 the club he did not notice a manager on the floor but did observe other
3 customers receiving lap dances. After leaving the club Deputy Brand identified
4 Pandora as a licensed dancer from her Adult Entertainer License photograph.

5
6 13. On August 7, 2014, at approximately 8:15 p.m. Detective Brian Stepp and
7 Deputy William Brand, Pierce County Sheriff's Office, arrived at Dreamgirls at
8 Fox's to perform an undercover compliance inspection. Detective Stepp was
9 greeted by staff and paid the cover charge. He then sat at a table for two with
10 Deputy Brand near the front of the main stage. After he ordered a soft drink
11 two dancers came to the table and identified themselves to him and Deputy
12 Brand.

13 14. Detective Stepp began talking with one of the dancers who introduced herself
14 as "Roslyn". She sat in his lap, straddled him, began talking with him, and
15 placed her hands on his shoulders. Roslyn, whom he later identified as
16 Rosemarie Waymire, advised him that she could give him a dance. He agreed
17 and she led him into the far corner of the VIP lounge section at the rear of
18 Dreamgirls.

19
20 15. Detective Stepp and Roslyn then discussed the price of the dance and she
21 advised that the cost was \$20 for a lap dance, \$40 for a better dance, and
22 \$100 for her hand in his pants. He started with the \$20 lap dance and
23 subsequently agreed to a second dance. In the first dance Roslyn bumped
24 and grinded on his crotch area, fully exposed her breasts, and encouraged him
25 to touch them as well as other areas of her body, all in an effort to arouse his

1 sexual desires. At the end of the dance Roslyn put her hand in Detective
2 Stepp's crotch and began rubbing him through his clothing, again to arouse his
3 sexual desires.

4
5 16. During the second dance Roslyn exposed herself and again touched Detective
6 Stepp's crotch with her hands. She fully exposed her breasts and rubbed them
7 against his chest and also exposed her vagina, all in an effort to arouse his
8 sexual desires. At the end of the dance Detective Stepp placed \$40 inside the
9 waistband of Roslyn's lingerie underwear.

10 17. Upon exiting Dreamgirls at approximately 9:20 p.m. Detective Stepp reviewed
11 a book provided by the Auditor's Office that contained the photographs, stage
12 names, and real names of all adult entertainer license holders. He identified
13 Roslyn from her photograph and noted that her real name is Rosemarie
14 Waymire. The Examiner upheld the Auditor's decision to suspend Ms.
15 Waymire's license for 30 days. She did not appeal.

16
17 18. On August 7, 2014, at approximately 9:50 p.m. Detectives Robert Shaw and
18 Shaun Darby entered Dreamgirls at Fox's to conduct an undercover
19 compliance inspection. Following payment of the cover charge the Detectives
20 sat down at a table near the center of the premises. Soon several dancers
21 approached them.

22 19. A dancer sat down next to Detective Shaw and introduced herself as "First
23 Leighty" and engaged him in conversation. Detective Shaw understood her to
24 say that her name was "First Lady". She asked Detective Shaw if he wanted a
25 dance and he responded in the affirmative. She then led him to an area at the

1 back of the club where dancers perform private dances. When the music
2 started First Leighty (later identified as Lamicka Parr McVea) sat on the
3 Detective's lap, ground her pelvis into his crotch area, and lifted his shirt so
4 that she could rub herself against him. She exposed her vagina and anus at
5 least four times. She was moving in sync with the music and dancing. First
6 Leighty also grabbed the crotch area of Detective Shaw's jeans and massaged
7 his private area through his pants. At one point during the dances she
8 exposed one of her breasts and rubbed it on the side of the Detective's face.
9 Upon completion of the dances First Leighty advised Detective Shaw that she
10 had danced through five songs and that the cost of five songs was \$100. He
11 then paid her directly \$100 in cash.

12
13 20. Prior to the dances First Leighty and Detective Shaw did not discuss price, but
14 Detective Shaw noticed that the price of a dance was posted on the wall.
15 Following completion of the dances First Leighty advised him of the price. No
16 negotiation or solicitation occurred.

17
18 21. Upon leaving the club at approximately 10:15 p.m. Detective Shaw reviewed a
19 book of Adult Entertainer Licenses provided by the Pierce County Auditor that
20 contained the photographs, stage names, and real names of all adult
21 entertainment license holders. He initially looked for a stage name of "First
22 Lady", but when he didn't find it, continued to look at the licenses until he
23 recognized Lamicka Parr McVea as "First Leighty". He immediately
24 recognized her photograph. The Examiner upheld the Auditor's suspension of
25 Ms. McVea's license but reduced the length of suspension to 25 days. She

1 did not appeal.

2 22. At no time during the five investigations did a manager or other employee of
3 Dreamgirls attempt to stop the lap dances.

4 23. Upon signing his application for an Erotic Dance Studio, Mr. Forbes certified
5 as follows:

6 ...I have also received, read and understand the Pierce County Code
7 5.14 pertaining to the type of license for which I am applying.

8
9 The testimony of all witnesses establishes that Mr. Forbes was not at
10 Dreamgirls during any of the investigations. Mr. Forbes asserts that he has no
11 liability or responsibility for activities that occur outside of his presence.
12 However, he also certified that he understood the requirements and
13 prohibitions contained in PCC 5.14. Furthermore, PCC 5.02.020 requires
14 liberal construction of Chapter 5.14 as follows:

15 Licenses required are for regulation and control. This entire Title shall
16 be deemed an exercise of the power of the State of Washington and of
17 the County of Pierce to license for regulation and/or control and all its
18 provisions shall be liberally construed for the accomplishment of either
19 or both such purposes.

20
21 Mr. Forbes, as license holder, cannot permit substantial and continuing
22 violations to occur in Dreamgirls and is responsible for the actions of his
23 managers should they permit such violations to occur (PCC 5.14.230).

24 24. Section 5.14.190 PCC entitled "Operation Restrictions-Unlawful Acts
25 Designated" provides in pertinent part as follows:

1. H. All dancing shall occur on a platform intended for that purpose which is
2. raised at least 18 inches from the level of the floor and no closer than
3. ten feet to any patron.

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

6. K. No patron shall pay or give any gratuity directly to any dancer.

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

8. M. No dancer or employee shall expose their breasts below the top of the
9. areola or expose any portion of the pubic hair, vulva or genitals, anus
10. and/or buttocks, except upon a stage at least 18 inches above the
11. immediate floor level and removed at least 10 feet from the nearest
12. patron.

13. S. The interior of the studio shall be sufficiently illuminated so that all
14. objects are plainly visible at all times the premises is open for business.
15. The minimum illumination level shall be 30 lux at 30 inches above the
16. floor in all areas open to or used by customers.

17. 25. Section 5.14.180 entitled "Manager Responsibilities" provides in part:

18. D. The manager shall be responsible for ensuring that the studio is in
19. compliance with the operational restrictions set forth in PCC 5.14.190.

20. E. The manager shall be responsible for ensuring that all dancers comply
21. with the operational restrictions set forth in PCC 5.14.190.

22. Section 5.14.230 PCC entitled "Standards for Revocation and Suspension of
23. License" provides in Subsection A in part:
24.
25.

1 A. The Auditor shall revoke or suspend, for a specified period of not more
2 than one year, any erotic dance studio license if he/she determines that
3 the licensee or applicant has: ... violated or permitted violation of any
4 provisions of this Chapter. (emphasis added)
5

6 26. The Notice and Order to Correct identifies violations of the above quoted
7 sections of the Pierce County Code that occurred between April 2014-August
8 2014. The allegations include dancers dancing next to patron tables off the
9 platforms; dancers accepting money from patrons; dancers touching patrons to
10 sexually arouse them; dancers exposing their private parts; insufficient
11 illumination of the studio, and failure of managers to ensure compliance with
12 PCC 5.14.190. The Notice and Order to Correct also asserts that an
13 unlicensed manager was on duty. However, the Examiner previously
14 determined that the person identified as an unlicensed manager was not
15 employed by Dreamgirls at the time and therefore no violation occurred.
16 Furthermore, while Dreamgirls was in violation of the lighting requirements
17 upon the initial inspection by the Pierce County Auditor's Office, the lighting
18 was brought into compliance during said inspection and in the subsequent
19 inspection remained in compliance. Therefore, Dreamgirls and Eric Forbes
20 have corrected the substandard lighting violation.
21

22 27. Section 5.02.120(E) PCC provides that Pierce County has the burden to
23 show..."by a preponderance of evidence,...that the standards for suspending
24 or revoking a license have been met". Division Two of our Washington Court
25 of Appeals in Brunson v Pierce County, 149 Wn. App. 855 (2009), held that

1 PCC 5.02.120(E) does not violate due process because it allows the hearing
2 examiner to base his or her decision on the lower evidentiary standard of
3 preponderance of the evidence. The Brunson court considered the
4 suspension of erotic dancer licenses and upheld the preponderance of
5 evidence standard, which our Washington Supreme Court in Nguyen v
6 Department of Health, 144 Wn. 2d 516 (2001), referred to as "the lowest
7 standard of proof available".
8

9 28. Applying the preponderance of evidence standard to the present case, the
10 uncontradicted testimony of the Pierce County Auditor's Office representatives
11 and the undercover officers of the Pierce County Sheriff's Office conclusively
12 establish that all violations of PCC 5.14.190, 5.14.180, and 5.14.230 set forth
13 on the Notice and Order to Correct occurred within Dreamgirls at Fox's on
14 numerous occasions (with the exception of an unlicensed manager and
15 lighting as set forth above).

16 29. Appellants Eric Forbes and Dreamgirls of Tacoma, LLC, assert that Mr. Forbes
17 was not present within Dreamgirls at the time that any of the violations
18 occurred, and that the Chapter 5.14 PCC does not hold him or Dreamgirls
19 responsible for the activities of the dancers or the managers. Appellants
20 assert that PCC 5.14180(D)(E) holds the managers responsible for assuring
21 compliance with the PCC. However, PCC 5.14.230(A) specifically authorizes
22 revocation and suspension of an erotic dance studio license if "the licensee or
23 applicant" has "violated or permitted violation" of any provisions of Chapter
24 5.14. As found above, Section 5.02.020 PCC requires liberal construction of
25

1 all provisions of Chapter 5.14 PCC. In the present case, the "applicant" for the
2 Dreamgirls of Tacoma, LLC, Adult Entertainer Establishment License is shown
3 as Eric Forbes personally. He signed personally above the line entitled
4 "Applicant's Signature". Under the "Business Information" section of the
5 application he noted the name of the business as "Dreamgirls of Tacoma
6 LLC". The Pierce County Auditor's Office issued the Adult Entertainer
7 Establishment License to Eric Forbes doing business as Dreamgirls of
8 Tacoma, LLC. Thus, Eric Forbes and Dreamgirls are the applicant and
9 licensee. Both Mr. Forbes personally and the business are responsible for the
10 activities of the managers and other employees/contractors working at the
11 business. The Auditor's Office did not issue the Notice and Order to Correct
12 for one isolated violation, but for a pattern of continuing violations that
13 extended over a five month period.
14

15 30. The investigations conducted by the Auditor's Office and the Sheriff's Office on
16 April 9, May 22, June 18, July 8, and August 7, 2014, show a pattern of
17 licensed dancer violations to include consistent solicitation for and
18 performance of lap dances off the stage, acceptance of money direct from a
19 customer, and exposing private parts. The evidence also shows lack of any
20 enforcement whatsoever by the managers of PCC 5.14.190. Furthermore,
21 the Dreamgirls business posted the cost for private dances of \$20 per song
22 and also authorized the disc jockey to advise of dancers available for one on
23 one lap dances. Such actions either encourage violations of the PCC to occur
24 or exhibit complete ignorance of Chapter 5.14 PCC. The Pierce County
25

1 Auditor properly issued a Notice and Order to Correct for violations of the PCC
2 occurring at Dreamgirls at Fox's.

3 **CONCLUSIONS OF LAW**

- 4
- 5 1. The Hearing Examiner has jurisdiction to consider and decide the issues
6 presented.
 - 7 2. The Pierce County Auditor properly issued Pierce County Adult Entertainer
8 Establishment License to Eric Forbes, doing business as Dreamgirls of
9 Tacoma, LLC, (Dreamgirls at Fox's) that became effective on December 31,
10 2013, and expired December 31, 2014. The license was in effect between
11 April-August, 2014, when all violations set forth in the Findings above
12 occurred. Pierce County has shown by a preponderance of evidence that Eric
13 Forbes and his business, Dreamgirls of Tacoma, LLC, violated PCC 5.14.230
14 by permitting numerous, continuing violations of Chapter 5.14 to occur within
15 the business. Mr. Forbes as the "applicant" for the license is responsible for
16 activities occurring in Dreamgirls.
 - 17 3. The Pierce County Auditor properly notified Mr. Forbes of the violation in the
18 Notice and Order to Correct and the accompanying cover letter. Therefore,
19 the issuance of the Notice and Order to Correct to Eric R. Forbes was
20 appropriate.
 - 21 4. Appellant alleges that PCC 5.14 is unconstitutional. The Pierce County
22 Hearing Examiner has no authority to determine that any section of the Pierce
23 County Code is illegal or violates the United States Constitution or the State of
24 Washington Constitution. See Yakima Clean Air v Glascom Builders, 85 Wn
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2d 255 (1975); Bare v Gorton, 84 Wn 2d 380 (1974); and Prisk v Poulsbo, 46 Wn 793 (1987). The Examiner's authority in this matter is limited to determining whether a violation of the PCC occurred. See Frances L. Chaussee v Snohomish County Council, et. al., 38 Wn. App. 630 (1984).

DECISION

The appeal of Eric Forbes and Dreamgirls at Fox's, LLC is hereby denied.

DATED this 24th day of February, 2015.



STEPHEN K. CAUSSEAU, JR.
Pierce County Hearing Examiner

APPENDIX D

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BEFORE THE PIERCE COUNTY HEARING EXAMINER

IN RE THE APPEAL OF THE ADULT
ENTERTAINER LICENSE SUSPENSION
OF HEATHER BLAKEWAY

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came before Deputy Pierce County Hearing Examiner Michael McCarthy on the 21st day of July 2016, upon an appeal of an Adult Entertainer License Suspension by Heather Blakeway. The Record was left open until August 5, 2016, at the request of the parties. Deputy Prosecuting Attorney, Cort O'Connor represented the Pierce County Auditor and Gilbert H. Levy, attorney at law, represented Heather Blakeway.

FINDINGS OF FACT

1 Heather Blakeway applied for an Adult Entertainment Dancer License pursuant to Chapter 5.14 of the Pierce County Code (PCC). The Pierce County Auditor's Office issued Adult Entertainment Dancer License Number 27521 to Heather Blakeway on December 18, 2015. The license has an expiration date of December 18, 2016. Pursuant to said license, Heather Blakeway worked as an adult entertainer for Dreamgirls at Foxes, 10707 Pacific Avenue S, Tacoma, Washington, in unincorporated Pierce County.

2 Based upon a site visit conducted by the Pierce County Auditor's Office on

1 March 16, 2016, Casey Kaul, Recording/Licensing Supervisor, mailed a Notice
2 and Order of Suspension dated March 24, 2016 to Heather Blakeway by both
3 certified and first class mail to the address shown on his license application
4 Said Notice and Order of Suspension advised Heather Blakeway that on
5 March 16, 2016, she was observed violating PCC 5 14 190H for dancing off
6 the platform and allowing a patron to sit closer than 10 feet while she
7 performed Both of these unlawful acts took place while the Auditor was
8 present
9

10 3 By letter dated March 31, 2016, Gilbert H Levy, attorney at law, entered a
11 Notice of Appearance for Ms Blakeway and appealed the code violation

12 4 Relevant facts in this matter are set forth hereinafter On March 16, 2016
13 Stacy MacFarlane and Whitney Rhodes entered Dreamgirls at Foxes They
14 arrived at 2 21 and left at 2 37 Ashley Richardson was the manager on duty
15 Ms Macfarlane and Ms Richardson went into Ms Richardson's office and Ms
16 Rhodes remained on the floor of the facility Ms Rhodes witnessed Ms
17 Blakeway "performing a lap dance on a man in the booth directly adjacent to
18 the hostess station " A server approached and said something to her, at which
19 point the dance ended and Ms Blakeway went on to a stage and began
20 dancing While she danced, Ms Macfarlane witnessed a male patron sitting
21 too close to the stage (he did not need to stretch in order to place money on it)
22 in violation of PCC 5 14 190, which requires a buffer of ten feet
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24 5 As stated in the brief of provided by Pierce County, Mens Rea is a criminal
25 concept that has no application to a civil code violation The cases cited by

1 the appellants are entirely criminal, likely because the definition of Mens Rea
2 is the state of mind the State must prove that a defendant had when
3 committing a crime State V Edwards, 171 Wn App 379, 388, 294 P 3d 708
4 (2012) The burden of proof is on the county to show, by a preponderance of
5 the evidence, that the standards for suspending a license have been met
6 There is no requisite mental state in a civil infraction hearing
7

8 6 Upon signing her application for an Adult Entertainment Dancer, Ms Blakeway
9 certified as follows

10 I have read and understand the Pierce county Code 5 14 pertaining to the
11 license for which I am applying

12 Ms Blakeway was cited with violating PCC 5 14 190 for violating operation
13 restrictions

14 7 Section 5 02 120 (E) PCC provides that Pierce County has the burden to show
15 "by a preponderance of the evidence that the standards for suspending or
16 revoking a license have been met" Brunson v Pierce County, 149 WN App
17 855 (2009), held that PCC 5 02 120 E does not violate due process because it
18 allows the hearing examiner to base his or her decisions on the lower
19 evidentiary standard or preponderance of the evidence The Court in Brunson
20 considered the suspension of erotic dancer licenses and upheld the
21 preponderance of evidence standard, which was later referred to in Nguyen v
22 Department of health, 144 Wn 2d 516 (2001), as the "lowest standard of proof
23 available "

24 8 Applying the preponderance of the evidence standard to the present case, the
25

1 Testimony of the Pierce County Auditor's office representatives conclusively
2 established that Ms Blakeway violated section 5 14 190 of PCC

3 CONCLUSIONS OF LAW

4
5 1 The Hearing Examiner has jurisdiction to consider and decide the issues
6 presented

7 2 The Pierce County Auditor properly issued a Pierce County Adult
8 Entertainment Dancer License to Ms Blakeway The License was active
9 between December 18, 2015 and December 18, 2016 The license was in
10 effect on the date the Auditor conducted and inspection of Dreamgirls at Foxes
11 and witnessed multiple violations in the roughly sixteen minutes they were
12 there Pierce County has shown by a preponderance of the evidence that Ms
13 Blakeway violated PCC 5 14 190

14 3 The Pierce County Auditor properly notified Ms Blakeway of the violation on
15 the Notice and order of Suspension Therefore, the issuance of the Order of
16 Suspension was appropriately executed

17
18 4 Appellant alleges that PCC 5 14 is unconstitutional The Pierce County
19 Hearing Examiner has no authority to determine that any section of the PCC is
20 illegal or violates the United States Constitution or the Constitution of the State
21 of Washington Yakima Clean Air v Glascam Builders, 85 Wash 2d 255 1975),
22 Bare v Gorton, 84 Wash 2d 380 (1974) and Prisk v Paulsbo, 46 Wash 793
23 (1987) The Examiner's Authority in this matter is limited to determine whether
24 a violation of the PCC occurred See Frances L Chaussee v Snohomish
25 County Counsel, et al, 38 Wn App 630 (1984)

1 5 PCC 5 02 120 (G) provides

2 The Examiner may affirm, modify, or overrule the decision of the Auditor, and
3 may reinstate the license and may impose any terms upon the continuance of
4 the license which may seem advisable

5
6 Appellant challenges the length of her suspension, asserting that the auditor
7 did not exercise discretion in imposing the license suspensions, but simply
8 suspended each license for the same length of time regardless of individual
9 circumstances In Brunson v Pierce County, supra, our Court of Appeals held
10 as follows

11 In this case, we agree with the auditor and the dancers that the action
12 here [license suspension] called for the exercise of discretion in setting
13 the length of the suspension

14 Failure to exercise discretion is an abuse of discretion

15 Brunson, Johnson, and Turner contend that Munns erred by using a
16 fixed formula without consideration of their individual circumstances
17 They are correct As discussed above, Munns considered every
18 violation of Chapter 5 14 PCC to be serious and worthy of the maximum
19 suspension [one year] 149 Wn App 855 @ 860, 861

20
21 8 The Auditor has no written standards by which to determine appropriate
22 periods of suspension, revocation, or warnings This was a first offense
23 violation for Ms Blakeway However, the fact that she committed two
24 violations in while she was likely aware that representatives of the Auditor's
25 Office were present and making a compliance inspection demonstrates that

1 she either had no knowledge of code regulations or knowingly violated the
2 code in the inspectors' presence Either reason is an aggravating factor
3 Based upon the above, the Examiner will modify the period of suspension to
4 ten days
5

6 **DECISION**

7 The appeal of Ms Blakeway is hereby denied, but the Pierce County Auditor's
8 imposition of a 30 day license suspension is hereby modified to ten days
9

10 DATED this 22nd day of August, 2016



11 _____
12 **Michael McCarthy**
13 Deputy Pierce County Hearing Examiner
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APPENDIX E

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BEFORE THE PIERCE COUNTY HEARING EXAMINER

IN RE THE APPEAL OF THE ADULT
ENTERTAINER MANAGER LICENSE
SUSPENSION OF ASHLEY
RICHARDSON

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came before Deputy Pierce County Hearing Examiner Michael McCarthy on the 21st day of July 2016, upon an appeal of an Adult Entertainer Manager License Suspension by Ashley Richardson. The Record was left open until August 5, 2016, at the request of the parties. Deputy Prosecuting Attorney, Cort O'Connor represented the Pierce County Auditor and Gilbert H. Levy, attorney at law, represented Ashley Richardson.

FINDINGS OF FACT

1 Ashley Richardson applied for an Adult Entertainer Manager License pursuant to Chapter 5.14 of the Pierce County Code (PCC). The Pierce County Auditor's Office issued Adult Entertainer Manager License Number 27372 to Ashley Richardson on August 28, 2015. The license has an expiration date of August 28, 2016. Pursuant to said license, Ashley Richardson worked as a Manager for Dreamgirls at Foxes, 10707 Pacific Avenue S, Tacoma, Washington, in unincorporated Pierce County.

1
2 Based upon a site visit conducted by the Pierce County Auditor's Office on
3 March 16, 2016, Casey Kaul, Recording/Licensing Supervisor, mailed a Notice
4 and Order of Suspension dated March 24, 2016 to Ashley Richardson by both
5 certified and first class mail to the address shown on her license application
6 Said Notice and Order of Suspension advised Ashley Richardson that on
7 March 16, 2016 she was observed violating PCC 5 14 180 While she was on
8 duty, a dancer was performing off the platform in violation of PCC 5 14 190(H),
9 a patron was sitting closer than 10 feet to a dancer actively performing on the
10 platform in violation of the same, and Ms Richardson did not ensure
11 compliance with operation restrictions set forth in PCC 5 14 090

12 3 By letter dated March 31, 2016, Gilbert H Levy, attorney at law, entered a
13 Notice of Appearance for Ms Richardson and appealed the code violation

14 4 Relevant facts in this matter are set forth hereinafter On March 16, 2016
15 Stacy MacFarlane and Whitney Rhodes entered Dreamgirls at Foxes They
16 arrived at 2 21 and left at 2 37 Ms Richardson was the manager on duty
17 Ms Macfarlane and Ms Richardson went into Ms Richardson's office and Ms
18 Rhodes remained on the floor of the facility Ms Macfarlane witnessed a male
19 patron sitting too close to the stage (he did not need to stretch in order to place
20 money on it) in violation of PCC 5 14 190, which requires a buffer of ten feet
21 Ms Richardson witnessed the behavior, but did nothing to correct it even after
22 it was pointed out by staff
23

24 5 As stated in the brief of provided by Pierce County, Mens Rea is a criminal
25 concept that has no application to a civil code violation The cases cited by

1 the appellants are entirely criminal, likely because the definition of Mens Rea
2 is the state of mind that the State must prove that a defendant had when
3 committing a crime. State V Edwards, 171 Wn App 379, 388, 294 P 3d 708
4 (2012) The burden of proof is on the county to show, by a preponderance of
5 the evidence that the standards for suspending a license have been met.
6 There is no requisite mental state in a civil infraction hearing.

7
8 6 Ms Rhodes witnessed a dancer dancing off of the platform in violation of PCC
9 5 14 190 H. The dancer was performing a lap dance for a patron when a
10 server said something in her ear, at which time the dance ended.

11 7 Upon signing her application for an Adult Entertainment Dancer/ Manager, Ms
12 Richardson certified as follows:

13 I have read and understand the Pierce county Code 5 14 pertaining to the
14 license for which I am applying.

15 Ms Richardson was cited with violating PCC 5 14 180 for violating Manager
16 Responsibilities, which states in pertinent part:

17 D) The manager shall be responsible for ensuring that the studio is in
18 compliance with the operational restrictions set forth in PCC 5 14 190.

19 E) The manager shall be responsible for ensuring that all dancers comply with
20 the operational restrictions set forth in PCC 5 14 190.

21 At the hearing it was argued that Ms Richardson cannot be responsible for
22 everything that happens in the club. She operates out of her offices often and
23 has to use the restroom. She testified that she delegates her responsibility to
24 waitresses and other employees to inform her of violations while she is in her
25 office. Waitresses are not required to obtain any type of license and such a

1 delegation does nothing to relieve Ms Richardson of her duty to assure
2 compliance, which she was witnessed failing to do in the brief time that the
3 Auditor was present Even when Ms MacFarlane pointed out the violation of a
4 patron being too close to the stage, Ms Richardson failed to act As such, she
5 did not comply with PCC which she certified she that she had read and
6 understood in her application for Adult Entertainment Manager
7

8 During the time the Auditor was present, an announcement was made
9 advertising "credit card payment for dances" and that "dancers were available
10 for intimate one on one time in the VIP " When questioned regarding the
11 announcement, Ms Richardson's responses were evasive and she was not a
12 credible witness

13 9 Section 5 02 120(E) PCC provides that Pierce County has the burden to show
14 "by a preponderance of the evidence that the standards for suspending or
15 revoking a license have been met " Brunson v Pierce County, 149 WN App
16 855 (2009), held that PCC 5 02 120(E) does not violate due process because
17 it allows the hearing examiner to base his or her decisions on the lower
18 evidentiary standard or preponderance of the evidence The Court in Brunson
19 considered the suspension of erotic dancer licenses and upheld the
20 preponderance of evidence standard, which was later referred to in Nguyen v
21 Department of health, 144 Wn 2d 516 (2001), as the "lowest standard of proof
22 available "

23
24 10 Applying the preponderance of the evidence standard to the present case,
25 the testimony of the Pierce county Auditor's office representatives conclusively

1 established that Ms Richardson violated section 5 14 180 of PCC

2 **CONCLUSIONS OF LAW**

3 1 The Hearing Examiner has jurisdiction to consider and decide the issues
4 presented

5 2 The Pierce County Auditor properly issued a Pierce County Adult
6 Entertainment Manager License to Ashley Richardson The License was
7 active between August 28, 2015 and August 28, 2016 The license was in
8 effect on the date the Auditor conducted and inspection of Dreamgirls at Foxes
9 and witnessed multiple violations in roughly sixteen minutes Pierce County
10 has shown by a preponderance of the evidence that Ashley Richardson
11 violated PCC 5 14 180 As the acting manager, Ms Richardson was
12 responsible for the violations committed by the dancers and patrons during the
13 Auditor's office site visit

14 3 The Pierce County Auditor properly notified Ms Richardson of the violation on
15 the Notice and order of Suspension. Therefore, the issuance of the Order of
16 Suspension was appropriately executed

17 4 Appellant alleges that PCC 5 14 is unconstitutional The Pierce County
18 Hearing Examiner has no authority to determine that any section of the PCC is
19 illegal or violates the United States Constitution or the Constitution of the State
20 of Washington Yakima Clean Air v Glascam Builders, 85 Wash 2d 255 1975),
21 Bare v Gorton, 84 Wash 2d 380 (1974) and Prisk v Paulsbo, 46 Wash 793
22 (1987) The Examiner's Authority in this matter is limited to determine whether
23 a violation of the PCC occurred See Frances L. Chaussee v Snohomish
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1 County Counsel, et al, 38 Wn App 630 (1984)

2 5 PCC 5 02 120 (G) provides

3 The Examiner may affirm, modify, or overrule the decision of the Auditor, and
4 may reinstate the license and may impose any terms upon the continuance of
5 the license which may seem advisable

6 6 Appellant challenges the length of her suspension, asserting that the auditor
7 did not exercise discretion in imposing the license suspensions, but simply
8 suspended each license for the same length of time regardless of individual
9 circumstances. In Brunson v Pierce County, supra, our Court of Appeals held
10 as follows

11 In this case, we agree with the auditor and the dancers that the action
12 here [license suspension] called for the exercise of discretion in setting
13 the length of the suspension

14 Failure to exercise discretion is an abuse of discretion

15 Brunson, Johnson, and Turner contend that Munns erred by using a
16 fixed formula without consideration of their individual circumstances
17 They are correct. As discussed above, Munns considered every
18 violation of Chapter 5 14 PCC to be serious and worthy of the maximum
19 suspension [one year] 149 Wn App 855 @ 860, 861

20 8 The Auditor has no written standards by which to determine appropriate
21 periods of suspension, revocation, or warnings. This was a first offense
22 violation for Ms Richardson. However, the fact that Ms Richardson allowed a
23 dance to take place off stage and failed to correct a patron who sat within ten
24 feet of the stage

1 feet of a dancer and the stage when knew that representatives of the Auditor's
2 Office were present and making a compliance inspection demonstrates that
3 she either had no knowledge of code regulations or knowingly violated the
4 code in the inspectors' presence Either reason is an aggravating factor
5 Based upon the above, the Examiner will modify the period of suspension to
6 fifteen days
7

8 **DECISION**

9 The appeal of Ashley Richardson is hereby denied, but the Pierce County Auditor's
10 imposition of a 30 day license suspension is hereby modified to fifteen days

11 DATED this 22nd day of August, 2016

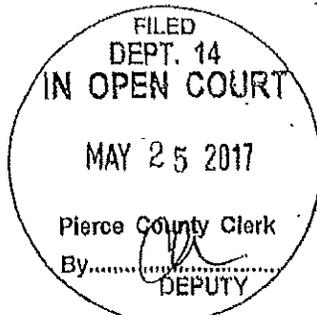
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14 **Michael McCarthy**
15 Deputy Pierce County Hearing Examiner
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APPENDIX F

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ERIC FORBES, ALEX HELGESON,
SABINA ZEMBAS, and DREAMGIRLS OF
TACOMA LLC, a Washington Limited
Liability Corporation,

Plaintiffs,

ASHLEY RICHARDSON,

Plaintiff,

HEATHER BLAKEWAY,

Plaintiff,

vs.

PIERCE COUNTY, a Washington Municipal
Corporation, JULIE ANDERSON, Pierce
County Auditor, and STEPHEN K.
CAUSSEAU, Pierce County Hearing
Examiner,

Defendants.

NO. 15-2-06771-6

~~ENCLOSURE~~
ORDER GRANTING PIERCE COUNTY
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

CLERK'S ACTION REQUIRED

The cross-motions of the parties for summary judgment dismissal pursuant to Civil
Rule 56 came on regularly before the Court on Tuesday, May 9, 2017.

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This consolidated case involves petitions for writ of review to three separate decisions of the Hearing Examiner made as to three separate persons, Eric Forbes, Ashley Richardson, and Heather Blakeway.

All three Plaintiffs also asserted causes of action under the Washington Constitution challenging the constitutionality of the Pierce County Code provisions regulating adult entertainment.

Three Plaintiffs, Alex Helgeson, Sabrina Zembas, and Dreamgirls of Tacoma, LLC, are Plaintiffs to the constitutional cause of action only. In the context of the claims asserted in this action, no citations were issued against them asserting violations of the Pierce County Code provisions regulating adult entertainment.

In ruling upon the cross-motions for summary judgment, the Court has considered the following:

1. Plaintiffs' Motion for Summary Judgment;
2. Declaration of Gilbert H. Levy in Support of Plaintiffs' Motion for Summary Judgment;
3. Defendants' Motion for Summary Judgment including Appendix A, Declaration of Susan Long with attached excerpts from the Legislative Record;
4. Plaintiffs' Response to Defendants' Motion for Summary Judgment; and
5. Defendants' Response to Plaintiffs' Motion for Summary Judgment.

The Court has considered all materials submitted in support of and in opposition to the cross-motions for summary judgment, and finds that there are no genuine issues of material fact and that Defendants Pierce County, Julie Anderson, and Stephen K. Causseaux are

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entitled to summary judgment dismissal as a matter of law regarding Plaintiffs' claims for the following reasons:

A. Analysis of Constitutional Challenge to the Pierce County Adult Entertainment Code Provisions

1. Plaintiffs have challenged the constitutionality of Pierce County Code Provisions regulating adult entertainment, claiming the challenged provisions violate portions of the Washington Constitution.

2. Under the facts and procedural posture of this case, as it has been presented by the parties, the constitutional issues are foundational to this Court's review of the challenges to the determinations by the Hearing Examiner. For that reason, this Court should first rule on the issues related to the constitutionality of the relevant Pierce County Code provisions that regulate adult entertainment.

3. Plaintiffs raised challenges regarding the constitutionality of the code provisions in each proceeding before the Hearing Examiner.

4. The Hearing Examiner properly refused to rule on those challenges as such a determination is beyond the scope of the Hearing Examiner's authority.

5. Presumably Plaintiffs could raise those issues for the first time before this Court, however the Court need not reach that issue because even if they were required to preserve those issues by raising them below, they have done so.

6. Erotic Dance Studios that operate in unincorporated areas of Pierce County are regulated under Chapter 5.14 of the Pierce County Code (PCC).

7. The challenges of the Plaintiffs to the code are focused on three provisions, PCC 5.14.180, .230, and .250.

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8. The Plaintiffs argue that Article I, § 5 of the Washington Constitution generally provides greater free speech protections for adult entertainment than does the First Amendment of the United States Constitution. Plaintiffs more specifically argue that Article I, § 5 of the Washington Constitution provides greater protection against prior restraints on free speech than does the First Amendment of the United States Constitution.

9. Washington courts will not consider claims that the Washington Constitution provides greater protections than comparable provisions of the United States Constitution absent an analysis of the Washington State Constitutional provision undertaken pursuant to *State v. Gumwall*, 106 Wash.2d 54 (1986). The parties have both conducted an analysis of Article I, § 5 that satisfies the requirements of *Gumwall*. This Court has therefore considered whether Article I, § 5 of the Washington Constitution provides greater protections than the First Amendment of the United States Constitution.

10. This Court recognizes that in this context, the *Gumwall* analysis by the Washington State Supreme Court in *Ino Ino v. City of Bellevue*, 132 Wn.2d 103, 116-122 (1997), is binding to the extent that it is relevant to the issues raised in this case.

11. Of the analysis of the six *Gumwall* factors by the court in *Ino Ino, Inc.*, the only factor that might possibly receive a different analysis under the facts of this case is the sixth factor of whether this case raises a matter of particular state or local concern. It is unclear how the facts of this case would involve a matter of particular state or local concern that is somehow greater than it was in *Ino Ino, Inc.*, where that case also dealt with free speech protections in the context of adult entertainment. For that reason, the Court concludes that on the whole, the factors weigh in favor of finding no greater protection under article 1, § 5 of the Washington Constitution.

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12. This Court concludes that Art. I, § 5 of the Washington Constitution in general provides no greater protection of adult entertainment than does the First Amendment of the United States Constitution.

13. This Court also concludes that Art. I, § 5 of the Washington Constitution provides no greater protection against non-injunctive prior restraints than does the First Amendment of the United States Constitution.

14. The Plaintiffs argue in favor of a legal doctrine they refer to as "post-publication prior restraint." Under this doctrine they argue that suspensions of studio, dancer, or manager licenses imposed for past violations of the Pierce County Code constitute a prior restraint on freedom of speech.

15. The Court concludes that the doctrine of "post-publication prior restraint" does not exist under Article I, § 5 of the Washington Constitution, nor under the First Amendment of the United States Constitution.

16. The Court further concludes that the license suspension provisions in Pierce County Code 5.14.230 do not effect a prior restraint on freedom of speech. The Court concludes that this is so because suspensions are only imposed for past violations of the requirements of Chapter 5.14 PCC, and because PCC 5.02.090 and .120 provide that any license suspension imposed may be challenged through an appeals process, and the suspension shall not take effect until the appeals process is completed.

17. The 2012 amendments to the Pierce County Code provisions regulating adult entertainment constitute content and viewpoint-neutral time, place, and manner restrictions. The legislative record to the 2012 amendments establishes that they were adopted to protect public health, safety, and welfare because the prior code provisions were insufficient to allow

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for effective enforcement of the code requirements and that widespread violations of the code regularly occurred.

18. The Court concludes that in light of *Regan v. Time, Inc.*, 468 U.S. 641 (1984); *United States v. Albertini*, 272 U.S. 675 (1985); and *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989), time, place, and manner restrictions are not subject to the "least restrictive alternative" test.

19. The licensing regulations imposed by Chapter 5.14 of the Pierce County Code, do not unduly burden freedom of speech. This includes the requirements of PCC 5.14.180 and .230, which impose responsibilities on managers to ensure that the studio and dancers comply with the requirements of Chapter 5.14 PCC.

20. Plaintiffs argue that PCC 5.14.230 imposes "strict liability" on dancers and managers in violation of their free speech rights. "Strict liability" and "mens rea" are concepts that apply in criminal law and torts, both of which involve wrongful or morally culpable conduct. The concepts of "strict liability" and "mens rea" are inapplicable in the regulatory context of licensing requirements.

21. The Defendants in their response to Plaintiffs' Motion for Summary judgment cite the following cases: *Genusa v. City of Peoria*, 619 F.2d 1203, 1219 (7th Cir. 1980); *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272 (Colo. 1995); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486, 494 (E.D. Tenn. 1986); *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1, (1989); *Allen-Burch, Inc. v. Texas Alcoholic Beverage Com'n*, 104 S.W.3d 345 (Tex. App. Dallas 2003); *DLH, Inc. v. Nebraska Liquor Control Com'n*, 266 Neb. 361 (2003); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir.1999). These cases

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establish that a licensee, including a manager, may be held responsible for violations committed by the licensee's agents, servants, and employees, etc.

22. PCC 5.14.230 does not impose "strict liability" on dancers or managers, either on its own, or in conjunction with any other provision of Chapter 5.14 PCC.

23. The Court concludes that PCC 5.14.250 pertains to criminal penalties only.

24. The Court concludes that PCC 5.14.250, by its express terms, imposes strict criminal liability for violations of Chapter 5.14 for any violation of the requirements set forth in PCC 5.14.180 and/or 5.14.190.

25. The Court concludes that the imposition of strict criminal liability by PCC 5.14.250 does not violate free speech.

26. PCC 5.14.260 is a severability clause. Further, the Court has a responsibility to construe PCC 5.14.250 so as to avoid any constitutional infirmity if possible. To the extent PCC 5.14.250 violates free speech rights, the constitutional deficiency can be limited to the use of the word "strictly" in that provision so that word can be severed, and the remainder of that provision remain intact.

27. Plaintiffs claim Chapter 5.14 PCC violates Due Process under the Washington Constitution. Plaintiffs did not undertake a *Gunwall* analysis of Article I, § 3 of the Washington Constitution, so the Court applies the same due process analysis used under federal law.

28. The Court concludes that Chapter 5.14 PCC, when considered in conjunction with Chapter 5.02 PCC and especially PCC 5.02.090 and .120, does not violate due process. The Chapter affords licensees reasonable notice of the requirements and responsibilities imposed on each class of licensee. In the event of a citation for a violation, licensees are

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afforded notice, a reasonable time period in which to respond and challenge the citation, and the opportunity to be heard on such. The provisions also allow for an appeals process. Finally, any penalty, including any license suspension, is stayed during the pendency of the appeals process.

29. Managers, including Plaintiff Ashely Richardson, do not engage in constitutionally-protected erotic dance.

30. PCC 5.14.180(D) and (E) impose constitutionally-permissible licensing obligations upon managers which are rationally related to a legitimate State interest.

31. Defendant Pierce County is not bound by the concept of judicial estoppel because the County's position before the Hearing Examiner is consistent with its position before the Superior Court. The County argued to the Hearing Examiner that the concept of mens rea is inapplicable to civil license suspension hearings, and its position is the same in Superior Court.

32. None of the challenged sections of Chapter 5.14 PCC, nor Chapter 5.14 PCC as a whole, violate the free speech or due process clauses of Washington State Constitution.

B. As to the Petitions for Writ of Review, the Court Makes the Following Determinations

33. The Court concludes that substantial evidence supports each of the decisions of the Hearing Examiner.

34. As to Plaintiff Eric Forbes, the Hearing Examiner's decision upholding the Motion and Order to Correct is **AFFIRMED**.

35. Defendants did not challenge the Hearing Examiner's reduction of the suspension of the license of Ashley Richards from thirty days to ten days.

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36. As to Plaintiff Ashley Richardson, the Hearing Examiner's decision to uphold the Notice and Order of Suspension but to reduce the period of suspension to ten days, is hereby AFFIRMED.

37. Defendants did not challenge the Hearing Examiner's reduction of the suspension of the license of Heather Blakeway from thirty days to ten days.

38. As to Plaintiff Heather Blakeway, the Hearing Examiner's decision to uphold the Notice and Order of Suspension but to reduce the period of suspension to ten days, is hereby AFFIRMED.

Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that Defendants Pierce County, Julie Anderson, and Stephen K. Causseaux's motion for summary judgment is hereby GRANTED, that Plaintiffs' motion for summary judgment is DENIED, and that all claims of Plaintiffs are hereby DISMISSED with prejudice.

~~DONE IN OPEN COURT~~ this 25 day of May, 2017.

DATED

Susan K. Serko
SUSAN K. SERKO
JUDGE, Department 14

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IN OPEN COURT
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Pierce County Clerk
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APPENDIX G

6.09.180 Grounds for suspension and revocation of licenses.

A. The director may suspend or revoke a license issued under this chapter in accordance with the following:

1. If a licensee obtained or renewed the license through a false, misleading or fraudulent omission or representation of material fact either on the application for the license or renewal or by failing to modify or supplement the application as required by K.C.C. 6.090140D, the license shall be revoked;

2.a. If a licensee violated other provisions of this chapter, the license shall be:

(1) suspended for thirty days on the first violation within twenty-four months of a prior violation,

(2) suspended for ninety days on the second violation within a twenty four month period, and

(3) revoked for a third violation within a twenty-four month period.

b. Time spent serving a suspension is not counted in determining the twenty-four month period referred to in subsection A.2a of this section.

c. For a business licensee, a violation for which the business license may be suspended or revoked includes a violation of this chapter by an employee, agent or entertainer occurring on the business premises when the business licensee knew or should have known of the violation; and

3.a. If a licensee is convicted of committing on the premises of an adult entertainment business a crime or offense involving one of the following, the license shall be revoked.

(1) a violation of chapter 9A.88 RCW, Indecent Exposure -- Prostitution,

(2) a liquor law violation or a transaction involving a controlled substance as defined in chapter 69.50 RCW, or

(3) a violation of chapter 9A.44 RCW, Sex Offenses, chapter 9.68 RCW, Obscenity and Pornography or chapter 9.68A RCW, Sexual Exploitation of Children.

b. For a business licensee, a conviction for which the business license may be revoked includes the conviction of an employee, agent or entertainer for a crime or offense listed in subsection A.3a of this section occurring on the business premises when the business licensee knew or should have known of the crime or offense.

c. For purposes of this subsection A.3, "convicted" or "conviction" includes a bail forfeiture accepted by the court as the final disposition of the criminal charge.

B. A licensee whose license has been revoked is not eligible to reapply for the license for one year following the date the decision to revoke is final.

C. The director shall effect a suspension, revocation or disqualification by issuing a notice and order in accordance with K.C.C. 6.01.130.

D. On receipt of a notice and order of suspension or revocation, the license holder shall promptly deliver the license to the director unless an appeal is pending under this chapter. For a license suspension, the director shall return the license to the license holder for the license's remaining term on expiration of the suspension. (Ord. 13548 § 19, 1999).

Home < > s obscene shall be judged by consideration of the following factors:

(a) Whether the average person, applying contemporary community standards, would find that the activity taken as a whole appeals to a prurient interest in sex; and

(b) Whether the activity depicts or describes in a patently offensive way, as measured against contemporary community standards, sexual conduct as described in RCW 7.48A.010(2)(b); and

(c) Whether the activity taken as a whole lacks serious literary, artistic, political or scientific value.

(3) This chapter does not apply to taverns and premises maintaining liquor licenses and which are subject to the rules and regulations of the Washington State Liquor Control Board.

(Ord. 96-046, § 19, June 24, 1997, Eff date Sept. 26, 1997; Amended Ord. 97-077, § 7, Aug. 27, 1997, Eff date Sept. 26, 1997).

6.25.130 Enforcement.

SHARE

The licensing authority and/or sheriff are authorized and directed to enforce the terms and provisions of this chapter.

(Added Ord. 86-099, § 59, Nov. 12, 1986; Amended Ord. 87-101, § 9, Nov. 23, 1987; Amended Ord. 96-046, § 20, June 24, 1997, Eff date Sept. 26, 1997).

6.25.135 Suspension and revocation.

SHARE

(1) The licensing authority may, at any time upon the recommendation of the sheriff or as provided below suspend or revoke any license issued under this chapter:

(a) Where such license was procured by fraud or false representation of fact; or

(b) For the violation of, or failure to comply with the provisions of this chapter or any other similar local or state law by the licensee or by any of its servants, agents or employees when the licensee knew or should have known of the violations committed by its servants, agents, or employees; or

(c) For the conviction of the licensee of any crime or offense involving prostitution, promoting prostitution, or transactions involving controlled substances as defined in RCW Article 69.50 committed on the premises, or the conviction of any of the licensee's servants, agents or employees of any crime or offense involving prostitution, promoting prostitution, or transactions involving controlled substances as defined in RCW Article 69.50 committed in the licensed premises when the licensee knew or should have known of the violations committed by its servants, agents or employees.

(2) 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 licensing authority shall suspend a license issued under this chapter for 30 days for the first violation, 90 days for the second violation and 120 days for the third and subsequent violations within a 24 month period, not including periods of suspension.

7.80.130 - License suspension and revocation—Hearing.

- (a) The licensing administrator may, upon the recommendation of the sheriff, the sheriff's designee, or on its own determination, and as provided in subsection (b) of this section, suspend or revoke any license issued under the provisions of this chapter:
- (1) If the license was procured by fraud or false representation of fact;
 - (2) For the violation of, or failure to comply with the provisions of this chapter by the licensee or by the licensee's servant, agent or employee when the licensee knew or should have known of the violations committed by the servant, agent or employee;
 - (3) For the conviction of the licensee of a crime or offense involving prostitution, promoting prostitution, a liquor law violation or transaction involving controlled substances as defined in RCW Chapter 69.50, or a violation of RCW Chapter 9.68 or 9.68A committed on the premises, or the conviction of the licensee's servant, agent or employee of a crime or offense involving prostitution, promoting prostitution, liquor law violations or transactions involving controlled substances as defined in RCW Chapter 69.50, or a violation of RCW Chapter 6.68A committed on the premises in which his or her adult entertainment establishment is conducted when the licensee knew or should have known of the violations committed by the servant, agent or employee. A license may be suspended or revoked under this subsection only if the conviction occurred within twenty-four months of the date of the decision to suspend or revoke the license.
- (b) The licensing administrator shall revoke a license procured by fraud or misrepresentation. If another violation of this chapter or other applicable ordinance, statute or regulation is found, the license must be suspended for a period of thirty calendar days upon the first such violation, ninety days upon the second violation within a twenty-four-month period, and revoked for a third and subsequent violation within a twenty-four-month period, not including a period of suspension. A licensee whose license has been revoked is not eligible to re-apply for a license for a period of one year following the date the decision to revoke becomes final.
- (c) The licensing administrator shall provide at least ten calendar days prior written notice to the licensee of the decision to suspend or revoke the license stating the reasons for the decision to suspend or revoke. The notice must inform the licensee of the right to appeal the decision to the designated hearing examiner and must state the effective date of the suspension or revocation.
- (d) If the building official or fire department or the county health department find that a condition exists upon the premises of an adult entertainment establishment that constitutes a threat of immediate serious injury or damage to person or property, the official may immediately suspend any license issued under this chapter pending a hearing in accordance with subsection (c) of this section. The official shall issue a 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 designated hearing body under the same appeal provisions set forth in Section 7.80.140. However, a suspension based on threat of immediate serious injury or damage may not be stayed during the pendency of the appeal.

(Res. 97-1052 Attachment A (§ 13), 1997)

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.)

5.10.200 License suspension and revocation – Hearing.

A. *Grounds.* The clerk, upon the recommendation of the chief of police or other city official responsible for administering laws and regulations pertaining to any license issue under this chapter, or his/her designee, may suspend or revoke any license issued under the provisions of this chapter at any time where the same was procured by fraud or through a materially false representation of fact; or for the violation of, or failure to comply with, the provisions of this chapter or any other similar local or state law by the licensee or any of his/her servants, agents or employees when the licensee knew or should have known of such acts or violations committed by its servants, agents or employees; or the conviction of the licensee, or any of his or her servants, agents, or employees, of any crime or offense involving prostitution, promoting prostitution, sexual crimes against children, sexual abuse, rape, distribution of obscenity or material harmful to minors, or transactions involving controlled substances (as that term is defined in Chapter 69.50 RCW) committed on the premises of the adult entertainment business.

B. *Suspension and revocation.* 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 thirty (30) days upon the first such violation, ninety (90) days upon the second violation within a twenty-four (24) month period, and revoked for third and subsequent violations within a twenty-four (24) month period, not including periods of suspension; except that where the city building official or fire marshal or their designees or the King County health department find that any condition exists upon the premises of an adult entertainment business 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 KCC 5.10.190 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.

LAW OFFICE OF GILBERT H. LEVY

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Comments:

Please note the Appendix is attached directly to the Brief. Thank you -

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