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' REPLY BRIEF

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

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TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases

Other Authorities

I. REPLY TO CITY'S COUNTER STATEMENT OF THE CASE

The City points to alleged lewd conduct and illegal activity at CAWA's business as a way to drum-up support for its position. But this case isn't about lewd conduct. If the City was seriously interested in preventing lewd conduct and other illegal activity at CAWA's premises, it could have easily pursued an abatement action or a moral nuisance action pursuant to RCW 7.48A.020. In reality, this case is about the City's desire to close CAWA's mini theaters at their present location and prevent them from opening elsewhere within the City. The combined effect of the City's zoning and licensing regulations is to effectively ban adult movie theaters, although the ordinance is broad enough to apply to a wider range of constitutionally protected activity. Moreover, the ban would apply to any such theater regardless of whether illegal activity ever had or would take place at its business. If CAWA kept its business as pristine and peaceful as a church, it wouldn't make the least bit of difference. If the City wins the lawsuit, adult movie theaters are on their way out of town.

II. REPLY TO CITY'S STATEMENT OF RELEVANT LEGISLATIVE HISTORY

CAWA's business began as a retail only business in 1999. At the time, it was located in unincorporated Spokane County. The business became a non-conforming use subject to a five year amortization provision

as a result of definitional changes in the zoning code that the County adopted that year. After it incorporated in 2003, Spokane Valley kept the County's zoning restrictions, but declined to adopt the five year amortization clause. As a result, the adult businesses that existed at the time – CAWA's retail business, two other adult retail stores, and a strip club – became lawful non-conforming uses under the Spokane Valley Code. These same businesses are operating in the City today.

CAWA's predecessor, World Wide Video of Washington, installed the mini theaters in 2002, prior to Spokane Valley's incorporation. When the County amended the zoning code in 1999, it changed the definition of "adult entertainment establishment". Whereas the previous definition referred specifically to "motion picture theaters", the new definition employed the terms "adult arcade establishment", "adult arcade device", and "adult arcade station", which are similar, but not identical, to the terms presently employed in Chapter 5.10 of the Spokane Valley Code. The issue is whether the definitions employed in the amended County ordinance were applicable to theaters, meaning rooms that accommodate multiple viewers, or whether they are meant to apply only to peep shows, meaning single occupancy viewing booths. In the latter case, CAWA's mini theaters were lawful at the time of their installation and now qualify as lawful non-conforming uses under the current Spokane Valley Code.

III. REPLY TO CITY'S OVERBREADTH AND NARROW TAILORING ARGUMENTS

A statute is unconstitutionally overbroad if it applies on its face to protected expression and if it reaches a substantial amount of constitutionally protected conduct. *Seattle v. Huff,* 111 Wash. 2d 923, 925, 767 P. 2d 572, 573 (1989); *Seattle v. Immelt,* 173 Wash 2d 1, 6, 305, 307 (2011). An unconstitutional statute may not be upheld merely because the government promises to exercise its discretion and use it responsibly. *United States v. Stevens,* 559 U.S. 460, 480, 130 S. Ct. 1577, 1591 (2009).

A regulation is narrowly tailored so long as it promotes a governmental interest that would be achieved less effectively absent the regulation and it does not burden substantially more speech that is necessary to further the government's legitimate interests. *Ward v. Rock Against Racism,* 491 U.S. 781, 798-799, 109 S. Ct. 2746, 2758 (1989); *Berger v. Seattle,* 569 F. 3d 1029, 1041 (9th Cir. 2009). An adult entertainment zoning ordinance is not narrowly tailored if it applies to categories of theaters not shown to produce unwanted secondary effects. *City of Renton v.Playtime, Theaters, Inc.,* 475 U.S. 41, 52, 105 S. Ct. 925, 931 (1986).

The tests for over breadth and narrow tailoring are similar if not identical. Defendants maintain that the definitions of "adult arcade establishment", "adult arcade station", and "adult arcade device" found in SVMC Chapter 5.10 and Appendix A to the zoning code are defective under both tests.[1] Indeed, what makes them defective is the extent to which they are facially applicable to various forms of constitutionally protected expression, some of which have nothing to do with so called secondary effects.

SVMC 5.10.010 defines an "adult arcade establishment" as:

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

Appendix A to the zoning code defines an "adult arcade establishment" as:

> A commercial premises to which a member of the public is invited or admitted and where adult arcade stations, booths

[1] The definitions of "adult arcade establishment", "adult arcade" and "adult arcade station" in Chapter 5.10 and Appendix A to the zoning code are similar but not identical. The definitions of "adult are arcade' and "adult arcade station" in Appendix A contain the phrases "in a booth setting" and "in a booth" respectively. These phrases were eliminated from the licensing code when Spokane Valley adopted Chapter 5.10. The definition of "adult arcade station" in Chapter 5.10 refers to "any enclosure" whereas the definition in Appendix A refers to "an enclosure". Defendants maintain that in spite of these differences, the two set of definitions are essentially the same for purposes of the over breadth and narrow tailoring challenges.

> **or devices** are used to exhibit or display a graphic picture, view, film, videotape of 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. (Emphasis supplied).

Under the above definitions, the terms "adult arcade station" and "adult arcade device" or "device" are employed in the disjunctive. So too are the phrases "regular basis" and "substantial part of the premises activity". Hence a commercial business containing a single "adult arcade device" would fall within the definitions of "adult arcade establishment" triggering the applicability of the licensing and zoning ordinances if the device is used on a "regular basis", regardless of whether use of the device constitutes a "substantial part of the premises activity". Furthermore, if a particular movie or video contains a "view" of "specified sexual activity" the zoning and licensing ordinances are applicable, regardless of whether sexually oriented content is not the "predominant emphasis" of the movie. In this regard, it is useful to contrast Spokane Valley's ordinances with definitions contained in other municipal codes. For example, Spokane Municipal Code 17A.020.010 provides:

> A motion picture theater is considered an adult entertaining 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". (Emphasis supplied).

Bellevue Municipal Code 20.50.010 defines "adult theater" as:

> An enclosed building or drive-in facility used for presenting, for commercial purposes, motion pictures, films, video cassettes, cable television, live entertainment or an other such material , performance or activity distinguished or characterized by a **predominant emphasis** on the depiction, description, simulation or relation to "specified sexual activities" or "specified anatomical areas" for observation by the patrons therein. (Emphasis supplied).

The definition of "adult arcade station" in SVMC § 5.10.010 refers to "any enclosure where a patron, member of the public or customer would ordinarily be positioned...". The definition of "adult arcade station" or booth" in Appendix A refers to "An enclosure where a patron, member of the public where a patron, ember or customer would ordinarily be position positioned...". Both definitions contain a single exception for the "private office of the owner or manager". Thus in each case, the definition encompasses standard motion picture theaters as well hotels and motels featuring adult movies on pay per view television. This is particularly true of the licensing ordinance definition which refers to "any enclosure".

The City's reliance on *Gammoh v. City of La Habra,* 395 F. 3d 1114 (9th Cir. 2005) is misplaced for several reasons. First, in determining that the ordinance at issue in that case was not overbroad, the court

employed the test in *Broadrick v. Oklahoma,* 413 U.S. 601, 903 S. Ct. 2908 (1973). Id. at 1120. The *Broadrick* test is that where a regulation involves both conduct and speech, the over breadth of the statute must be not only real but substantial when judged in relation to the statute's plainly legitimate sweep. *Broadrick* at 615, 2917. *Gammoh* was a nude dancing case and the ordinance at issue attempted to regulate the conduct of dancers by requiring them to dance two feet away from patrons. In contrast, the ordinance at issue in this case regulates movies, a form of pure speech for purposes of the First Amendment. *World Wide Video, Inc. v. Tukwila,* 117 Wash. 2d 382, 388, 816 P. 2d 18 (1991). Since the regulations at issue here involve pure speech rather than expressive conduct, the *Broadrick* test is inapplicable. To the extent it calls for a more rigorous standard for determining impermissible over breadth, it doesn't apply in this case.

The over breadth challenge in *Gammoh* involved the definition of "adult cabaret dancers" as:

> any person who is an employee or a independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and or buttocks but does not involve exposure of "specified anatomical

areas" or depicting, or engaging in "specified sexual activities."

The ordinance at issue in *Gammoh* was more specific and narrowly drawn than the ordinances at issue in this case. The Court of Appeals noted that the plaintiffs were unable to cite any example of a performance to which application of the ordinance's restrictions would be over broad. *Gammoh* at 1120. The difference here is the degree of over breadth. Unlike the ordinance at issue in *Gammoh,* the City's ordinances apply on their face to a substantial amount of protected speech. This includes theaters showing movies with a limited amount of sexual content regardless of whether the sexual activity is the predominant theme of the movie. It includes premises containing a single "adult arcade device" regardless of whether the device constitutes a "substantial part of the premises activity." It includes "any enclosure" or "an enclosure" containing an "adult arcade device" which means that the definition is applicable to traditional movie theaters as well as hotels and motels which allow guests to view sexually explicit movies on pay per view television. The ordinances at issue here encompass a substantial amount of expressive activity whereas that was not the case in *Gammoh.*

The City suggests that the over breadth could perhaps be cured by judicial construction.[2] When a statute is unambiguous, it is not susceptible to judicial construction and its meaning must be derived from the plain language of the statute alone. *State v. Sullivan,* 143 Wash. 2d 162, 175, 19 P. 3d 1002, 1019 (2001). The purpose of statutory construction is to ascertain and carry out legislative intent. *Rozner v. City of Bellevue,* 116 Wash. 2d 342, 347, 804 P. 2d 24 (1991). In construing an ambiguous statute, courts may not read into it matters that are not in it and may not create legislation under the guise of interpreting the statute. *State v. Watson,* 146 Wash. 2d 947, 955-956, 51 P. 3d 66, 69 (2002). Under the doctrine of *expressio unius est exclusio alterius,* a cannon of statutory construction, expression of one thing in a statute excludes another. *State v. Delgado,* 148 Wash. 2d 723, 729, 63 P. 3d 792, 796 (2003).

The definition of "adult arcade station" in SVMC 5.10.010 is unambiguous when it refers to "any enclosure". The plain meaning of the term "any" is that the ordinance is all inclusive. The Court is therefore constrained from defining it to mean only some types of enclosure. The problem with construing the ordinance to mean "separately partitioned small rooms" as suggested by the City is that the Court has no basis for

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[2] "If deemed necessary, the Court should construe the definitions to regulate HEB but leave untouched adult movie theaters that do not consist of separately partitioned small rooms." City's Responding Brief at pp. 48-49.

ascertaining the legislative intent. Does a "small room" mean 20 persons or less, ten persons or less, or some other number? In essence, the City is asking this Court to rewrite the ordinance without any guidance from the enactors.[3] Finally, the definitions of "adult arcade establishment" in both the zoning and licensing ordinances contain but a single exception for the private office of the owner or manger. The maxim *expressio unius est exclusio alterius* precludes this Court from reading additional exceptions into the ordinance. If the City Council intended to create exceptions for standard movie theaters and hotels and motels showing x-rated movies on pay per view television, it easily could have said so.

IV. REPLY TO CITY'S ARGUMENT THAT THE LICENSING ORDINANCE DOES NOT CONSTITUTE A PRIOR RESTRAINT

Adult mini theaters are a unique medium of expression. They are different than peep shows meaning booths designed to accommodate a single patron. The City's ordinance bans them completely by providing that the "adult arcade station" may only be occupied by a single occupant and may contain only a single chair or seating surface. SVMC § 5.10.080(C)(6). It bans them by providing that "All adult arcade stations must be open to the public room so that the area inside is fully and completely visible to the manager." SVMC § 5.10.080(D)(3). Even if

[3] The Court is requested to take judicial notice of the fact that today many motion picture theaters are now operated as multiplexes where a single building is subdivided into a number of separate small theaters.

CAWA's business was fully compliant with the City's adult entertainment zoning ordinance, it would still not be able to operate its business given the restrictions in the licensing code. These restrictions apply regardless of whether a particular business allows lewd conduct or illegal activity to occur on its premises.

The restrictions mentioned herein meet the test for determining the existence of a prior restraint. A prior restraint is an official restriction on speech or other forms of protected expression in advance of publication. *Ino Ino, Inc. v. Bellevue,* 132 Wash. 2d 103, 126, 937 P. 2d 154, 168 (1997), citing *Seattle v. Bittner,* 81 Wash. 2d 747, 756, 505 P. 2d 126 (1973) and *JJR Inc. v. City of Seattle,* 126 Wash. 2d 1, 6, 891 P. 2d 720 (1995). The definition applies to licensing schemes and court orders that "effectively ban the speech". *Ino Ino* at 126. The City concedes in its brief that permitting only one occupant in a theater auditorium would "probably be an effective ban on all adult theaters." City's Responding Brief at p. 46. If the ordinance bans traditional adult theaters it also bans adult mini theaters. The City failed to address this issue in its brief, perhaps hoping that the Court would overlook it.

V. REPLY TO CITY'S ARGUMENT THAT IT IS ENTITLED TO SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF ITS ZONING ORDINANCE

A. Federal Law

Under SVMC Chapter 19.80, businesses defined therein as "adult entertainment establishments" are limited to two of the smaller zones within the City and are subject to 1000 foot set back requirements within those zones. The City's zoning ordinance relegates businesses defined therein as adult entertainment establishments to 1.2% of the City's land. Very few other land uses are zoned as restrictively under the City's zoning code as adult entertainment establishments. See the City's Matrix of Permitted and Accessory Uses attached hereto as Appendix A. Casinos, taverns, and nightclubs are not zoned as restrictively as adult entertainment establishments. According to the Defendants' expert, there are approximately 39 parcels that are zoned correctly for adult entertainment. Five of the properties are occupied by the Union Pacific Railroad and one is occupied by the Spokane Transit Authority. Nearly half of the remaining properties are occupied by big box retailers and establishes franchises and are likely subject to long term leases. All but a few of the properties are unoccupied by existing businesses. Nevertheless, according to the City, it has done enough to provide reasonable alternative avenues of communication as a matter of law.

Having decided that the city's zoning ordinance was a time place and manner regulation subject to mid level scrutiny, the Supreme Court in

Renton provided only a very general statement as to what constitutes reasonable alternative avenues of communication in the context of adult entertainment zoning. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53, 106 S. Ct. 925, 932 (1986). In that case, the district court made an uncontested finding that the city had provided 520 acres consisting of "ample, accessible real estate" including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is crisscrossed by freeways, highways and roads." Id. The Court of Appeals found that this did not constitute reasonable alternative avenues, having been persuaded by the theater's argument that practically none of the land was available for sale or lease and it was not commercially viable. Id. The Supreme Court reversed stating:

> We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, **on an equal footing with other prospective purchasers and lessees** does not give rise to a First Amendment violation. **And although we have cautioned against the enactment of zoning regulations that "have the effect of suppressing, or greatly restricting access to lawful speech**," *American Mini Theatres,* 427 U.S., at 71, n. 35, 96 S. Ct. at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related business for that matter, will be able to obtain sites at bargain prices. *See* Id. at 78, 96 S. Ct. at 2456 (Powell, J., concurring)("The inquiry for First Amendment purposes is not concerned with economic impact"). **In our view, the First Amendment requires only that Renton refrain**

> **from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance easily meets this requirement.**

Id. at 54, 932 (Emphasis supplied).

More recently, the Supreme Court dealt with the constitutionality of adult entertainment zoning in *City of Lost Angeles v. Alameda Books,* 535 U.S. 425, 122 S. Ct. 1728 (2002). That case was a plurality opinion, dealing with the constitutionality of a zoning ordinance providing that an adult bookstore and peep show could not be located in the same building. The question in that case was what did the city have to show to establish the sufficiency of the legislative record as to the existence of adverse secondary effects and whether the evidence in the legislative record is subject to challenge by the regulated businesses. The district court granted summary judgment in favor of the adult entertainment plaintiffs holding that the legislative record justifying the regulation was insufficient as a matter of law. The Supreme Court reversed and remanded for further proceedings. Justice O'Connor wrote the plurality opinion in which she concluded that the legislative record was sufficient to overcome summary judgment but the record could be refuted by countervailing evidence presented on the behalf of the adult businesses. Id. at 438, 439, 1736.

Justice Kennedy wrote a concurring opinion in *Alameda Books* in

which he discussed the City's burden in seeking to uphold the constitutionality of adult entertainment zoning regulations. Justice Kennedy's concurrence is regarded as the controlling opinion in the case. See *Center for Fair Public Policy v. Maricopa County, Arizona,* 336 F. 3d 1153, 1160 (9th Cir. 2005), citing *Marks v. United States,* 430 U.S. 188, 193, 197 S. Ct. 990 (1976), ("When a fragmented court decides a case and no single result enjoys the assent of five justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds."). Justice Kennedy wrote that in order to prove that its ordinance is content neutral rather than content based; the city must show that it was intended to reduce secondary effects without substantially reducing protected speech. He stated:

> In *Renton,* the Court determined that while the material inside the adult bookstore and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, **as far as possible, untouched.** If a City can reduce crime and blight associated with certain speech by the traditional exercise of its zoning power, and at **the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection**. This is so even if the measure identifies the problem outside by reference to the speech inside – that is, even if the measure is in that sense content based.
>
> **On the other had, a city may not regulate the secondary effects by suppressing the speech itself**. A city may not, for example, impose a content-based fee or tax. (Cite and internal quote omitted). This is true even if the government

> purports to justify the fee by reference to secondary effects. (Cite omitted). Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose **and effect** of a zoning ordinance must be to reduce secondary effects **and not to reduce speech.**

Alameda Books, supra, at 445, 1739, 1740, (emphasis supplied).

While the Supreme Court has indicated that municipalities cannot enact ordinances which have the effect of "suppressing or greatly restricting access to lawful speech", the lower federal courts have all but ignored this injunction when it comes to deciding what constitutes a reasonable opportunity to open and operate an adult entertainment business. Thus the Ninth Circuit has stated that a property is considered to be unavailable to an adult use seeking to relocate only when it is unreasonable to believe that the property well ever become available to any commercial enterprise. *Topanga Press, Inc. v. City of Los Angeles,* 989 F. 2d 1524, 1531 (9th Cir. 1993). Lost profits, higher over head costs, and commercial feasibility is irrelevant. Id. It is also not relevant that sites would not be welcomed by landlords. Id. at 1532. According to the Fifth Circuit in *Woodall v. City of El Paso,* 49 F. 3d 1120, 1124 (5th Cir. 1995), a property is unavailable only if it has legal or physical characteristics that render it unavailable to any kind of development. According to the Second Circuit, property must be suitable for some

generic commercial business but it need not be suitable for a particular class of commercial business. *T.J.S. v. Town of Smithtown,* 598 F. 2d 17, 28 (2nd Cir. 2010). Thus, one cannot exclude a property that would only suitable for a large industrial warehouse or a big box retailer. Id. It is also irrelevant that a site is currently occupied or that the owner might be unwilling to sell or lease to a sexually oriented business. Id. The number of legally zoned sites must only be equal to or greater than the number of adult businesses presently in existence. *Big Wolf Discount Movie Sales, Inc. v. Montgomery County,* 256 F. Supp. 2d 385 (D. Maryland 2004). One cannot exclude land that is subject to a restrictive covenant that prohibits sale or lease to a sexually oriented business. *Maages Auditorium v. Prince George County,* 2014 WL 884009 (D. Maryland 2014).

Collectively, the lower court federal cases stand for the proposition that municipalities can pretty much do whatever they want when it comes to adult entertainment zoning and need only pay lip service to the First Amendment. Thus, a handful of legally zoned sites would seem to be sufficient regardless of whether the particular properties are occupied by well established businesses, subject to restrictive covenants, or completely unsuited for development by a small commercial business. The Supreme Court's concept of "equal footing" seems to have been lost in the shuffle. The lower court federal analysis ignores the obvious that market forces

can become an insurmountable barrier when the opportunities for relocation are greatly restricted and that the inevitable effect will be substantially diminished expression.

This Court is free to adopt its own reasonable interpretation of *Renton* and *Alameda Books.* On matters of federal law, this Court is bound only by the decisions of the United States Supreme Court. *W.G.Clark Construction Company v. Pacific Northwest Regional Council of Carpenter,* 180 Wash. 2d 54, 62, 322 P. 3d 1207, 1211 (2014). Decisions of the federal circuit courts are entitled to great weight but are not binding. Id. This Court can and should adopt Justice Kennedy's position in *Alameda Books.* Applying this standard, and viewing the evidence in the light most favorable to the non-moving party, Spokane Valley's ordinance does not leave the "quantity and accessibility of the speech ...substantially undiminished." *Alameda Books, supra,* at 445, 1739, 1740. This gives rise to an issue of material fact and the trial court erred in granting summary judgment on this claim.

B. State Constitutional Law

To a certain extent, market forces represent an obstacle to any new business seeking to find a location. Some properties are occupied by well established long term uses. Some properties may be prohibitively expensive to develop. Some properties lend themselves to development

by certain types of uses and not others. Some properties may be subject to restrictive covenants or have other impediments to development such as inadequate parking spaces or the presence of environmental hazards. Some property owners, for personal reasons, may be unwilling to rent or sell to a particular type of use. The teaching of *Renton* is that adult businesses have to deal with these adversities like any other new business seeking to open and operate. However, in a case such as this one, where the City through use of its zoning power greatly restricts the area where a new adult business may locate, barriers imposed by market forces become insurmountable obstacles.[4] This is the effect of the Spokane Valley ordinance, which amounts to a prior restraint.

Prior restraint doctrine restricts the government from suppressing expression before it is communicated even though such expression may be subject to punishment after it is communicated. Saxer, *Zoning Away First Amendment Rights,* 53 Journal of Urban and Contemporary Law 1, 12. According to Professor Saxer:

> Zoning legislatively restricts in advance activity that may be protected under the First Amendment and, at times, administratively requires prior approval of First Amendment exercise in the form of special approval or permits. Thus zoning regulations that are designed to prevent offenses – such as secondary effects that rise to the

[4] An adult business owner unable to find available property in the permitted areas does not have the opportunity to look elsewhere in the city afforded by the City's zoning ordinances to similar non-sexually oriented businesses.

> level of a nuisance – are a classic example of a prior restraint based upon executive approval, in the form of zoning action, rather than subsequent punishment, in the form of a common law nuisance action.

Id. at 14.

She goes on to state:

> Zoning actions, either legislative or administrative, are prior restraints when they unconstitutionally abridge First Amendment rights because "the constitutional right to freedom of expression can be abridged only in the presence of a truly compelling governmental interest and ...only on an independent judicial forum can adequately decide whether particular expression is unprotected by the First Amendment." (Cite omitted). Allowing local governments to prohibit, segregate, or otherwise designate the proper location of certain land uses, either by regulation or special exception, presents the danger of permitting local officials to discriminate against constitutionally protected activities by reference to "viewpoint-neutral criteria such as potential parking, noise, and litter problems," particularly when local officials are inclined to stretch such concepts to disallow a particular land use that might be controversial and "offensive to the politics or sensibilities of some citizens."

Id. at 16. (Cite omitted).

The notion that prior restraint doctrine prevents local governments from restraining speech in advance of publication but may punish subsequent misconduct is completely consistent with and supported by the plain text of Article 1, Section 5, which provides:

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

The view that prior restraint doctrine prohibits restraints on speech in advance of publication was adopted by the Washington Supreme Court in *Seattle v. Bittner,* 81 Wash. 2d 747, 756, 505 P. 2d 126, 131 (1973) and again in *JJR, Inc. v. Seattle,* 126 Wash. 2d 1, 7, 891 P. 2d 720, 723 (1995), both of which dealt with licensing of sexually oriented expression.[5] *JJR* is instructive in the sense that it did not involve an absolute ban on expressive activity. The ordinance at issue in that case was a licensing ordinance which failed to provide for a mandatory stay of proceedings pending judicial review of a license suspension. That was held to constitute a restraint on future speech so as to require enhanced protection under Article 1, Section 5. The fact that the person appealing his or her license suspension could nevertheless obtain a stay from the court in its discretion did not cure the defect. The relevance of *JJR* to this case is that the degree of restraint on future speech mandated by the Spokane Valley zoning ordinance, which relegates adult entertainment business to a miniscule part of the city, is greater than any restraint imposed by the Seattle licensing ordinance at issue in *JJR.* Persons appealing their license suspensions in *JJR* were free to apply for a discretionary stay so the only

[5] "Although license denial acts as a punishment for unlawful activity, it nevertheless constitutes a prior restraint because it suppresses future, protected expression. *JJR, Inc. v. Seattle, supra,* at 7, 23, citing *Bittner.*

restraint at issue in that case was the possibility that a court might decide not to issue a stay.

Viewed correctly, the Spokane Valley zoning ordinance is a prior restraint and not merely a time place and manner regulation. A time place and manner regulation is a place restriction that allows for "ample alternative avenues of communication" which is something that the Spokane Valley Ordinance fails to do. See, *City of Renton v Playtime, Theaters, Inc., supra.* By confining adult entertainment uses to a small area of the city wherein they are placed at an extreme disadvantage vis-à-vis market forces, the Spokane Valley ordinance imposes a discernable restraint on speech in advance of publication, even if, in theory, it does not amount to an absolute ban.

The decisions of the Oregon Supreme Court in *City of Portland v. Tidyman,* 306 OR. 174, 759 P. 2d 2060 (1988) and in *City Nyassa v. Dufloth,* 339 OR 330, 121 P. 3d 639 (2005) are consistent with this analysis. Interpreting language in the Oregon Constitution similar to free speech clause of the Washington Constitution, the Oregon Supreme Court rejected the holding in *Renton.* Instead, the Court held that in enacting zoning and licensing ordinances applicable to expressive activity, cities cannot rely on a legislative record documenting the existence of so called secondary effects, but instead the ordinance in question must require proof

of secondary effects in order to justify its application in a particular case. This approach rejects the suppression of speech in advance of publication but instead seeks to punish only those who have abused their free speech rights in the past, thus prohibiting prior restraints.

In *Ino Ino, Inc. v. City of Belllvue,* 132 Wash. 2d 103, 121, 037 P. 2d 154, 186 (1997), the Court stated that, "...the text and history of Const. Art. 1, § dictate enhanced protection under the State Constitution in the context of adult entertainment regulations that impose prior restraints." Undoubtedly, this statement was intended by the Court to be more than an idle promise and meaningless rhetoric. The evidence presented by the Defendants in response to the City's motion for summary judgment tends to show that Spokane Valley's zoning ordinance is not merely a place restriction. Rather, it imposes a prior restraint on future speech regardless of whether a particular business has abused its free speech rights in the past. The Trial Court erred in granting summary judgment on this issue.

VI. CONCLUSION

The Court should grant the relief requested in the Appellant's Opening brief.

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DATED: September 25, 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 25th day of September, 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: September 25, 2014

Gilbert H. Levy, WSBA 4805
Attorney for Appellants

APPENDIX A

Chapter 19.120
PERMITTED AND ACCESSORY USES

Sections:

19.120.010 General.

Printing instructions

A. Uses allowed in each zone district are shown in SVMC 19.120.050, Permitted use matrix.

B. Uses within the shoreline jurisdiction are also subject to additional use restrictions pursuant to Chapter 21.50 SVMC, Shoreline Management and Restoration Program. (Ord. 14-003 § 3 (Att. A), 2014; Ord. 13-003 § 3 (Exh. A), 2013; Ord. 12-022 § 3 (Att. A), 2012; Ord. 12-021 § 4, 2012; Ord. 11-021 § 1, 2011; Ord. 10-005 § 1 (Exh. A), 2010; Ord. 09-036 § 6, 2009; Ord. 09-017 § 1, 2009; Ord. 09-010 § 1, 2009; Ord. 09-006 § 5, 2009; Ord. 08-026 § 1, 2008; Ord. 08-002 § 1, 2008; Ord. 07-015 § 4, 2007).

19.120.020 Use categories.

Uses are assigned to the category that describes most closely the nature of the use. Uses have been classified into general use categories and subcategories. Definitions and examples are provided in SVMC Appendix A, Definitions. (Ord. 14-003 § 3 (Att. A), 2014).

19.120.030 Uses not listed.

If a use is not listed, the community development director may determine, based on SVMC Appendix A, Definitions, the use categories and subcategories:

A. That a proposed use is substantially similar to other uses permitted or not permitted in the respective zones; and

B. Whether the use should be permitted or not permitted in the zoning district. (Ord. 14-003 § 3 (Att. A), 2014).

19.120.040 Explanation of table abbreviations.

The following describe the abbreviations used in SVMC 19.120.050, Permitted use matrix:

A. Permitted uses are designated with a "P." Permitted uses are allowable uses within a zone district.

B. Conditional uses are designated with a "C." Conditional uses are authorized pursuant to Chapter 19.150 SVMC.

C. Accessory uses are designated with an "A." Accessory uses are allowed when they are subordinate to, or incidental to, the primary use on the same lot.

D. Temporary uses are designated with a "T." Temporary uses are permitted for a limited period of time or pending the occurrence of an event pursuant to Chapter 19.160 SVMC.

E. Regional siting uses are designated with an "R" and applies to uses that are of statewide or regional/countywide significance. They are subject to the Spokane County regional siting process for essential public facilities.

F. Uses subject to supplemental use regulations are designated with an "S." The "Supplemental Conditions" column in SVMC 19.120.050, Permitted use matrix, provides a reference to the applicable supplemental use regulation. Other requirements may apply, including but not limited to, parking, landscaping, stormwater, and engineering

requirements. Where only one SVMC provision is cited for a given use, such provision shall apply to the use for all of the zoning districts designated with an "S" in the permitted use matrix.

G. Prohibited uses, within a zone district, are designated with a blank cell.

H. Explanation for the zoning district abbreviations is provided in SVMC 19.20.010, Zoning districts. (Ord. 14-003 § 3 (Att. A), 2014).

19.120.050 Permitted use matrix.

Permitted Use Matrix

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts									Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Agriculture and Animal																	
Animal processing/handling																P	
Animal raising and/or keeping	S	S	S	S	S	S									S	S	SVMC 19.40.150. Keeping of swine is prohibited
Animal shelter								S							P	P	SVMC 19.60.080(B)(6)
Beekeeping, commercial																P	
Beekeeping, hobby	S	S	S														SVMC 19.40.150(C)
Community garden	S	S	S	S	S	S	S	S						S			Produce may be sold pursuant to RCW 36.71.090 as adopted or amended
Greenhouse/nursery, commercial												P	P		P	P	
Kennel							S	S			S	S	S		P	P	See zoning districts for conditions
Marijuana production												S	S		S	S	Chapter 19.85 SVMC
Orchard, tree farming, commercial															P	P	
Riding stable														C	P	P	
Communication Facilities																	
Radio/TV broadcasting studio							P	P		P		P	P		P		
Repeater facility	P	P	P	P	P	P				P	P	P	P		P	P	
Telecommunication wireless antenna array	S	S	S	S	S	S	S	S	C	C	S	S	S		S	S	Chapter 22.120 SVMC

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts										Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Telecommunication wireless support tower	C	C	C	C	C	C	S	S	C	C	S	S	S		S	S	Chapter 22.120 SVMC
Tower, ham operator	S	S	S	S	S	S	S	S	C	C	S	S	S		S	S	SVMC 19.40.110(A)
Community Services																	
Community hall, club, or lodge				P	P	P	P	P		P	P	P	P	P			
Church, temple, mosque, synagogue and house of worship	P	P	P	P	P	P	P	P	P	P	P	P	P				
Crematory								P				P	P		P	P	
Funeral home								P				P	P				
Transitional housing						C											
Day Care																	
Day care, adult	P	P	P	P	P	P	P	P		A	P	P	P		A	A	
Day care, child (12 children or fewer)	P	P	P	P	P	P	P	P	A	A	P	P	P		A	A	
Day care, child (13 children or more)	C	C	C	C	P	P	P	P	A	A	P	P	P		A	A	
Education																	
Schools, college or university							P	P	P	P		P	P				
Schools, K through 12	P	P	P	P	P	P	P	P			P	P	P				
Schools, professional, vocational and trade schools						P	P	P	P	P		P	P		P	P	
Schools, specialized training/studios							P	P	P	P	P	P	P				
Entertainment																	
Adult entertainment and retail												S	S				Chapter 19.80 SVMC
Carnival, circus							T	T				T	T		T	T	
Casino							P	P				P	P				

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts									Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Cultural facilities							P	P	P	P	P	P	P				
Exercise facility					A	A	P	P	A	P	P	P	P		A	A	
Off-road recreational vehicle use															P	P	
Major event entertainment													P		P	P	
Racecourse								P					P		P	P	
Racetrack															P	P	
Recreation facility							P	P				P	P	A	P	P	
Theater, indoor							P	P		P		P	P				
Food and Beverage Service																	
Espresso establishment							P	P	P	P	P	P	P	A	P	P	
Mobile food vendors							S	S	S	S	S	S	S	S	S	S	SVMC 19.60.010(L),19.70.010(B)(2)
Restaurant, full service							P	P	A	P	P	P	P		P	P	
Restaurant, drive-through or drive-in							P	P		A	C	P	P		P	P	
Tavern/night club							P	P			P	P	P		P	P	
Group Living																	
Assisted living/convalescent /nursing home				P	P	P	P	P	P	P							
Community residential facilities (6 residents or less)	P	P	P	P	P	P	P	P									
Community residential facilities (greater than 6 residents under 25)				P	P	P	P	P									
Dwelling, congregate					P	P	P	P				P					
Industrial, Heavy																	
Assembly, heavy																P	
Explosive storage															P	P	

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts										Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Hazardous waste treatment and storage															S	S	SVMC 21.40.060
Manufacturing, heavy																P	
Power plant (excluding public utility facilities)																P	
Processing, heavy																P	
Solid waste recycling/transfer site															P	P	
Wrecking, junk and salvage yard															C	P	
Industrial, Light																	
Assembly, light							P	P		P		P	P		P	P	
Carpenter shop								P					P		P	P	
Machine shop or metal fabrication								P							P	P	
Manufacturing, light								P							P	P	
Marijuana processing												S	S		S	S	Chapter 19.85 SVMC
Plastic injection molding, thermoplastic							P	P				P	P		P	P	
Processing, light															P	P	
Industrial Service																	
Carpet/rug cleaning, dry cleaning, laundry, linen supply plant, commercial															P	P	
Contractor's yard															P	P	
Laboratories (bio safety level 2)							P	P							P	P	
Laboratories (bio safety level 3)								P							P	P	
Laboratories (bio safety level 4)															P	P	

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts										Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Recycling facility								S				S	S		P	P	SVMC 19.60.050(B)(4), 19.60.060(B)(4), 19.60.080(B)(5)
Lodging																	
Bed and breakfast	P	P	P	P	P	P		P	P	P							
Hotel/motel							P	P		P		P	P		P		
Recreational vehicle park/campground												C	S				SVMC 19.60.010
Medical																	
Ambulance service							P	P		P		P	P		P	P	
Hospital							P	P		P		P	P				
Hospital, psychiatric and substance abuse	R	R	R	R	R	R	R	R	R	R		R	R		R	R	
Hospital, specialty							P	P		P		P	P		A	A	
Laboratories, medical and diagnostic							P	P		P		P			P		
Medical, dental, and hospital equipment supply/sales							P	P		P		P	P		P		
Medical/dental clinic							P	P	P	P		P	P		P		
Office																	
Animal clinic/veterinary					P	P		P			S	P	P		P		Chapter 19.60 SVMC. See also supplemental conditions for kennels
Office, professional					P	P	P	P	P	P	P	P	P		P	P	
Parks and Open Space																	
Cemetery	P	P	P	P								P					
Golf course	S	S	S	S	S	S							P	S	P	P	Chapter 22.60 SVMC
Golf driving range	C	C	C	C	C	C	P						C	S	P	P	Chapter 22.60 SVMC
Parks	P	P	P	P	P	P	P	P	P	P	P	P	P	P			
Public/Quasi-Public																	
Community facilities	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	See zoning districts for conditions

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts									Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Essential public facilities	R	R	R	R	R	R		R		R	R	R	R		R	R	Chapter 19.90 SVMC
Public utility distribution facility	S	S	S	S	S	S	S	S	P	P	P	P	P	P	P	P	See zoning districts for conditions
Public utility transmission facility	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	See zoning districts for conditions
Tower, wind turbine support										C	S	S	S		S	S	SVMC 19.60.050(B)(2)
Residential																	
Dwelling, accessory units	S	S	S	S													SVMC 19.40.100
Dwelling, caretaker's residence								S			S	S	S		S	S	SVMC 19.60.060(B)(1)
Dwelling, duplex			P	P	P	P	P	P									
Dwelling, multifamily				P	P	P	P	P	S	S							SVMC 19.60.020(B)(2)
Dwelling, single-family	P	P	P	P	P	P	P	P	S	S							SVMC 19.60.020(B)(2)
Dwelling, townhouse				P	P	P	P	P	P		P						
Manufactured home park		S	S	S	S	S											SVMC 19.40.130
Retail Sales																	
Antique store							P	P			P	P	P				
Appliance sales/service							P	P				P	P		S	S	Retail sales may be accessory in industrial zones, only if manufactured/assembled on premises
Bakery, retail							P	P	P	P	P	P	P		S	S	Floor area limited to 10% of gross leasable floor area (GLFA) not to exceed 1,000 sq. ft.
Building supply and home improvement and hardware store							P	P			S	S	P		P	P	Floor area limited to 50,000 sq. ft. or less
Candy and confectionery							P	P	P	P	P	P	P		P	P	
Clothes retail sales							P	P			P	P	P				
Convenience store							P	P	S	S	P	P	P		P	P	SVMC 19.60.020

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts										Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Department/variety store							P	P			S	P	P				Floor area limited to 50,000 sq. ft. or less
Educational and hobby store							P	P	P	A	P	P	P		A	A	
Equipment sales, repair, and maintenance								P				P	P		P	P	
Florist shop							P	P	A	A	P	P	P		P		
Food sales, specialty/butcher shop/meat market/specialty foods							P	P			S	P	P				SVMC 19.60.040(B)(3)
General sales/service							P	P	A	A	P	P	P		P	P	
Gift shop							P	P	A	A	P	P	P	A			
Grocery store							P	P			S	P	P				SVMC 19.60.040(B)(3)
Office supply and computer sales							P	P		A	P	P	P		P	P	
Landscape materials sales lot and greenhouse, nursery, garden center, retail							P	P				P	P		P	P	
Manufactured home sales												P	P		P		
Marijuana sales							S	S				S	S				Chapter 19.85 SVMC
Market, outdoor							P	P				P	P	P	P		
Pawn shop							P	P				P	P				
Pharmacy							P	P	A	P	P	P	P		P		
Secondhand store, consignment sales							P	P			P	P	P		S		SVMC 19.70.010(B)(9)
Showroom							P	P		P		P	P		P		
Specialty stores							P	P	A	A	P	P	P				
Retail Services																	
Bank, savings and loan, and other financial institutions							P	P	P	P	P	P	P		P	P	

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts										Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Barber/beauty shop							P	P	P	P	P	P	P		P		
Catering services					P	P	P	P	P	P	P	P	P				
Equipment rental shop								P				P	P		P	P	
Personal services							P	P	P	P	P	P	P				
Post office, postal center							P	P	P	P	P	P	P		P	P	
Print shop							P	P	A	P	P	P	P		P	P	
Taxidermy							P	P				P	P		P	P	
Upholstery shop								P				P	P		P	P	
Transportation																	
Airstrip, private															P	P	
Heliport															P	P	
Helistop										C		C	C		C	P	
Parking facility, controlled access							P	P		P		P	P		P	P	
Railroad yard, repair shop and roundhouse																P	
Transit center							P	P		P		P	P		P	P	
Vehicle Services																	
Automobile impound yard															P	P	
Automobile/taxi rental							P	P		P		P	P		P	P	
Automobile parts, accessories and tires							P	P				P	P		P	P	
Automobile/truck /RV/motorcycle painting, repair, body and fender works								S				S	P		P	P	Enclosed structure only. SVMC 19.60.050(B)(3).
Carwash							P	P			S	P	P		P	P	SVMC 19.60.040(B)
Farm machinery sales and repair													P		P	P	
Fueling station							P	P		P	A	P	P		P	P	

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts									Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
Heavy truck and industrial vehicles sales, rental, repair and maintenance															P	P	
Passenger vehicle, boat, and RV sales, service and repair								P				P	P		P		
Towing							P	P							P	P	
Truck stop															P	P	
Warehouse, Wholesale, and Freight Movement																	
Auction house								P				P	P		P		
Auction yard (excluding livestock)															P	P	
Catalog and mail order houses							P	P					P		P	P	
Cold storage/food locker															P	P	
Freight forwarding															P	P	
Grain elevator															P	P	
Storage, general indoors							P	P	A	A	A	P	P		P	P	
Storage, general outdoors							S	S					S		S	P	See zoning districts for conditions
Storage, self-service facility					P	P	P	P				P	P		P	P	
Tank storage, critical material above ground															S	S	SVMC 21.40.060, Chapter 21.50 SVMC
Tank storage, critical material below ground												S	S		S	S	SVMC 19.60.040, 21.40.060, Chapter 21.50 SVMC
Tank storage, LPG above ground							S	S			S	S	S		S	S	SVMC 21.40.060, Chapter 21.50 SVMC
Warehouse							P	P				P	P		P	P	
Wholesale business							P	P				P	P		P	P	

Use Category/Type	Residential Zone Districts						Commercial and Industrial Zone Districts										Supplemental Conditions
	R-1	R-2	R-3	R-4	MF-1	MF-2	MUC	CMU	GO	O	NC	C	RC	P/OS	I-1	I-2	
A = Accessory use, C = Conditional use, P = Permitted use																	
R = Regional siting, S = Permitted with supplemental conditions																	
T = Temporary use																	

(Ord. 14-008 § 3, 2014; Ord. 14-003 § 3 (Att. A), 2014).

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Please accept for filing the following attached pleading:

'Appellant's Reply Brief'

in regard to the Direct Appeal of Brian Dirks, Christine Dirks, Maressa Dirks, and CA-WA Corp, a California Corporation doing business as Hollywood Erotic Boutique, case number 89785-9.

Attached to the pleading is an accompanying declaration of service. Also attached to the reply brief is Appendix A.

Thank you,

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