No. 33140-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SPOKANE VALLEY,

Respondent,

vs.

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

Appellants.

APPELLANTS' OPENING BRIEF

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

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I. INTRODUCTORY STATEMENT

Appellant CAWA CORP owns and operates a business in the City of Spokane Valley. Appellants Brian, Christine and Maressa Dirks are the owners of the property wherein the business is located and lease the space to CAWA. The business has a retail component in which CAWA sells DVD's, magazines and novelties of sexually explicit nature. The business also has six mini theaters in which patrons pay an entrance fee to view sexually explicit movies in a small room. Respondent Spokane Valley filed a nuisance abatement action alleging that CAWA was operating its mini theaters in violation of Chapters 5.10 and 19.80 of the Spokane Valley Municipal Code. Chapter 5.10 imposes special licensing requirements on businesses defined therein as "adult entertainment establishments" and Chapter 19.80 subjects "adult entertainment establishments" to special zoning restrictions. Appellants are appealing the Trial Court's orders granting summary judgment in favor of the City and issuing a warrant of abatement. Appellants maintain that the Trial Court committed error in denying their claims that Chapters 5.10 and 19.80 are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 5 of the Washington Constitution. Appellants furthermore maintain that the Trial Court erred in its determination that Chapters 5.10 is facially

applicable to CAWA's business and in its determination that the business is not a lawful non-conforming use under the Spokane Valley Zoning Code.

II. ASSIGNMENTS OF ERROR

Assignment of Error No 1: The Trial Court Erred in Its determination that Appellants did not have standing to challenge the constitutionality of SVMC Chapter 5.10.

Issue related to Assignment of Error No. 1: Did the Trial Court err in its determination that Appellants did not have standing to challenge SVMC Chapter 5.10 where Respondent's abatement action is based on the Appellants' alleged non-compliance with that Chapter and where the Appellants are entitled to surrogate standing under the First Amendment over breadth doctrine.

Assignment of Error No. 2: The trial court committed error in its determination that Chapters 5.10 is applicable to Defendant CAWA's business.

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Issue No. 2 Related to Assignment of Error No. 5: Were there genuine issues of material fact as to whether Chapter 19.80 provides reasonable alternative channels of communication such that it was improper for the Trial Court to grant summary judgment?

Issue No. 3 Related to Assignment of Error No. 5: Were there genuine issues of material fact as to whether Chapter 19.80 is a prior restraint in violation of Article 1, Section 5 of the Washington Constitution such that it was improper for the Trial Court to grant summary judgment?

III. STATEMENT OF THE CASE

A. Statement of Procedure

Respondent City of Spokane Valley, (hereinafter "Plaintiff" or the "City"), filed a complaint for declaration of public nuisance and warrant of abatement. CP 1-8.[1] Appellants, (hereinafter the "Defendants"), answered the complaint and filed counterclaims under the Civil Rights Act alleging that Spokane Valley Municipal Code, (hereinafter "SVMC"), Chapters 5.10 and 19.80 are unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 5 of the Washington Constitution. CP 15-17, 18-33. Defendants filed amended answers and counterclaims, in which they included an additional counterclaim seeking declaratory judgment that the mini theatres are a lawful non-conforming use under the Spokane Valley Zoning Code. CP 843-848.

The City filed a motion for declaration of public nuisance. CP 644-672. In the motion, the City alleged that SVMC Chapter 5.10 was applicable to the Defendants' business and that the business was a public nuisance because it failed to secure a license as required by that provision. Id. Defendants filed an opposition to the Motion for Public Nuisance and a Cross Motion for Partial Summary Judgment. CP 648-672. In their

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

Opposition and Cross Motion, the Defendants alleged that Chapter 5.10 was inapplicable to the business in question or in the alternative that Chapter 5.10 was unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 5 of the Washington Constitution. Id. Following argument, the Trial Court issued a decision granting the City's Motion for Declaration of Public Nuisance and denying the Defendants' Cross Motion. CP 3902-3911. In its decision, the Trial Court held that the Defendants did not have standing to challenge the constitutionality of Chapter 5.10. Id. However, the Trial Court withheld action on the request for a warrant of abatement pending a decision on the constitutionality of Chapter 19.80. Id.

The City filed a motion for summary judgment seeking a determination that Chapter 19.80 is constitutional. CP 4139-4153. Defendants opposed the City's Motion arguing that the ordinance is unconstitutional under the federal and state constitutions and that there are genuine issues of material fact that precluded summary judgment. CP 4154-4181. Following argument, the Trial Court granted the City's motion for summary judgment and issued a warrant of abatement. CP 4481-4485. Defendants filed a timely notice of appeal. CP 4486-4462. The Trial Court issued an order staying enforcement of the judgment pending appeal. CP 4503-4504.

B. Statement of Facts

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

The business name is Hollywood Erotique Boutique. CP 674. The business has a retail component in which it sells and rents DVD's, magazines and novelties, lingerie and shoes. Id. The majority of the DVD's and magazines are of a sexually explicit nature. Id. The business also features six mini theatres which allow audience members to watch sexually oriented movies in DVD format. Id. The movies are shown in separate rooms, which are configured as mini theatres. Id. Different movies are played simultaneously in each of the theatres. Id. The business occupies a two story building. Id. The ground floor of the business is subdivided into separate rooms. Id. The main room contains a counter where the clerk/manager is stationed and where customers may make purchases or pay an entrance fee for the mini theaters. Id. The other

rooms on the ground floor contain retail items on shelves or display racks. Id. There is also a single mini theater on the main floor of the building. Id.

There are five mini theaters located on the second level of the building. Id. at 674. They are contained in separate rooms situated along a common aisle. Id. Each of the mini theaters has seating for up to ten patrons and contains a screen for viewing movies, which are continuously displayed in each room. Id. The screen in each room is connected by a cable to a DVD player. Id. The DVD players are located behind the clerk's counter downstairs in the main room. Id. Several of the DVD players run only a single movie at a time in which case the clerk/manger changes the DVD at the end of each movie. Id. Several of the DVD players are capable of playing multiple movies without the necessity of changing them at the end of each movie. Id. Patrons are allowed to enter the mini theatres by paying a single entrance fee of $12.00. Id. at 674, 675. Payment of the entrance fee entitles a patron to view the movies displayed in any one of the mini theatres for up to four hours. Id. at 675. During the four hour period a patron can move from theater to theater. Id. Patrons exercise no control over what movie is being played and do not access the DVD players. Id. World Wide Video began operating the business at 9611 East Sprague in 1999. Id. The mini theaters as described

above were installed in 2002 and have operated continuously since that time. Id. There are two other retail businesses in Spokane Valley that deal in sexually explicit merchandise. Id. Neither of these businesses has both a retail component and mini theatres. Id. CAWA's business is the only business of its kind in the City. Id.

CAWA's mini theatres are distinguishable from businesses that are commonly known as "peep shows". CP 675. Peep shows are movie booths intended to accommodate one patron at a time. Id. Each booth typically contains a screen and a coin or token operated device which enables the viewer to view a sexually explicit movie by inserting a token or coin into the device. Id. There are several major differences between CAWA's business at 9611 E. Sprague and what are commonly known as peep shows. First, the mini theaters are multiple occupant rooms which may accommodate up to 10 persons at a time. Id. at 676. Second, entire feature length movies are shown in each of the mini theaters as opposed to several minutes of viewing upon insertion of a coin or token. Id. Third, there is no "device" contained within the viewing area; rather the image is being transmitted from a remote DVD player located at the clerk's station. Id. Fourth, patrons access the entertainment by paying a single admission price rather by inserting a coin or token into a machine. Id. Fifth, patrons

may choose to enter a particular theater but exercise no control over the movie being shown. Id.

Spokane Valley was incorporated on March 31, 2003. CP 689. Prior to that time, the business at 9611 E. Sprague was located in unincorporated Spokane County. CP 25. In 1999, the business was located in a B3 zone. Id. Under the County's Zoning Code, businesses defined therein as "adult bookstores" and "adult entertainment establishments" were permitted to located in the B3 zone, subject to set back requirements from certain enumerated zones and uses. CP 25, 183-185. Spokane County amended its zoning ordinances in September 1999. CP136-150. Prior to the Amendment, the County's Zoning Code defined an "adult entertainment establishment" as:

> An enclosed building, or any portion thereof, used for presenting performances, activities, or material or relating to, "specified sexual activities" or specified anatomical areas as defined in this section, for observation by patrons therein; Provided, however, that a motion picture theater shall be considered an adult entertainment establishment if the preponderance of the films presented is distinguished or characterized by an emphasis on the depicting or describing of "specified sexual activities" or "specified anatomical areas"; provided further, however, that a hotel or motel shall not be considered an adult entertainment establishment merely because it provides closed circuit television programming in its rooms for registered guests.

CP 60.

The September 1999 Amendment to the Spokane County Code deleted the above quoted definition and instead defined "adult entertainment establishment" as "an establishment defined pursuant to Chapter 7.80 of the Spokane County Code". CP 146. The Amendment also deleted the definition of "adult bookstore" and contained a new definition for businesses defined therein as an "adult retail use establishments". Id. The amendment provided that, "Any adult retail use establishment located within the unincorporated areas of Spokane County on [insert date of adoption] which is made a nonconforming use by amendments to this Code pursuant to Resolution [insert resolution number] shall be terminated within five (5) years." CP 150.[2]

The Code contained no amortization provision applicable to "adult entertainment establishments", which were treated the same as other non-conforming uses. CP 1520.

Spokane County adopted Chapter 7.80 of its Business License Code in 1997. CP 233-295. The Chapter contains various licensing requirements and restrictions applicable to businesses defined therein as

[2] This is section comprises what is commonly known as an "amortization" provision. See, for example, *Northend Cinema, Inc. v. City of Seattle,* 90 Wash. 2d 709, 565 P. 2d 1153 (1978). Amortization provisions are typically contained in adult entertainment ordinances and provide that businesses made non-conforming by the ordinance are required to terminate within a certain period of time.

"adult entertainment establishments". Section 7.80.040 contains the following definitions:

> "Adult entertainment establishment" collectively refers to adult arcade establishments and live adult entertainment establishments, as defined herein.
>
> "Adult arcade establishment" means a commercial premises to which a member of the public is invited or admitted and where adult arcade stations, boots, or devices are used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, or live adult entertainment in a booth setting to a member of the public on a regular basis or as a substantial part of the premises activity.
>
> "Adult arcade device" sometimes known as "panoram", "preview", "picture arcade," "adult arcade," or "peep show," means any device which for payment of a fee, membership fee, or other charge, is used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, or live adult entertainment in a booth setting. All such devices are denominated under this chapter by the tem "adult arcade device". The term "adult arcade device as used in this chapter does not include other games which employ pictures, views, or video displays, or gambling devices which do not exhibit or display, adult entertainment.
>
> "Adult arcade station" or "booth" means an enclosure where a patron, member, or customer would ordinarily be positioned while using an adult arcade device or viewing a live adult entertainment performance, exhibition, or dance in a booth. Adult arcade station or booth refers to the area in which an adult arcade device is located and from which the graphic picture, view, film, videotape, digital display of sexual activity, or live adult entertainment is to be viewed.

> These terms do not mean such an enclosure that is a private office used by an owner, manager or person employed on the premises for attending the tasks of his or her employment, if the enclosure is not held out to any member of the public for use, hire, or for a fee for the purpose of viewing the entertainment provided by the arcade device or live adult entertainment, and not open to any person other than employees.

CP 214, 242. (Emphasis supplied).

At the time of its incorporation in 2003, Spokane Valley adopted Chapter 7.80 of the County's Business license code. CP 234, 235. The Chapter was then codified as Spokane Valley Municipal Code Chapter 5.10. Id. The City also adopted the County's Zoning Ordinances, including the five year amortization provision for "adult retail use establishments." CP 231, 695, 738. In September 2003, the Spokane Valley City Council amended its Zoning Code to eliminate the five year amortization provision for "adult retail use establishments". CP 702-704. Spokane Valley never adopted an amortization provision for "Adult Entertainment Establishments". Id. Under the Spokane Valley Zoning Code, "adult retail use establishments" and "adult entertainment establishments" which were originally lawful but later became non-conforming, are treated the same as other non-conforming uses. Id.

Spokane Valley Municipal Code Section 19.20.060(A) (1) defines a non-conforming use as:

> Any use that does not conform with the present regulations of the zoning district in which it is located shall be deemed a non-conforming use if it was in existence and in continuous and lawful operation prior to the adoption of these regulations.
>
> CP 791.

Subsection (B)(1) of SVMC 19.20.060 provides in part:

> The lawful use of land at the time of passage of this code, or any amendments hereto, may be continued, unless the use is discontinued or abandoned for a period of 12 consecutive months.

CP 791, 7912.

In 2007, Spokane Valley adopted Municipal Code Chapter 19.80. CP 704, 705, 759-768.[3] Chapter 19.80 was intended to replace the provisions of the adult entertainment zoning ordinance that had been adopted previously. Id.

Under Chapter 19.80, "adult entertainment uses" can only locate in the Community Commercial and Regional Commercial zones. SVMC 19.80.030(A). They must be set back one thousand feet from the nearest property line of certain enumerated uses, including public libraries, public playgrounds and parks, public or private schools, nursery schools, day

[3] The Court is requested to take judicial notice of the current version of Chapter 19.80 and Appendix A to the Spokane Valley Zoning Code which contains the definitions applicable to "adult entertainment establishments". These are attached to this brief as Appendices A and B.

care centers, churches, convents, monasteries, synagogues, and other adult uses. SVMC 19.80.030(B). They must also be set back one thousand feet from an "urban growth area" and certain enumerated zones. SVMC 19.80.030(C). The definitions applicable to "adult entertainment establishments" in Appendix A are the same as those contained in the Spokane County Licensing Ordinance. CP 762, 763.

In 2010, Spokane Valley adopted Ordinance 10-006, which replaced the previous Chapter 5.10 of the licensing code with a new Chapter 5.10, dealing with licensing and regulation of Adult Entertainment Establishments. CP 862.[4] The legislative record preceding the City Council's adoption of Ordinance 10-006 consisted of: (1) Secondary effects studies conducted by other municipalities: (2) Reported court decisions from the State of Washington dealing with the constitutionality of local ordinances governing peep shows and live enter establishments; (3) Police reports from other municipalities dealing with sexual conduct that had taken place in peep shows; (4) Other materials pertaining to the legislative history of Ordinance 10-006, which included police reports of sexual conduct in the theatres at 9611 E. Sprague. CP 3143-3859

[4] The Court is requested to take judicial notice of the current version of Chapter 5.10, a copy of which is attached to this brief as Appendix C.

As amended by Ordinance 10-006, Section 5.10.010 of the Spokane Valley Municipal Code contains the following definitions:

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

Sexual conduct" means acts of:

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

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

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

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

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

"Specified sexual activities" refers to the following:

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

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

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

As amended by Ordinance 10-006, SVMC § 5.10.020 provides that no person may operate an "adult entertainment establishment" without first obtaining a license. SVMC § 5.10.040(A)(9) provides, "No adult entertainment license may be issued to operate an adult entertainment establishment in a location which does not meet the requirements set forth in Chapter 19.80 unless otherwise exempt." SVMC § 5.10.160 provides

violations of provisions of Chapter 5.10, such as failure to obtain a license, constitutes a misdemeanor and each day's violation constitutes a separate offense.

SVMC § 5.10.080(C)(6) provides:

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

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

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

The City began its efforts to close down CAWA's mini theatres in 2007, claiming that CAWA was operating an "adult entertainment establishment" without a license and it was operating in the wrong zone. CP 814-822.[5] CAWA's representative responded to the City's notices by pointing out that the business did not constitute an "adult entertainment establishment' as that phrase was defined in the Spokane Valley Municipal Code because the movies were not being shown "in a booth".

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

CP 823-831. The parties never reached an agreement on this issue and the present lawsuit followed in April 2012. CP 1-8.

IV. ARGUMENT

A. The Trial Court Erred in Determining that the Defendants did not have Standing to Challenge SVMC Chapter 5.10

1. Facts Relevant to Assignment of Error

In its order granting the City's motion for public nuisance, the Trial Court ruled that the Defendants did not have standing to challenge the constitutionality of Chapter 5.10. CP 3910, 3911. The Trial Court reasoned that CAWA's mini theaters fell within the definition of "adult entertainment establishment" in SVMC 5.10.010 and that the mini theaters were not a lawful non-conforming use within the meaning of SVMC 19.20.060(A) (1) because they were not lawfully in existence prior to the adoption of SVMC Chapter 19.80. CP 3902-3909. The Trial Court held that because the mini theaters were being operated in the wrong zone, Defendants were ineligible to obtain a license and therefore did not have standing to challenge the licensing ordinance.[6] Id.

In their opposition to the motion for public nuisance and their cross motion for summary judgment, Defendants argued that properly construed, Chapter 5.10 does not apply to their business and that their

[6] SVMC 5.10.040(A)(9) provides that no adult entertainment license may be issued to a business that does not meet the zoning requirements of SVMC 19.80.

business was a lawful non-conforming use because prior to the adoption of Chapter 19.80, the County's adult entertainment zoning ordinance only applied to peep shows and not to movie theaters. CP 648-672. Defendants argued that if Chapter 5.10 is construed to apply to them, the definitions in SVMC 5.10.010 are vague and overly broad. Id. They argued that Chapter 5.10 is an impermissible prior restraint because if it is construed to apply to movie theaters, it imposes operational requirements that no theater could reasonably comply with. Id.

2. Standard of Review

Defendants maintain that standing is a mixed question of fact and law and the standard of review for mixed questions is de novo. *State v. Dearbone,* 125 Wn. 2d 173, 177, 883 2d 303 (1994). The standard of review on an order of summary judgment is de novo – the appellate court performs the same function as the trial court. *Smith v. Safeco Insurance Co.* 150 P. 3d 478, 483, 78 P. 3d 1274 (2003).

3. Argument

The Court has established a two part test to determine whether a party has standing to bring a particular action. *Branson v. Port of Seattle,* 152 Wash. 2d 862, 875, 101 P. 3d 67 (2004). The Court first asks whether the interest asserted is arguably within the zone of interests protected by the statute or constitutional guaranty in question and second the Court

must consider whether the party in question has suffered injury in fact. Id. One may not urge the unconstitutionality of a statute unless he or she has been adversely affected by the features of it which he claims are unconstitutional. *Bitts, Inc. v. Seattle,* 86 Wash. 2d 395, 397, 544 P. 2d 1242 (1976).

There are special standing rules applicable to constitutional challenges based upon claims of vagueness, over breadth and impermissible prior restraint. Where First Amendment rights are involved, a party may bring a facial challenge on grounds of vagueness and argue that the statute or ordinance is vague as to others, even if it isn't vague as to the party bringing the challenge. *State v. Halstien,* 122 Wash. 2d 109, 116, 857 P. 2d 270, 275 (1993); *Ramm v. Seattle,* 66 Wash. App. 15, 830 P. 2d 395, 398 (1992). If a regulation impermissibly burdens expression, a party has standing to bring an over breadth claim even though the party's activity falls within the permissible scope of the regulation and even if such constitutional over breadth can be considered harmless error as applied to them. *O'Day v. King County,* 109 Wash. 2d 796, 802, 749 P. 2d 142, 146 (1988); *City of Tacoma v. Levine,* 118 Wash. 2d 826, 840-41, 827 P. 2d 1374, 1381082 (1992). Where a licensing scheme constitutes an impermissible prior restraint, a party has standing to bring a facial challenge without the necessity of first having applied for

and having been denied a license. *Clark v. City of Lakewood,* 259 F. 3d 996, 1009 (9th Cir. 2001); and see *JJR, Inc. v. City of Seattle,* 126 Wash. 2d 1, 891 P. 2d 720 (1995).

The City brought the action in this case alleging that the Defendants were operating their business without a license in violation of Chapter 5.10 of the Spokane Valley Municipal Code. CP 1-8. Non-compliance with that Chapter is one of the grounds for the abatement order. CP 112. Whether CAWA's business falls within the definition of "adult entertainment establishment" is the nub of the dispute between the parties.[7] In this case, the Defendants are subject to an abatement order by virtue of their having fallen within the definition of "adult entertainment establishment". They have suffered injury in fact as result of that provision and therefore have standing to challenge it on grounds of vagueness and over breadth insofar as it impermissibly burdens free speech rights.

In the case of a party seeking injunctive and declaratory relief, injury in fact may consist of threatened future injury. *Clark v. City of Lakewood, supra,* at 1007. If a regulation would force a business to close or render it unprofitable, a sufficient showing has been made. Thus in

[7] The definitions of the "adult entertainment establishment" in the zoning and licensing ordinances are similar but not identical. Compare the definitions contained in Appendices B and C.

Clark, the plaintiff strip club owner was afforded standing to challenge the provisions dealing with the licensing of managers and dancers on prior restraint grounds, because without properly licensed dancers and managers he could not conduct his business. Id. at 1011.

As construed by the Trial Court, Chapter 5.10 "adult arcade station" means any enclosure containing a screen that affords a view of sexual content. CP 3908. According to the Trial Court, Chapter 5.10 applies to theaters as well as to peep shows and each mini theater in CAWA's business is an "adult arcade station" within the meaning of SVMC 5.10.010. Under Chapter 5.10, each "adult arcade station" may accommodate only one patron at a time and may contain only a single chair or seating surface. SVMC 5.10.080(C)(8). Each adult arcade station must be open to the "public room so that the area inside is fully and completely visible by direct line of sight to the manager, and the manager's view cannot be obscured by a curtain or wall. SVMC 5.10.090(B). Compliance with these standards is a condition of obtaining and maintaining a license. See SVMC § 5.10.040(B)(8) and 5.10.110(C). These provisions amount to a prior restraint in that they effectively ban adult movie theaters.[8] CAWA would be unable to operate its mini theaters

[8]"We have applied prior restraint analysis in cases involving licensing schemes and court orders that effectively banned speech". *Ino Ino, Inc. v. City of Bellevue,* 132 Wash. 2d 103, 125, 937 P. 2d 154, 168 (1997).

even if it is successful in challenging the zoning ordinance and even if it were to relocate its business to a parcel that it is correctly zoned for adult entertainment. This constitutes a sufficient threat of future injury to afford standing to the Defendants to obtain injunctive and declaratory relief with respect to SVMC §§ 5.10.080(C)(6) and 5.10.090(B).

B. The Trial Court Erred in its Determination that Chapters 5.10 Applies to CAWA's Business

1. Facts Relevant to Assignment of Error

The original Spokane County Zoning Ordinance defined "adult entertainment establishment" as:

> An enclosed building or portion thereof, used for presenting performances, activities, or material relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein; Provides, however, that a motion picture theater shall be considered an adult entertainment establishment if the preponderance of the films presented is distinguished or characterized by an emphasis on the depicting or the describing of "specified sexual activities" or "specified anatomical areas"; provided further that a hotel or motel shall not be considered an adult entertainment establishment merely because it provides adult closed circuit television programming in its rooms for the registered guests.

CP 60.

That definition was deleted from the County Zoning Ordinance in 1999 and replaced with the definition contained in the County's Licensing Ordinance, which provides:

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

CP 107.

As amended by Ordinance 10-006, SVMC 5.10.010 provides:

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

The County's Ordinance provides that an arcade booth or station may only be occupied by one person at a time. CP 121. It provides that all arcade stations must be open to the public room by direct line of sight to the manager and the manager's view may not be obscured by a curtain or wall. CP 123.

When Spokane Valley adopted the current version of Chapter 5.10, it borrowed many of the provisions of the County's ordinance. When the County adopted its licensing ordinance in 1997 and later amended its zoning ordinance in 1999, it was concerned primarily with video arcades and peep shows, as was stated in the preamble. CP 104, 105. The preamble makes no mention of mini theaters, which, in all likelihood, did not exist at that time.

2. Standard of Review

Issues of law are reviewed de novo. *State v. Read,* 147 Wash. 2d 238, 243, 53 P. 3d 26, 29 (2002).

3. Argument

Defendants maintain that Chapter 5.10 should be construed to apply only to peep shows meaning an enclosure designed to accommodate a single patron. Several cannons favor this construction. Municipal ordinances are interpreted using the same rules as statutes. *Sleasman v.*

City of Lacey, 159 Wash. 2d 639, 643, 151 P. 3d 990, 992 (2007). Statutes are to be read in *pari materia* meaning that statutes relating to the same subject matter must be construed together as constituting a unified whole. *Hallauer v. Spectrum Properties,* 143 Wash. 2d 126, 146, 18 P. 3d 540, 550 (2001). If a statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent, while avoiding a literal reading if it would result in unlikely, absurd or strained consequences. *Whatcom County v. City of Bellingham,* 128 Wash. 2d 537, 546, 909 P. 2d 1303, 1308 (1996). Courts will strive to construe a statute to uphold its constitutionality. *O'Day v. King County,* 107 Wn. 2d 796, 806, 749 P. 2d 124, 148 (1988).

On its face, the definition of "adult arcade station" in SVMC Chapter 5.10 is ambiguous as to whether it applies only to peep shows meaning single occupancy booths as opposed to theaters designed to accommodate multiple patrons. The definition of "adult arcade station" in SVMC 5.10.010 must be read in conjunction with the requirements in SVMC 5.10.080(C)(6) which provides that the "adult arcade station" may accommodate only "one person at a time" and may contain only a single chair or seating surface. That latter provision was obviously intended to deal with peep shows meaning single occupancy viewing areas. Additional ambiguity is to be found in the definitions themselves.

SVMC provides that an "adult arcade device" is "any device, which for payment of a fee, membership fee, or other charge, is used to display a graphic picture, view, film videotape or digital display...". "Adult arcade station" refers to "the area in which an adult arcade device is located...". In the case of peep shows, the machine or mechanical device that enables the viewing of the movie is contained within the booth itself. CP 675. In the case of theaters, the device that enables the viewing of the movie – the projector or DVD player – is operated from a remote location.

In the face of this ambiguity, the Trial Court's construction of the Spokane Valley Ordinance should be rejected because it leads to absurd results. No movie theater can exist if it can accommodate only a single patron and contain only a single chair or seating surface. The net effect of the Trial Court's construction is to convert all theaters to peep shows. Moreover, the Trial Court's construction should be rejected because, as argued below, it causes the ordinance to be overly broad and unjustifiably burdens free speech rights.

C. The Trial Court Erred in Denying the Defendant's Challenge to the Constitutionality of Chapter 5.10

1. Facts Relevant to Assignment of Error

The businesses that were the focus of the legislative record preceding enactment of Ordinance 10-006 were strip clubs, adult movie

theaters, peep shows and other businesses disseminating what might best be described as hard core sexually oriented material on a full time basis. CP 3201-3859. No mention is made in the legislative record of businesses disseminating sexually oriented material on less than a full time basis. No mention is made of movies which may contain sex scenes but wherein the sexually oriented content is not the predominant theme of the movie. No mention is made of hotels and motels which permit their guests to view sexually oriented movies on closed circuit television. The original Spokane County Zoning Ordinance contained exemptions for these types of businesses. CP 146. However, the exemptions were eliminated with the 1999 Amendment to the Spokane County Code. Id. SVMC Chapter 5.10 likewise contains no such exemptions.

2. Standard of Review

The standard of review on an order of summary judgment is de novo – the appellate court performs the same function as the trial court. *Smith v. Safeco Insurance Co.* 150 P. 3d 478, 483, 78 P. 3d 1274 (2003).

3. Argument

a) Overview of First Amendment Law

Movies are a form of expression protected under the free speech clauses of the federal and state constitutions. *Fine Arts Guild, Inc. v. City of Seattle,* 74 Wn. 2d 503, 506, 445 P. 2d 602 (1968); *Seattle v. Bittner,* 81

Wn. 2d 747, 748, 505 P. 2d 126 (1976). Published material that is sexually oriented but not obscene is fully protected by the First Amendment. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 78, 93 S.Ct. 2628 (1973).

Courts have applied different tests to analyze the constitutionality of adult entertainment licensing schemes. In *Ino Ino v. City of Bellevue, Inc.,* 132 Wn. 2d 103, 127, 937 P. 2d 154 (1997), the Court evaluated the constitutionality of a licensing ordinance applicable to nude dancing establishments under the test set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct.1673, 20 L. Ed. 2d 672 (1968). A regulation is constitutional under the *O'Brien* test if: (1) the regulation is within the constitutional power of government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restrictions on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest. Id. The Ninth Circuit in evaluated the constitutionality of a peep show licensing regulation under the time place and manner test announced in *City of Renton v. Playtime Theatres, Inc.,*475 U.S. 41 106 S.Ct 925, 89 L.Ed 2d 29 (1986). *Fantasy Land Video, Inc. v. County of San Diego,* 505 F. 3d 996, 1001 (9th Cir. 2007). The *Renton* inquiry proceeds in three steps: first, the ordinance

cannot be a complete ban on protected expression. Second, the ordinance must be content neutral or, if content based with respect to sexually oriented expression, it's predominate concern must be the secondary effects associated with the speech. Third, the regulation must pass intermediate scrutiny. It must serve a substantial government interest, be narrowly tailored to serve that interest, and allow for reasonable alternative avenues of communication. Id.

The Ninth Circuit has stated that there is no substantive difference between the *O'Brien* and *Renton* tests and a given result under one necessarily dictates an identical outcome under the other. *Clark v. City of Lakewood,* 259 F. 3d 996, 1005, n.3 (9th Cir. 2000). The Court of Appeals, Division II, applied the *Renton* test rather than the *O'Brien* test in analyzing the constitutionality of a licensing ordinance similar to the one considered by the Washington Supreme Court in *Ino Ino. DCR, Inc. v. Pierce County,* 92 Wn. App. 660, 667, 964 P. 2d 380 (1998).

Under the *Renton* test, an ordinance is not narrowly tailored if it applies to businesses not shown to generate secondary effects.[9] See also

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[9] "Moreover, the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), and *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45

World Wide Video, Inc. v. Tukwila, 117 Wn. 2d. 382, 816 P. 2d 18 (1991) holding that the City's adult zoning ordinance was not narrowly tailored because the City failed to demonstrate that sexually oriented businesses with predominantly take home merchandise were responsible the same type of secondary effects as those associated with adult movie theatres and peep shows. Secondary effects are features associated with the speech that are unrelated to its content. *Boos v. Barry,* 485 U.S. 312, 314, 108 S. CT. 1157, 99 L. Ed 2d 333 (1988). In the case of sexually oriented businesses, secondary effects typically consist of such things as higher crime rates, depreciated property values, and neighborhood blight. *Renton, supra,* at 47-49.

b) State Constitution

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.

Defendants maintain that a discussion of the six non-exclusive factors of *State v. Gunwall,* 106 Wn. 2d 54, 58, 720 P. 2d 808 (1986) is unnecessary because the issue of whether Article 1, Section 5 mandates

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L.Ed.2d 125 (1975)." *City of Renton v. Playtime Theatres, Inc.I,* 475 U.S. at 52.

enhanced protection in the case of licensing ordinances applicable to sexually oriented speech related businesses has previously been decided by this Court . *State v. McKinney,* 148 Wash. 2d 20, 26, 60 P. 3d 46 (2002) and see *O'Day v. King County,* 109 Wash. 2d 796, 749 P. 2d 142 (1988); *JJR, Inc. v. Seattle,* 126 Wash. 2d 1, 9, 891 P. 2d 720 (1991); *Ino Ino, Inc. v. City of Bellevue,* 132 Wash. 2d at 115-123. Nevertheless, the *Gunwall* factors are discussed herein to avoid any suggestion of waiver.

Textual Language

Article 1, Section 5 provides the right to speak freely on "all subjects" and gives no indication that sexually oriented speech should receive less protection than other forms of speech.

Differences in Text

On its face, Article 1, Section 5 mandates broader protection than the First Amendment. On its face, it categorically prohibits prior restraints. See *Ino Ino Inc. v. Bellevue, supra,* at 117, 164.

Constitutional History

As is the case with nude dancing, the framers of the Washington Constitution undoubtedly never considered the question of enhanced protection for sexually oriented movies. See *Ino Ino Inc. v. City of Bellevue, supra,* at 121.

Pre-existing State Law

The Court in *Ino Ino, Inc. v. City of Bellevue,* explained the difference between time place and manner regulations and prior restraints. Time, place and manner regulations impose temporal or geographical restrictions on protected expression. 132 Wn. 2d at 125, 126. Prior restraints impose official restriction on speech in advance of publication. Id. In general, Article 1, Section 5 of the Washington Constitution provides greater protection for speech than does the Federal Constitution. Id. at 115. However, application of the enhanced protection of the Washington Constitution depends upon the specific context in which the state constitutional challenge is raised. Id. The Washington Constitution provides greater protection against time, place and manner regulations, only in the case of "pure non-commercial speech in a public forum". Id. at 118, 119. However, in the case of sexually oriented expression in a non-public forum, such as nude dancing in a nightclub, the federal test and the State test for evaluating the constitutionality of time, place and manner regulations are the same. Id. at 127, and see also *World Wide Video, Inc. v. City of Spokane,* 125 Wn. App. 289, 303, 103 P. 3d 1265 (2005). Article 1, Section 5 of the Washington Constitution provides greater protection against regulations affecting sexually oriented expression that amount to a prior restraint. Id. at 121. A regulation which "effectively bans" a particular form of expression is a prior restraint. Id. at 125;

Article 1, Section 5 categorically prohibits prior restraints on constitutionally protected expression. *O'Day v. King County,* 109 Wn. 2d 796, 894, 749 P. 2d 142 (1988). Article 1, Section 5 provides greater protection against over breadth only in a case where the over breadth "rises to the level of a prior restraint." *Ino Ino, Inc. v. City of Bellevue, supra,* at 119.

Structural Differences

The federal constitution is a grant of enumerated powers while the State Constitution acts as limitation on the otherwise plenary power of government. *Ino Ino, Inc. v. City of Bellevue, supra,* at 121. This distinction simply reinforces this Court's responsibility to engage in independent state analysis and afford broader protection where necessary. Id.

Particular State or Local Concern

This factor favors independent State analysis insofar as ordinances such as the one at issue are typically enacted by local governments in an effort to social problems of local concern.

Defendants concede that the Federal test is applicable insofar as Chapter 5.10 may be viewed simply as a time place and manner regulation. On the other hand, if it rises to the level of a prior restraint, enhanced protection under the State Constitution is required. The critical

question in this case is what amounts to an "effective ban"? Defendants maintain that at the point where a so called time, place and manner regulation is so restrictive that it would force a business to close or prevent it from opening, it amounts to a prior restraint.

c) SVMC 5.10.010 is Defectively Vague

Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) it does not define the criminal offense with sufficient definiteness that ordinary people can understand what is proscribe; or (2) that statute does not contain ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Williams,* 144 Wash. 2d. 197, 203, 26 P. 3d 890 (2001). A statute is vague if either requirement is satisfied. Id. at 204. Courts are especially cautious in the interpretation of vague statutes when First Amendment interests are implicated. Id.

SVMC 5.10.010 provides:

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

This definition is vague in two respects. First "regular basis" and "substantial" are undefined. "Regular basis" could mean once a week, once a month, or once every six months. "Substantial" could mean less than 20% of the business activity. A particular business owner who desires to limit the days on which he or she shows sexually explicit movies in order to avoid having to comply with the Ordnance has no way of knowing what the law requires. Secondly, this Section fails to specify what percentage of sexual content in a particular movie would trigger applicability of the Ordinance. Read literally, the regular showing of movies that depict a limited amount of sexual content would require licensing under SVMC Chapter 5.10. Vagueness in this particular section of the SVMC would promote self censorship and would have a "chilling effect" on the exercise of free speech rights.

d) SVMC 5.10.010 is Overly Broad

Over breadth and narrow tailoring are parallel concepts. A criminal statute is overbroad if it burdens a substantial amount of protected speech, even if it has a legitimate application. *State v. Williams,* 144 Wn. 2d 197, 207, 28 P. 3d 890 (2001). An ordinance is not narrowly tailored if it applies to a speech related activity that is not shown to produce adverse secondary effects. *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46-47, 106 S. CT. 925, 931, 89 L. Ed. 2d 29 (1986); *World Wide*

Video, Inc. v. City of Tukwila, 117 Wash. 2d 382, 388, 816 P. 2d 18 (1991).[10] To satisfy the narrow tailoring requirement, the government bears the burden of showing that the remedy it has adopted does not burden more speech than is necessary to further the government's legitimate interests. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F. 3d 926, 948 (9th Cir 2011).

Under the City's definition of "adult arcade station", Chapter 5.10 applies to businesses that "exhibit or display a ...view....or digital display of specified sexual activities or sexual conduct to a member of the public on a regular or as a substantial part of the premises activity". "Regular" and "substantial part" are undefined. "Specified sexual activities: may include the "Touching of the ...female breast...whether clothed or unclothed...". According to the Trial Court, an "adult arcade station" means "any enclosure" wherein patrons may view sexually oriented content and the definition is not limited to a viewing booth designed to accommodate a single patron. CP 3908.

As construed by the trial court, Chapter 5.10 applies to theaters that that show sexually oriented movies on part time basis. It applies to

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[10] "...Tukwila has not shown that adult businesses with predominantly 'take home' merchandise (which clearly are covered by the ordinance) have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows; thus the 'substantial governmental interest' portion of the test has not been met." 117 Wash. 2d at 388.

theaters showing movies wherein the sexual conduct or specified sexual activities are not the predominant theme of the movie. It applies to hotels and motels which provide sexually oriented movies to guests on closed circuit television. There is no reference to any of these businesses in the legislative record preceding enactment of Chapter 5.10. As was the case with the ordinance under consideration in *World Wide Video v. Tukwila, supra,* the Spokane Valley Ordinance "strives to regulate forms of expressive activity different from those studied in the materials upon which it relies." 117 Wash. 2d at 390. The legislative record preceding enactment of Chapter 5.10 deals exclusively with nude dancing establishments, peep shows, and adult movie theaters which show hard core pornography on a full time basis. The City therefore has failed to sustain its burden to show that Chapter 5.10 is narrowly tailored to further a substantial governmental interest and the ordinance is, for that reason, overly broad.

e) SVMC 5.10.010 is an Impermissible Prior Restraint

According to the Trial Court, the definition of "adult arcade station" includes viewing areas designed to accommodate multiple patrons. Under SVMC 5.10.080(C)(6), an "adult arcade station" may be occupied by only a single patron at any time and may contain only a single chair or seating surface. Under SVMC 6.10.080(D)(3), the "adult arcade

station" must be open to the public room and fully completely visible to the manager. A theater is "A building, room or outdoor structure for the presentation of dramatic performances, as plays or motion pictures." *Webster's New Collegiate Dictionary.* The common understanding of a theater is a room or auditorium designed to accommodate multiple patrons. This Court is requested to take judicial notice of the fact that many conventional theaters now operate as multiplexes which consist of multiple auditoriums opening onto a common lobby. CAWA's President in his declaration in support of Defendants' motion for summary judgment stated:

> It would be impossible to operate a theater in which use of the auditorium is limited to a single patron. It would be impossible to operate a multiplex consisting of mini theaters if the rooms containing the theaters cannot be separated by walls. CP 676.

The Spokane Valley Ordinance effectively bans all sexually oriented movie theaters, multiplexes, and mini theaters and is therefore a prior restraint. *Ino Ino, Inc.v. City of Bellevue, supra,* at 125. Chapter 5.10 prohibits a unique medium of expression in violation of the First Amendment and Article 1, Section 5 of the Washington Constitution.

D. The Trial Court Erred in Determining that CAWA's Business was not a Lawful Non Conforming Use

1. Facts Relevant To Assignment of Error

CAWA installed the mini theaters in 2002. CP 675. At the time, "adult entertainment establishments" were governed by the Spokane County adult entertainment zoning ordinance. CP 231. The Spokane County Ordinance incorporated the definition of the "adult entertainment establishment" contained in its licensing code. CP 146. The definition of "adult entertainment establishment" in the County licensing code refers to "adult arcade establishments" and "live adult entertainment establishment." The County's Licensing Code provides:

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

The County's Licensing Code provides in part:

> "Adult arcade station" or "booth" means an enclosure where a patron, member, or customer would ordinarily be positioned while using an adult arcade device or viewing a live adult entertainment performance, exhibition, or dance **in a booth**. Adult arcade station or booth refers to the area in which an adult arcade device is located and from which the graphic picture, view, film, videotape, digital display of sexual activity, or live adult entertainment is to be viewed.

CP 240 (Emphasis supplied).

Spokane Valley adopted Chapter 19.80 of the Spokane Valley Municipal Code in 2007. However, the definitions of "adult arcade establishment" and "adult arcade station" in Appendix A to the Spokane Valley Zoning Code are the same as those contained in the Spokane County Ordinance. CP 763.

When Spokane Valley amended its licensing code in 2010, it eliminated the words "in a booth setting" from the definition of "adult arcade establishment" and the words "in a booth" from the definition of "adult arcade station". CP 298.

SVMC 19.20.060(A) provides in part:

> Legal non conforming uses and structures include:
>
> (1) Any use which does not conform with the present regulations of the zoning district shall be deemed a non-conforming use if it was in existence and in continuous use and lawful operation prior to the adoption of these regulations.

SVMC 19.20.060(B) allows non-conforming uses to continue indefinitely provided that they are not discontinued or abandoned.

2. Standard of Review

The interpretation of the zoning code presents an issue of law. Issues of law are reviewed de novo. *State v. Read,* 147 Wash. 2d 238, 243, 53 P. 3d 26, 29 (2002).

3. Argument

The mini theaters were established by CAWA's predecessor, World Wide Video, in 2002. At the time, businesses defined as "adult entertainment establishments" were governed by the Spokane County Zoning Ordinances, which was adopted by Spokane Valley at the time of incorporation. The issue is whether the County Ordinance applied to theaters meaning multiple occupancy viewing rooms as well as to peep shows, meaning single occupancy viewing booths. If it did not apply to theaters, then CAWA's business is a lawful non-conforming use within the meaning of the Spokane Valley Zoning Code and it is entitled to issuance of a license under Chapter 5.10, assuming that it meets other standards set forth in that Chapter.

Zoning ordinances are in derogation of the common law and must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose. *Morin v. Johnson,* 49 Wash. 2cd 275, 278, 300 P. 2d 569, 571 (1956). This cannon of construction prevails over the interpretation given the ordinance by local officials only to the extent that ambiguity exists. *Mall Inc. v. City of Seattle,* 108 Wash. 2d 369, 378, 739 P. 2d 668, 673 (1987).

The definitions of "adult arcade establishment" and "adult arcade station" are ambiguous as to whether they apply to theaters meaning multiple patron viewing areas. The term "theater" appears nowhere in either definition. The use of the term "in a booth setting" in the definition of "adult arcade establishment" and the term "in a booth" in the definition of "adult arcade station" contributes to the ambiguity. These terms could refer only to the immediate antecedents "live adult entertainment" and "dance" or they could refer to all uses previously described in the definition. The phrase "adult arcade station or booth refers to the area in which an adult arcade device located..." also adds to the ambiguity in that the location of the device in the viewing area is a feature that is common to peep shows and not to theaters. In recognition of the ambiguity, Spokane Valley deleted to words "in a booth setting" and "in a booth" from the definitions "adult arcade establishment" and "adult arcade station" when it adopted the current version of the licensing ordinance in 2010.

Given the ambiguity in the definitions in the County Ordinance, they should be construed in favor of the Defendants to apply only to peep shows, meaning single occupancy viewing booths. When the Ordinance is construed in that manner, the mini theaters in CAWA's business were a lawful conforming use at the time that they were constructed and they

have remained continuously in operation since that time. They are therefore a lawful non-conforming use within the meaning of the Spokane Valley Zoning Code and the Trial Court erred in concluding otherwise.

E. The Trial Court Erred in Granting the City's Motion for Summary Judgment with Respect to the Constitutionality of Chapter 19.80 of the Spokane Valley Zoning Code

1. Facts Relevant to Assignment of Error

The City moved for summary judgment on the remaining issues arguing that Chapter 19.80 was constitutional under the First Amendment in that it met the federal standard announced in *Playtime Theaters Inc. v. City of Renton,* 475 U.S. 41 (1986) 106 S.CT.925, 89 L.Ed. 2d 29. CP 4139-4153. The City argued that its Ordinance met the *Renton* standard of providing reasonable alternative of communication in that there were a sufficient number of relocation sites for adult entertainment establishments in Spokane Valley. Id. Defendants responded to the City's summary judgment motion raising three issues: (1) Whether Chapter 19.80 violates the First Amendment because it applies on its face to businesses not shown to generate secondary effects; (2) Whether Chapter 19.80 violates the First Amendment because it fails to provide a reasonable opportunity to open and operate an adult entertainment business; and (3) Whether Chapter 19.80 violates Article 1, Section 5 of the Washington Constitution because it amounts to an impermissible prior restraint. CP 4154, 4155.

According to Chapter 19.80, businesses defined therein as "adult entertainment establishments" and "adult retail use establishments" are required to locate in the Community Commercial and Regional Commercial Zoning Districts. In order to locate within these Districts, "adult entertainment establishments" must be located 1000 feet from certain enumerated uses including public libraries, public parks or playgrounds, public or private schools, nursery schools, day care centers, churches, convents, monasteries, synagogues and other adult uses. They must also be located 1000 feet from an urban growth boundary and certain enumerated zones.

In support of its summary judgment motion, the City presented evidence that the Community Commercial and Regional Commercial Districts together comprise 5% of the City's land. CP 4082. It presented evidence that there are currently 4 adult businesses operating in the City including two other adult retail establishments, the retail portion of CAWA's business and a nude dancing establishment. Id. All of these businesses were lawfully in existence at the time that City adopted Chapter 19.80 and are lawful non-conforming uses. Id.

In support of its summary judgment motion, the City presented the declaration and report of Real Estate Appraiser Bruce Jolicoeur. CP 4042-4078. Mr. Jolicouer conducted a survey all of parcels in the City of

Spokane Valley that are legally zoned for "adult entertainment establishments" and "adult retail use establishments". He concluded that that there are currently 45 sites available for adult oriented uses within the city. CP 4044. He concluded that, "These 45 sites could accommodate a minimum of 4 and as many as 5 simultaneously located adult-oriented businesses." Id.

In support of its motion, the City presented the declaration and report of land use planner Reid Shockey. CP 3997-3999. Mr. Shockey conducted a survey to determine the number of parcels in surrounding municipalities that are legally zoned for adult entertainment. CP 4003. The communities included the City of Spokane, Post Falls, Millwood, Spokane County and Liberty Lake. Id. He concluded that there were 260 sites within these communities that were legally zoned for adult entertainment. CP 3998. He conducted a survey to determine the number of licenses issued to adult entertainment businesses in several Washington Municipalities. CP 4004. Based upon this Survey, he determined that 4 licenses had been issued to adult entertainment businesses in Spokane Valley, 4 in Yakima, 3 in Bellingham, 1 in Federal Way, 1 in Kennewick, and 1 in Vancouver. Id.

In opposition the City's Motion for Summary Judgment, Defendants' presented the declaration and report of Land Use Planners

Lee Michaelis and Robert Thorpe. CP4182-4221. They were retained to determine the number or properties presently available to adult entertainment uses in the City of Spokane Valley. CP 4191-4197. The methodology consisted of: (1) Using GPS data to locate and map the areas that are set back 1000 feet form the zones listed in SVMC 19.80.030(C); (2) visiting the areas to determine the location of disqualifying uses listed under SVMC 10.80.030(B); (3) determining the location of properties within the permitted zones that are set back 1000 feet from disqualifying uses; and (4) documenting with photographs and providing a description of the activity conducted on the properties that fall outside of the zoning restrictions contained in Chapter 19.80. Id.

Using the above described methodology, the Thorpe Report describes three potential areas in the City where adult entertainment uses can locate. CP 4191-5197. They consist of a small industrial park, (Area 1), the Spokane Valley Mall, (Area 2), and a commercial strip at the west end of Sprague Avenue. (Area 3). Id. There are a maximum of 39 properties that meet zoning code requirements within these areas and a maximum of 4 adult uses that can exist simultaneously, given the 1000 foot set back requirement from other adult uses. Id. The majority of the properties are occupied by existing businesses. CP 4205-4213. Five of the properties are occupied by the Union Pacific Railroad and one is

occupied by the Spokane Transit Authority. Id. Additional occupied properties include La Quinta Inn, McDonalds, I-Hop, Wendy's, Nordstrom Rack, Oxford Suites, Walmart, Costco, Home Depot and Big 5 Sporting Goods. Id. 1.2% of the City's land is available to adult entertainment establishments. CP 4220.

In opposition to the City's Motion, the Defendants presented the declaration of Commercial Real Estate Broker, Rich Crisler. CP 4317-4323. Mr. Crisler has worked as commercial real estate broker in the Spokane area since 1978, has represented buyers and sellers, and is generally familiar with the local market. Id. He was tasked with determining which of the properties listed as "viable parcels" in the Jolicouer report are presently available for rent or sale to an adult entertainment business and which are likely to become available some time in the reasonably foreseeable future. Id. He conducted his examination using metroscan, contacting the owners of the properties, and personally inspecting each of the properties depicted as "viable parcels" in Jolicoeur's report. Id. Mr. Crisler determined that several of viable parcels were occupied by a single business and in all there were thirty three properties. Id. Four of the thirty three properties were vacant land and the remainder were occupied by existing businesses. Id. The existing businesses included established franchises and big box retailers such as

Home Depot, Lowes, and Costo. Id. Mr. Crisler opined that based upon his experience and knowledge of the commercial real estate market, 15 of Jolicoeur's "viable parcels" were occupied by well established businesses and were unlikely to become available anytime within the reasonably foreseeable future. Id.

In opposition to the City's Motion for Summary Judgment, Defendant's submitted the declaration of James R. Sicilia, the owner and sole shareholder of CAWA CORP. CP 4324, 4325. He stated in his declaration that he has been in the adult entertainment for over 30 years and has considerable experience identifying potential business locations. Id. He stated that if CAWA is forced to close its mini theaters at the present location, he would seek to open a similar business elsewhere in the City. Id. He stated that based upon his review of the Thorpe report and the declaration of Rich Crisler, it would be difficult if not impossible to open a similar business elsewhere in the City given the limited number of available properties. Id.

In opposition to the City's Summary Judgment Motion, Defendants presented the deposition of Reid Shockey. CP 4246-4316. Shockey testified that in conducting his zoning survey, he selected municipalities based solely upon "travel distance". CP 4274-4276. He consulted no scholarly articles, texts or planning documents to determine

whether these municipalities were in the same economic market as Spokane Valley. CP 4276. He has no idea as to whether the demographics in these communities are the same. CP 4278. Each of these cities has its own separate adult zoning ordinance. CP 4279. Spokane County has its own separate ordinance and there is no county wide adult ordinance that applies to other municipalities within the county. CP 4281. Shockey's site survey was limited to determining what properties were correctly zoned for adult entertainment. CP 4297. He did not consider the nature of the use that was located on the property nor which properties were subject to long term leases. CP 4298.

Mr. Shockey testified in his deposition that he determined the number of adult entertainment licenses that had been issued in certain municipalities by having his associate telephone their planning departments. CP 4302. He is unaware of the nature of CAWA's business and does not know whether the businesses that received licenses in these communities are the same as CAWA's business. CP 4305. He concluded that these communities are the same as Spokane Valley based exclusively on population. CP 4306. He conducted no market studies to determine what the demand is for adult entertainment in Spokane Valley. Id. All of the communities that he considered have some form of restrictive zoning for adult entertainment businesses. CP 4307- 4309. He has no opinion as

to how many adult entertainment businesses there would be in these communities if there was no restrictive zoning. CP 4310. He did not attempt to determine whether the market for adult entertainment businesses in these communities was saturated. CP 4311.

The City produced the legislative record preceding enactment of Chapter 19.80 in its motion for declaration of a public nuisance. CP 888-3142. It consisted of: (1) A copy of the Spokane County Ordinance; (2) A letter from an adult video store owner complaining about proposed closing hours; (3) An article dealing with the "secondary effects doctrine"; (3) A report of the Minnesota Attorney General dealing with the regulation of sexually oriented businesses; (3) An Austin Texas study on the adverse sex effects of sex businesses; (3) A Pittsburgh report on the adverse effects of sex businesses; (4) A letter to the Spokane Valley Council from Penny Lancaster, representing a community group; (5) neighbor complaints about Hollywood Erotique Boutique stores in the City of Spokane; (6) A lengthy 1986 Report by the United States Attorney General on the ill effects of pornography. Id.

2. Standard of Review

The standard of review on an order of summary judgment is de novo – the appellate court performs the same function as the trial court. *Smith v. Safeco Insurance Co.* 150 P. 3d 478, 483, 78 P. 3d 1274 (2003).

The moving party is entitled to summary judgment if there are no material issues of fact and judgment should be entered as a matter of law. Superior Court Civil Rule 56. A material fact is one on which the outcome of the litigation depends in whole or in part. *Morris v. McNicol*, 83 Wash. 2d 491, 494, 519 P. 2d 7, 10 (1974). The burden of showing that there is no material issue of fact is on the moving party. *Hash v. Children's Orthopedic Hospital and Medical Center,* 110 Wash. 2d 912, 915, 757 P. 2d 507, 508 (1988). All reasonable inferences must be resolved against the moving party and summary judgment should be granted only if reasonable people can reach but one conclusion. Id. On appeal, an appellate court must review the motion in a light most favorable to the non-moving party. Id. When presented with a mixed question of fact and law, factual issues can be decided as matter of law only if one reasonable conclusion can be drawn there from. *City of Seattle v. Mighty Movers,* 112 Wn. App. 904, 912, 51 P. 3d 152 (2002), (reversed on other grounds).

3. Argument

a) Overview of First Amendment Zoning Law

The leading First Amendment case on adult entertainment zoning is *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1996). That case dealt with the constitutionality of Renton's ordinance that required motion picture theaters to be set back from

residential zones and certain enumerated uses. In upholding the ordinance in the face of a First Amendment challenge, the Court held that it was a time, place and manner regulation because it merely limited where adult motion picture theaters could be located within the city. Id. at 46. Time place and manner regulations are constitutional if they are content neutral, narrowly tailored to serve a substantial governmental interest and leave open ample alternative channels of communication. Id. The Court found that the Renton ordinance was content neutral because it was aimed not at the speech but at eradicating secondary effects. Id. at 47. It served a substantial government interest based upon the city's legislative record demonstrating the association of adult motion picture theatres with secondary effects. Id. at 51, 52. The ordinance was narrowly tailored because it applied only to that category of theatres "shown to produce the unwanted secondary effects". Id. at 52. The ordinance left open ample alternative avenues of communication based on the District Court's finding that the ordinance provided 520 acres including acreage, "in all states of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." Id. at 53.

The leading Ninth Circuit case is *Topanga Press, Inc.v. City of Los Angeles,* 989 F. 2d 1524 (9th Cir. 1993). There, the Court held that the

question under *Renton* is whether the city has denied adult businesses a reasonable opportunity to open and operate. The city is therefore obligated to provide a reasonable number of relocation sites. Id. at 1529. In making this assessment, the court is not directly concerned with economic impact but economic factors may be considered. Id. at 1530. The Court held that there are two questions that must be answered in determining whether an adult business has been given a reasonable opportunity to open and operate:

> The first question is whether relocation sites provided to a business may be considered part of an actual business real estate market. The second question is whether, after excluding those sites that may not be properly considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses.

Id. at 1530.

The Court in *Topanga Press* held that to be part of the business real estate market, a particular location must be potentially as opposed to actually available. 989 F. 2d 1531. The Court deferred on the question of whether properties subject to leases for a term of years are potentially unavailable but held that properties are not potentially available when it is unreasonable to believe that they will ever become available to any commercial business. Id. Properties in industrial zones are potentially

available if they are accessible to the general public and have infrastructure such as roads, sewers and electricity. Id. A relocation site must be suitable for some generic commercial business although not a particular type of business. Id. Relocation sites in commercial areas are considered part of the real estate market. Id. Assuming that a property is part of the relevant market, it is not relevant whether a particular location will result in lost profits, higher overhead costs, or even prove to be unfeasible for an adult business. Id.

Applying the above test to the evidence presented by the plaintiffs in that case, the Court in *Topanga Press* held that acreage submerged beneath the Pacific Ocean, landing strips for the air port, land fill, oil refineries, and sports stadia were properly excluded from the relevant real estate market because they were unlikely to become available to any commercial business. 989 F. 2d at 1532. Likewise, it was proper to exclude a defense plant, a General Motors assembly plant, a portion of Children's Hospital and other large businesses on the grounds that they were unsuitable for any generic commercial business. Id. The Court concluded on that basis that the plaintiff adult businesses made a sufficient showing of probability of success on the merits and were entitled to a preliminary injunction. Id. at 1533.

In *Lim v. City of Long Beach,* 217 F. 3d 1050 (9th Cir. 2000), the Court noted that the city has the burden of proving that there is a reasonable opportunity to open and operate an adult business. The Court stated:

> A city cannot merely point to a random assortment of properties and simply assert that they are reasonably available to adult businesses. The city's duty to demonstrate the availability of property is defined at a bear minimum, by reasonableness and good faith. If a plaintiff can show that a city's attempt is not in fact in good faith or reasonable, by, for example, showing that a representative sample of properties are on their face unavailable, then the city will be required to put forth more detailed evidence. But where a city has provided a good faith and reasonable list of potentially available properties, is for the plaintiffs to show that in fact certain sites would not reasonably come available.

Id. at 1055, 1056.

The Court in *Lim* found that the city had met its burden of demonstrating reasonableness and good faith in identifying potentially available properties. The case was remanded to the district court to provide the plaintiffs with an opportunity to demonstrate that the properties that the city had provided were not in fact available. The Court stated, "We therefore remand to permit Plaintiffs to develop and present evidence that Long Beach's proffered properties would not reasonably become available because, for example, they were encumbered by long-term leases." 217 F. 3d at 1056.

In *Diamond v.Taft,* 215 F. 3d 1052 (9th 2000), the issue was whether in determining the relevant number of relocation cites, the court is required to consider all of the correctly zoned sites or only the maximum of adult entertainment sites that could exist simultaneously given the set back requirement from other adult businesses. The Court held that where plaintiff is the first adult entertainment business seeking to open the city, the applicable measure of reasonably available sites is all the sites that are zoned for adult entertainment. However, when the ordinance has the effect of forcing an existing business to close, the applicable measure is the number of adult sites than can exist simultaneously within the permitted area. The Court stated, "Generally, in cases where there is a restriction on the distance between adult businesses, a proper measure of sufficiency can only include the number of sites that could exist because the total acreage of land in the relevant real estate market does not determine the number of sites available to adult businesses." Id. at 1057.

In *Young v. Simi Valley,* 216 F. 3d 807 (9th Cir. 2000), the Court declined to hold as a matter of law that 4 relocation sites was an unreasonable number. Rather the issue is fact specific and depends on a number of factors. One factor is whether the number of relocation sites available is greater than the demand. However, the Court declined to adopt a bright line rule based upon supply and demand analysis noting the

"chilling effect that an adult use ordinance may have on prospective business owners". Id. at 822. Rather a variety of factors should be considered including, "the percentage of acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, 'community needs, the incidence of [adult businesses] in comparable communities, [and] the goals of the city plan.', (internal cite omitted)". Id.

b) State Constitution

Defendants incorporate by reference their discussion of the six non-exclusive *Gunwall* factors in the preceding section of this brief. The argument with the respect to factors 1, 2, 3, 5, 6 is the same. With respect to factor 4 – pre-existing State law - the Court in *Ino Ino, Inc.v. City of Bellevue* held that Article 1, Section 5 of the Washington Constitution mandates enhanced protection for time, place and manner regulations only in the case of "pure non-commercial speech in a public forum." 132 Wash. 2d at 121. However, it provides enhanced protection for regulations that amount to a prior restraint. Id. at 121. A regulation that "effectively bans" a particular form of speech is a prior restraint. Id. at 125. The Washington Court of Appeals, Division III, applied the same analysis in upholding the constitutionality of Spokane's adult entertainment zoning ordinance, holding that the plaintiff failed to prove

that the regulation in question amounted to a prior restraint. *World Wide Video of Washington, Inc. v. City of Spokane,* 125 Wn. App. 289, 302, 103 P. 3d 1265 (2005).

This Court has decided only two cases that deal specifically with the zoning of sexually oriented businesses – *Northend Cinema v. City of Seattle,* 90 Wash. 2d 709, 565 P. 2d (1978) and *World Wide Video, Inc. v. City of Tukwila,* 117 Wash. 2d 382, 816 P. 2d 18 (1991). Both cases were decided under the First Amendment and neither addressed the State Constitution. However, both cases have bearing on the issues now before the Court.

c) The Trial Court Erred in Its Determination that Chapter 19.80 Is Narrowly Tailored to Further a Substantial Governmental Interest

The definitions of "adult arcade establishment" and "adult arcade station" are essentially the same as those contained in the licensing code. As these provisions have been construed by the Trial Court, they apply to theaters, multiplexes and mini theaters that provide sexually oriented content on a "regular" basis, although "regular" is undefined in the ordinance. They apply to movies wherein the sexually oriented content is not the predominant theme of the movie. They apply to hotels and motels that provide sexually oriented movies to their guests via closed circuit television. The City has failed to sustain its burden of proving that

Chapter 19.80 is narrowly tailored with respect to these businesses. *World Wide Video, Inc. v. City of Tukwila, supra.* The legislative record for Chapter 19.80 is essentially the same as the legislative record for the licensing ordinance. The businesses referred to therein are nude dancing establishments, peep shows, and movie theaters which provide hard core pornography on a full time basis. The City has presented no evidence that businesses showing sexually oriented movies on a part time basis, businesses showing movies wherein the sexual content is not the predominant theme of the movie, and hotels and motels providing sexually explicit movies on closed circuit television are responsible for the same secondary effects as the businesses referred to in the legislative record. At the very least, there are genuine issues of material fact that preclude summary judgment.

d) The Trial Court Erred in Granting Summary Judgment on Defendants' First Amendment Claim

In determining the sufficiency of relocation sites provided by Spokane Valley, it is improper to consider relocations sites available in other municipalities, such as those listed in the Shockey report. In *Schad. v. Borough of Mount Ephraim,* 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981), the Supreme Court invalidated a local adult entertainment zoning ordinance which completely excluded live entertainment. In an

effort to sustain the regulation, the city argued that live nude entertainment was available in nearby communities. The Supreme Court rejected this claim, stating:

> The Borough nevertheless contends that live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of he borough. Its position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment only in selected areas of the county and to exclude it from primarily residential communities such as the Borough of Mount Ephraim. This may very well be true, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning in Camden County, and Mount Ephraim is free under state law to impose its own zoning restrictions, within constitutional limits. Furthermore, there is no evidence in this record to support the proposition that the kind of entertainment appellants wish to provide is available in nearby areas. The courts below made no such findings; and at least in their absence, the ordinance excluding live entertainment from the commercial zone cannot be constitutionally applied to appellants so as to criminalize activities for which they have been fined. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State,* 308 U.S., at 163, 60 S.Ct. at 151.
>
> Id. at 76.

Cases following *Schad* have held that a city cannot rely on relocation sites outside of the municipal boundaries in the absence of county wide zoning. *Centerfold Club, Inc. v. City of St. Petersburg,* 969 F. Supp. 1288, 1206 (M.D. Fla. 1997); *Wolfe v. Village of Brice,* 997 F. Supp. 939, 945 (S.D. Ohio 1998). As Mr. Shockey acknowledged in his

deposition, there is no county wide zoning and the municipalities that he cites in his study each have their own adult entertainment zoning ordinance.

In determining the number of relocation sites, the Court should consider the number of locations that can exist simultaneously and not the total number of sites. The Ninth Circuit's holding in *Diamond v.Taft, supra,* provides that that when an ordinance forces an existing business to close, the appropriate measure is the number adult entertainment uses that can exist simultaneously within the permitted area. In this case, the City invoked Chapter 19.80 and nuisance abatement procedures to force the closure of Defendants' business.

In resisting summary judgment, Defendants presented evidence that the area set aside for adult entertainment in the City of Spokane Valley constitutes 1.2% of the City's land. Defendants presented evidence that nearly half of the relocation sites that the City claims are available consist of a rail road yard or well established businesses that are unlikely to become available to any generic commercial business any time within the reasonably foreseeable future. Defendants presented evidence that nearly all of the relocation sites which the City claims are available are presently occupied. Plaintiff's expert, Bruce Jolicoeur, did not nothing other than plot zoning boundaries and consider the set backs. He did no

analysis of the properties in question to determine their suitability or potential availability as required by *Topanga* press. His analysis is misleading insofar as he failed to mention that in several instances, multiple parcels are occupied by a single business.

The Ninth Circuit decision in *Young v. Simi Valley, supra,* recognized that the demand for available sites is only one of the factors to be considered given that the restrictive provisions in a particular ordinance may have a chilling effect on demand. This would appear to be the case in Spokane Valley. All the existing adult entertainment uses in Spokane Valley are non-conforming uses that were in existence prior to incorporation. The City failed to present evidence that anyone has applied for an adult entertainment license in Spokane Valley since the date that its adult entertainment zoning ordinance was adopted.

The Shockey report concerning licenses issued to adult businesses in other communities is devoid of relevant information. Shockey performed no market studies or demographic analysis to enable reasonable comparison of the various communities listed in his report. He had no opinion on whether the market for adult entertainment businesses in Spokane Valley is saturated. He had no opinion as to whether the restrictive zoning in the communities he considered affected the number of licenses. He had no idea as to what the Defendants' business consists of

or whether it is comparable to the businesses issued licenses in the other communities listed in his report.

To summarize, the issue presented is a mixed question of fact and law and not simply a question of law. There is a genuine issue of material fact as to whether the City provided a reasonable number of relocation sites and the question should have been reserved for the fact finder. As non-moving parties, the Defendants were entitled to the benefit of the factual inferences. This is a genuine issue of material fact as to whether the City has acted reasonably and in good faith, given the paucity of acreage that City chose to make available for adult entertainment. The City merely pointed to a random assortment of properties and thereby failed to sustain its burden of proof. The Trial Court erred in granting the motion for summary judgment.

e) The Trial Court Erred in Granting Summary Judgment on the Defendants' State Constitutional Claim

In *World Wide Video .v City of Spokane,* 125 Wn. App. 289, 302, 103 P. 3d 1265 (2005), the Court of Appeals, Division III, was faced with a constitutional challenge to the City of Spokane's adult entertainment zoning ordinance based upon Article 1, Section 5 of the Washington Constitution. Applying a *Gunwall* analysis, the Court in that case held that the ordinance did not seek to regulate traditional speech in a public

forum and the ordinance was not a prior restraint but merely a time, place and manner regulation because it did not amount to an absolute ban. 125 Wn. App. at 304. Hence, that there was no basis for invoking the enhanced protection of Article 1, Section 5. However, that case did not involve an alternative avenues challenge and the plaintiff presented no evidence as to the unavailability of alternative sites.

The Court has yet to decide what constitutes a prior restraint in the context of adult entertainment zoning. However, there is instructive language in the earliest Washington adult entertainment zoning case, *Northend Cinema, Inc. v. City of Seattle,* 90 Wn. 2d 709, 585 P. 2d 1153 (1978). That case is important because it reflects pre-existing State law - one of the determinative *Gunwall* factors. In *Northend,* the ordinance at issue confined adult move theaters to Seattle's downtown business district. The plaintiffs in that case presented no evidence that adult movie theaters would have a difficult time securing locations within the permitted area. In rejecting the plaintiffs' argument that the ordinance amounted to a prior restraint, the Court stated:

> As pointed out above, appellants make no showing that the market for distribution and exhibition of theses films is in fact restrained. There was testimony at trial that adult movie theaters would easily be able to find a location in the designated zones. Furthermore, although potential viewers would be able to see the films only in those downtown

> areas, there is no evidence that this places any burden on the adult movie market.
>
> Under these circumstances, where there is no restraining effect on the market, and no substantial deterrent effect on individual rights of free speech, the City's most important interest in regulating use of its property for commercial purposes is clearly sufficient to justify the zoning regulation here. We conclude the zoning regulation of adult movie theaters is a reasonable regulation of place for First Amendment speech which does not violate the First Amendment.

Id. at 717.

In this case, Defendants presented evidence that the City has set aside 1.2% of its land for adult entertainment businesses. All but a few of the properties that meet all of the zoning restrictions are presently occupied. Many of these properties are occupied by established businesses such as Costco and Wal-Mart that are unlikely to relocate any time within the foreseeable future. No one has applied for a license to open an adult entertainment business in Spokane Valley since the date of incorporation and the handful of adult businesses in the City are pre-existing nonconforming uses. Adult entertainment businesses are severely restricted in where they can locate in Spokane Valley and to pretend otherwise is to engage in a flight of fantasy. In *City of Renton v. Playtime Theaters Inc.,* the Supreme Court saw no problem with requiring adult businesses to "...fend for themselves, **on an equal footing**, with other

prospective purchasers and lessees ...". 475 U.S. at 54. This is not a case of "equal footing". Rather, the restrictions in the Spokane Valley ordinance place adult entertainment businesses at an extreme disadvantage vis-à-vis other commercial businesses, which are not faced with similar zoning restrictions. According to the evidence, the market for adult entertainment in Spokane Valley is severely restrained.

Cases interpreting the Federal Constitution seem to suggest that the First Amendment is satisfied so long as it is theoretically possible for an adult entertainment business to find a location in the City. It matters not whether a particular property is occupied by an existing business or whether the occupant is a well established franchise unlikely to rent or sell to anyone let alone an adult entertainment business. If Article 1, Section 5 provides enhanced protection, it should recognize that at a certain point, time place and manner regulations can be so restrictive as to amount to a prior restraint. There is a genuine issue of material fact as whether the Spokane Valley Ordinance is so restrictive as to amount to an effective ban in violation of the Washington Constitution. The Trial Court erred in granting summary judgment on this issue.

V. CONCLUSION

The Trial Court's order granting summary judgment and declaring a public nuisance should be reversed. The Court should determine that the

Defendants have standing to challenge to the constitutionality of SVMC Chapter 5.10. Chapter 5.10 should be construed so as to not apply to the Defendants' business or it should be declared unconstitutional and void.

The Court should hold that Defendants' business is a lawful non-conforming use within the meaning of the Spokane Valley Zoning Code. Alternatively, the Court should hold that there are genuine issues of material fact as to the constitutionality of SVMC Chapter 19.80 and remand the issue for trial.

VI. REQUEST FOR ATTORNEY FEES

In the event that Chapters 5.10 or 19.80 are declared to be unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution, Defendant should be awarded costs and attorney's fees pursuant to Title 42 United States Code Section 1988.

DATED: June 19, 2014.

Gilbert H. Levy, WSBA #4805
Attorney for Appellants

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of Washington State that on the 19th day of June, 2014, I caused to be served the foregoing document via email and U.S. Mail on Menke, Jackson, Beyer LLP, 807 North 39th Avenue, Yakima, WA 98902:

DATED: June 19th, 2014

Gilbert H. Levy, WSBA #4805
Attorney for Appellants

APPENDIX A

Chapter 19.80
ADULT USES

Sections:

19.80.010 Purpose.

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

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

19.80.020 License required.

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

19.80.030 Adult use development standards.

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

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

1. Public library;

2. Public playground or park;

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

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

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

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

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

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

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

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

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

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

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

7. MUC, Mixed Use Center district;

8. CMU, Corridor Mixed Use district;

9. CC, City Center district; or

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

APPENDIX B

APPENDIX A
DEFINITIONS

A. General Provisions.

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

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

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

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

5. Use of male designations shall also include female.

B. Definitions.

AASHTO: American Association of State Highway and Transportation Officials.

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

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

ADA: Americans with Disabilities Act.

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

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

Adult entertainment: Includes the following:

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

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

• **Adult arcade or peep show:** Any device which, for payment of a fee, membership fee, or other charge, is used to exhibit or display a graphic picture, view, film, videotape, or digital display of

specified sexual activity, or live adult entertainment in a booth setting. All such devices are denominated under this chapter by the term "adult arcade device." The term "adult arcade device" as used in this code does not include other games which employ pictures, views, or video displays, or gambling devices which do not exhibit or display adult entertainment.

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

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

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

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

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

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

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

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

• **Live adult entertainment:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

• **Sexual conduct:** Acts of:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Affordable housing: Where the term "affordable" is used, it refers to the federal definition of affordability stating that annual housing costs shall not exceed one-third of a family's annual income.

APPENDIX C

5.05.050 Fee — Terms — Penalty.

A. Business registration shall occur on a calendar-year basis and shall expire on December 31st of the year for which the registration was issued.

B. A fee shall be charged for businesses registering for the 2005 calendar year and years thereafter. Business registration fees shall be established by city council resolution.

C. Failure to pay the registration fee by the applicable date shall result in a late fee of 50 percent of the annual registration fee.

D. Failure to pay the annual fee may result in non-issuance of a Washington State license, as determined by the Washington State Department of Licensing. (Ord. 04-032 § 1, 2004; Ord. 34 § 5, 2003).

5.05.060 Transfer or sale of business — New license required.

Upon the sale or transfer of any business, the registration issued to the prior owner or transferer shall automatically expire on the date of such sale or transfer and the new owner intending to continue such business in the City shall apply for a new registration pursuant to the procedures established by this chapter. (Ord. 04-032 § 1, 2004; Ord. 34 § 6, 2003).

5.05.070 Violation — Penalty.

Any person, as defined herein, and the officers, directors, managing agents, or partners of any corporation, firm, partnership or other organization or business violating or failing to comply with any provisions of this chapter shall be subject to a Class 2 civil infraction pursuant to Chapter 7.80 RCW. (Ord. 04-032 § 1, 2004; Ord. 34 § 7, 2003).

Chapter 5.10
ADULT ENTERTAINMENT ESTABLISHMENTS

Sections:

5.10.010 Definitions.

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

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

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

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

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

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

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

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

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

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

"Licensing administrator" means the community development director and his/her designee(s) and is the person designated to administer this chapter. In the event of any appeal to the hearing examiner

under this chapter, the licensing administrator shall prepare and/or ensure the submittal of the department reports required under SVMC 17.90.060(A) and Appendix B, Section C.

"Liquor" means all beverages defined in RCW 64.04.010.

"Live adult entertainment" means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Sexual conduct" means acts of:

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

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

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

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

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

"Specified sexual activities" refers to the following:

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

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

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

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

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

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

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

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

5.10.020 License required.

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

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

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

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

5.10.030 License prohibited to certain classes.

No license shall be issued to:

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

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

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

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

5.10.040 Applications.

A. Adult Entertainment Establishment License.

1. An application for an adult entertainment establishment license must be submitted to the licensing administrator in the name of the person or entity proposing to conduct the adult entertainment establishment on the business premises and must be signed by the person and certified as true under the penalty of perjury. An application must be submitted on a form supplied by the licensing administrator, which must require the following information:

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

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

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

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

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

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

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

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

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

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

k. A scale drawing or diagram showing the configuration of the premises for the proposed adult entertainment establishment, including a statement of the total floor space occupied by the business, and marked dimensions of the interior of the premises. Performance areas, seating areas, manager's office and stations, restrooms, adult arcade stations and adult arcade devices, overhead lighting fixtures, walls and doorways, and service areas shall be clearly marked on the drawing. An application for a license for an adult entertainment establishment must include building plans that demonstrate conformance with all applicable building code requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.10.050 Adult entertainment establishment manager and entertainer licenses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. This chapter does not prohibit:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIOLATORS ARE SUBJECT TO CRIMINAL PROSECUTION.

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

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

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

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

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

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

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

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

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

5.10.090 Premises – Specifications.

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

B. Adult Arcade Entertainment Establishment Premises. All adult arcade stations must open to the public room so that the area inside is fully and completely visible by direct line of sight to the manager. All adult arcade stations shall be maintained in a clean and sanitary condition at all times. All floors, walls and ceilings shall consist only of hard, cleanable surfaces. All adult arcade stations shall be thoroughly cleaned with a diluted bleach solution whenever necessary for the removal of any potentially infectious materials (including, without limitation, semen, blood and vaginal secretions), but at least once daily. A record of such cleaning, listing the date and time, shall be posted in each adult arcade station. Any such potentially infectious materials, together with any cleaning rags, cloths or other implements, and any condoms, needles, or other items that may contain such potentially infectious materials, shall be placed in a properly labeled medical waste bag and disposed of pursuant to applicable laws or regulations.

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

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

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

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

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

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

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

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

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

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

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

Calendar Days Past Due	Percent of License Fee
7 – 30	25%

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

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

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

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

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

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

5.10.110 Suspension or revocation of licenses.

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

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

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

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

5.10.120 Appeal and hearing.

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

all testimony at any hearing affecting a license under this chapter shall be taken under oath. The filing of such appeal shall stay the action of the license administrator.

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

5.10.150 Compliance by existing adult entertainment establishments.

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

5.10.160 Penalties.

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

5.10.170 Additional remedies.

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

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

Chapter 5.15
SPECIAL EVENTS

Sections: