No. 33140-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIAN DIRKS, CHRISTINE DIRKS, MARESSA DIRKS and CA-WA CORP, a California corporation doing business as HOLLYWOOD EROTIQUE BOUTIQUE,

Petitioners,

v.

CITY OF SPOKANE VALLEY, a Washington municipal corporation,

Respondent.

BRIEF OF RESPONDENT CITY OF SPOKANE VALLEY

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I. INTRODUCTION

CAWA Corp ("CAWA") has operated an adult entertainment establishment for several years in the City of Spokane Valley (the "City") in violation of licensing and zoning codes. CAWA opposed requests by the City to cease the illegal use. The City sued rather than take direct action against CAWA. CAWA has been free to operate during the pendency of this litigation. The City's efforts have been unrelated to the content of the speech disseminated by CAWA's adult entertainment business. CAWA has no evidence to the contrary.

Affirming the trial court will further the City's even-handed application of its adult business ordinances. CAWA will still be allowed to operate its adult-oriented merchandise sales business as a legal nonconforming use. The City has made no effort to terminate any of CAWA's legal nonconforming use rights, by amortization or otherwise.

CAWA is unable to demonstrate that the City's actions are a complete ban on any protected expression or will deprive CAWA of a constitutionally "reasonable opportunity to open and operate." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986).

II. COUNTER-STATEMENT OF THE CASE

A. The City's response to CAWA's adult entertainment business.

In the spring of 2007, as a result of a citizen complaint, the City learned that CAWA was operating an adult entertainment business at 9611 E. Sprague Ave. under the name "Hollywood Erotique Boutique" ("HEB"). CP 154; 158. The complaint stated that HEB charged admission for men, but not women, and that most of the women negotiate "services" with patrons to "do business." *Id.* The complaint stated that viewing rooms within the business were "an area where people can meet for sexual purposes." *Id.*

The City's code enforcement officer, Chris Berg, met with the manager of HEB at the site of the business in May 2007. CP 161. City personnel asked the manager for permission to inspect the business, which was granted. *Id.*

The inspection of the second floor of the business was conducted by Detective James Wakefield. CP 161; 181-182. Detective Wakefield observed several small darkened rooms of approximately ten feet in width by ten feet in length. CP 181. These rooms had closed doors. *Id.* Inside the rooms Detective Wakefield observed large-screen televisions showing erotic material. *Id.* Plastic chairs were positioned before the television screens. *Id.* He observed persons in the rooms engaged in masturbation. *Id.*

After the inspection Mr. Berg informed the manager that the adult entertainment portion of the business, operating on the second floor, would require a permit issued through the City. CP 161. The manager agreed to cease the unlawful activity until a permit could be obtained. CP 162.

Several months later Detective Wakefield returned to HEB to conduct a follow-up investigation. CP 183. On arrival he paid the $10 admission fee for access to the second floor. *Id.* He again observed multiple plastic chairs within each room. *Id.* In various rooms he observed persons masturbating. *Id.* Certain rooms had up to four occupants. *Id.*

During site visits occurring over the next several years, Detective Wakefield continued to report on activities at HEB. CP 187-204. He frequently encountered groups of persons engaged in various forms of open sexual contact. *Id.* Based on Detective Wakefield's reports, misdemeanor summonses were issued for municipal code violations and for indecent exposure. *Id.*

The City compiled a record of instances of indecent exposure in HEB's viewing rooms. CP 179. Other criminal activities occurring in or near HEB have been documented. CP 346; 404-631. In addition to indecent exposure, there has been: theft (CP 442-443; 501-514; 518-522; 528-529; 538-547); counterfeiting (CP 442-443; 626-631); threats of bodily harm (CP 446-447); and robbery (CP 486-500; 515).

Sexually explicit postings on the internet solicit illegal activity at HEB. CP 207-225. Individually-packaged condoms are offered for sale at the business for a nominal charge. CP 169.

The City exchanged correspondence with Darryl Richardson, who identified himself as director of operations for "CAWA Corp." CP 358-369. Mr. Richardson denied that HEB was subject to any requirement to obtain a license as an adult entertainment establishment. CP 367-368. He claimed that he did not understand the basis for the City's view to the contrary. CP 360-362. Mr. Richardson disputed that HEB's business was of an "adult" nature. CP 376 n.3.

B. Relevant regulatory chronology.

Adult entertainment businesses located in the City are regulated in two ways. The City requires that all adult entertainment businesses obtain and possess an adult entertainment license. CP 321. In addition, adult entertainment businesses are regulated by the City's zoning code. CP 342-343. The licensing code for adult entertainment establishments is Ch. 5.10 SVMC. The zoning code is Ch. 19.80 SVMC.

Further consideration of applicable codes is necessary because CAWA's adult entertainment business at 9611 E. Sprague Ave. dates to 2002, which precedes the incorporation of the City on March 31, 2003. CP 675; 231.

1. Sequence of licensing and zoning codes.

In resolution number 97-1052, passed by Spokane County on November 4, 1997, the County adopted an ordinance for adult entertainment licensing. CP 100-135. The County ordinance was codified virtually verbatim by the City in ordinance number 36, adopted on March 27, 2003. CP 234-295. The evolution of adult entertainment licensing within the City continued with the adoption of ordinance number 10-006 on April 13, 2010. CP 297-312. The purpose of this ordinance was to more clearly define the type of conduct allowed in adult merchandise sales establishments. CP 3717.

Setting aside licensing regulations, in 1998 the County zoned "adult entertainment establishments." CP 25; 39-58. Such businesses were prohibited in the B-1 zone and were prohibited in the B-3 zone if within a certain distance of other conflicting zones. CP 25.

Following a decision of the Spokane County hearing examiner, the parcel on which CAWA operates HEB was rezoned to B-3 as of January 11, 1999. CP 25; 28-36.

Because of this rezone to B-3, after January 11, 1999, the applicable County zoning code at 9611 E. Sprague Ave. was Ch. 14.628 SCC. CP 25. This zoning code was further amended when the County adopted resolution number 99-0762 on September 7, 1999. CP 26; 137-150. The main effect

of resolution number 99-0762 was the definitional separation of "adult retail use establishments" from "adult bookstores." CP 149-150. The resolution also made the definition of "adult entertainment establishment" specifically congruent with the definition found in Ch. 7.80 SCC (the licensing code). CP 146. Throughout this chronology, adult entertainment establishments occupying property zoned B-3 were prohibited if located within 1000 feet of other property zoned UR-22, UR-7, and/or UR-3.5. CP 25; 85.

Upon its incorporation, the City adopted the County zoning regulations as the City's interim regulations. CP 231. Under these regulations, HEB's location at 9611 E. Sprague Ave. remained zoned B-3. CP 231; 877; 882-887. As with the applicable zoning code in the County, under the new City code the subject site was prohibited as an adult entertainment use because it was within 1000 feet from property zoned UR-22. CP 877. HEB has, at all relevant times, been located within 1000 feet of property zoned UR-22. CP 861; 877. This fact has been true dating back at least to 1998. CP 861; 864-873.

At no time has CAWA or HEB possessed a license to operate an adult entertainment establishment at the property, whether under the jurisdiction of the County or the City. CP 26; 231.

2. Synopsis of applicable codes.

The zoning code, Ch. 19.80 SVMC, contains definitions applicable to "adult entertainment establishments" that are the same as those contained in the former County licensing ordinance. CAWA agrees that the definitions in the current City zoning and licensing codes are "essentially the same." Br. 15; 22 n.7; 42; 60.

Under the current licensing code, an "adult arcade establishment" is a type of "adult entertainment establishment." SVMC 5.10.010. The term "adult arcade establishment" is defined to include "adult arcade stations or adult arcade devices." SVMC 5.10.010. With respect to "adult arcade devices" the SVMC uses the following definition:

> 'Adult arcade device,' sometimes also known as a 'panoram,' 'preview,' 'picture arcade,' 'adult arcade,' or 'peep show,' ***means any device*** which, for payment of a fee, membership fee or other charge, ***is used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activities or sexual conduct.*** All such devices are denominated under this chapter by the term 'adult arcade device.' The term 'adult arcade device' as used in this chapter does not include other games which employ pictures, views, or video displays, or gambling devices which do not exhibit or display adult entertainment. SVMC 5.10.010 (emphasis added).

The terms "sexual conduct" and/or "specified sexual activities" are defined by SVMC 5.10.010.

"Adult arcade stations" are defined as "any enclosure where a patron, member, or customer would ordinarily be positioned while using an adult arcade device." *Id.*

C. Key factors of HEB relating to code definitions.

HEB's business consists of operations on two floors, both of which are regularly held open to the public for commercial activities. CP 178. The ground floor is characterized by the retail sale of various adult-oriented items, such as videos, sex toys, and lingerie. *Id.* The second floor consists of a series of small darkened viewing rooms with a television screen in each room. *Id.* Access to the second floor viewing rooms is obtained by paying a fee to a manager located downstairs. *Id.*

The source of the images on the television screens is a series of DVD players controlled by the manager. CP 178-179. The images on the televisions consist of a variety of specified sexual activities and sexual conduct. CP 155; 166; 178-179; 193; 407-408; 422-423.

D. Proceedings in the trial court.

The City filed a motion for declaration of public nuisance, code violations, and warrant of abatement. CP 644-645. CAWA responded to the City's motion and also filed its own cross motion for partial summary judgment. CP 648-672.

CAWA argued -- and the City agreed -- that an order of abatement would be premature until the constitutionality of the zoning ordinance could be analyzed under *Renton*'s test for reasonable alternative avenues of communication. CP 857; 3867; 3894.

On April 5, 2013, the court entered an order declaring a public nuisance (but not ordering abatement) based on HEB's unlicensed adult entertainment establishment.[1] CP 3916-3918. Because HEB was not licensed, it could not be a legal nonconforming use and was therefore also in violation of the zoning code since it was within 1000 feet of another disqualifying zone. CP 3917. The court denied CAWA's cross motion for summary judgment. CP 3912-3915.

After a period of discovery, the City filed a motion for summary judgment on all remaining issues including the constitutionality of the zoning code. CP 3919-3920. On December 20, 2013, the court granted the City's motion and issued a warrant of abatement. CP 4481-4485; 4500-4502. The court's order exempted the aspects of HEB's business that did not constitute adult entertainment (i.e., the adult merchandise sales operations were unaffected). CP 4484.

III. ARGUMENT

A. Standard of review.

Review of a decision to grant summary judgment is de novo. *Simpson Tacoma Kraft Co. v. Dep't of Ecology,* 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). This Court may affirm the trial court on any grounds supported by the record. *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65

[1] Any violation of Ch. 5.10 SVMC is a public nuisance under SVMC 5.10.160. Any violation of the zoning code is also a public nuisance under SVMC 17.30.010.

P.3d 696 (2003). The trial court's declaratory judgment in favor of the City is also subject to de novo review. *City of Spokane v. Spokane Civil Serv. Comm'n*, 98 Wn. App. 574, 578, 989 P.2d 1245 (1999).

B. Overview of intermediate scrutiny.

The same intermediate scrutiny analysis applies to both the City's licensing regulations (Ch. 5.10 SVMC) and the zoning regulations (Ch. 19.80 SVMC). Because CAWA agrees that the applicable definitions of each code are essentially the same, this brief consolidates its discussion of both regulations except where separate treatment is required. This approach will allow this Court to review CAWA's arguments on the unconstitutionality of the City's licensing code and thereby respond to CAWA's complaint that the trial court erroneously denied it standing to challenge Ch. 5.10 SVMC.

C. Basis for applying intermediate scrutiny.

The relevant framework was established in *Renton*, which remains the touchstone. *See Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1036 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 762 (2011). *Renton* was preceded by the almost equally important case of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In *Young*, the Court recognized that government may legitimately use the content of erotic materials "as the basis for placing them in a different classification from other motion

pictures" without violating the First Amendment. *Young*, 427 U.S. at 70-71. This result followed from the Court's view that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate...." *Id.* at 70.

Subsequent cases have applied *Renton* in various adult movie theater contexts, including not only zoning regulations but also regulations governing the physical features of adult theaters (e.g., rooms must be visible by direct line of sight to adjacent rooms; an employee must monitor activities in the rooms; viewing rooms must have a certain level of lighting). *See Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982); *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990); *Berg v. Health & Hosp. Corp.*, 865 F.2d 797 (7th Cir. 1989); *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir. 1986).

The clearest recent statement of the framework is *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996 (9th Cir. 2007):

> ... the *Renton* inquiry proceeds in three steps: First, the ordinance cannot be a complete ban on the protected expression. Second, the ordinance must be content-neutral or, if content-based with respect to sexual and pornographic speech, its predominate concern must be the secondary effects of such speech in the community. 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.* at 1001 (citation omitted).

1. The City has not banned any speech by licensing and zoning adult entertainment businesses.

The first inquiry is whether the City's adult entertainment regulations are "a complete ban on the protected expression." *Id.* Ch. 5.10 SVMC prohibits only the dissemination of graphic sexual images subject to licensing the locations in which they are shown (with restrictions on number of occupants, numbers of chairs, and visibility to management, among other matters). It is not a complete ban. "The ordinance is therefore properly analyzed as a form of time, place, and manner regulation." *Renton,* 475 U.S. at 46.

The same analysis may be applied to the City's zoning code, Ch. 19.80 SVMC. Zoning regulations targeting adverse secondary effects of sexually oriented businesses are not subject to strict scrutiny because "the zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Alameda Books,* 535 U.S. 425, 448-449 (2002) (Kennedy, J., concurring).

The content-neutrality of a local regulation depends partly on the text of the adopting ordinance. *See World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1191 (9th Cir. 2004) (purpose statements endorsed content neutrality). Statements corresponding to this inquiry can be found in each code relevant here.[2] CP 100; 101; 234; 274-275; 297; 761.

[2] A statement from the City zoning code, Ch. 19.80 SVMC, is illustrative: "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

2. The licensing and zoning regulations target adverse secondary effects and have no effect on the content of what is disseminated.

The second step of the *Renton* framework considers whether a regulation is designed to remedy secondary effects of speech in the community. *Fantasyland Video,* 505 F.3d at 1001. This inquiry is guided by evaluation of the primary motivation behind the regulation. *See Renton,* 475 U.S. at 47; *Gammoh v. City of La Habra*, 395 F.3d 1114, 1123 (9th Cir. 2005), *cert. denied*, 546 U.S. 871 (2005).

Courts "generally accept that a regulation's purpose is to combat secondary effects if the enactment can be justified without reference to speech." *Gammoh,* 395 F.3d at 1124. None of the various regulations' statements of purpose refers to the erotic content of speech. They address non-speech considerations such as public health and criminal conduct.

Courts will also consider "objective indicators of intent" beyond mere statements of purpose. *Id.* This requires consideration of the materials that were before the legislative body when it enacted the regulations.

The record before the City Council prior to enactment of the zoning code can be found at CP 889-3142. The record relating to the adoption of

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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." CP 342.

the licensing regulations is at CP 3144-3859. Both show that the City acted on a concern about secondary effects as opposed to any consideration of the content of any protected expression.

The record includes indices listing: studies conducted in other cities; relevant recent court decisions; items of personal testimony; police reports; and health reports. CP 890; 3146. The record also includes materials generated directly by the County and the City. CP 891-907; 3680-3695. With respect to this last category, record evidence includes instances of masturbation within adult entertainment establishments, including involving multiple occupants in each viewing area (CP 3682-3683); the presence of unlawful alcoholic beverages in the viewing areas (CP 3683); further instances of multiple-occupant masturbation (CP 3684-3685; 3689-3690; 3692-3693); observations of illegal drug use (CP 3692); and observations of prostitution. *Id.*

CAWA does not argue that the record indicates a motive to reduce protected speech. CAWA has no evidence that the local governments did not rely on evidence "reasonably believed to be relevant." Because the record "compares favorably" with the evidence presented in other cases, precedent "commands that [the Court] should not stray from a deferential standard in these contexts, even when First Amendment rights are implicated through secondary effects." *Dream Palace v. County of*

Maricopa, 384 F.3d 990, 1015 (9th Cir. 2004) (quotation omitted); *see also World Wide Video of Washington*, 368 F.3d at 1190 n.4.

D. Intermediate scrutiny applied.

To apply intermediate scrutiny, *Renton* turns to analysis of whether the regulation "is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication." *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1166 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004).

1. Substantial government interest.

The "substantial government interest" prong is readily satisfied. Courts have found that evidence of pornographic litter and public lewdness, standing alone, "was sufficient to satisfy the 'very little' evidence standard of *Alameda Books*." *World Wide Video of Washington,* 368 F.3d at 1195 (citation omitted). On this topic, "anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects...." *Id.* 1196-1197 (quotation omitted).

Courts have found a substantial interest unrelated to expression in the presence of "rampant masturbation at a commercial property open to the public" because this "may rationally trigger sanitation concerns and impair

the right of other patrons to view their materials or read the accompanying articles in peace." *Fantasyland Video*, 505 F.3d at 1003. Virtually every court considering the matter has found that reducing unlawful public sexual activity is a proper concern associated with regulation of sexually oriented businesses. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1166 (citing numerous cases). The "elimination of pornographic litter, by itself, also represents a substantial governmental interest, especially as concerns protection of minors." *World Wide Video of Washington*, 368 F.3d at 1195.

To satisfy this test, the government may rely on both evidence preceding and, for rebuttal, evidence following enactment of the relevant regulations. *Alameda Books*, 535 U.S. at 441.

Evidence of public sexual activity at HEB is copious. Aside from instances mentioned above, the record contains indications of drug use and pornographic litter. CP 1267-1277. Neighboring business owners have observed sexual conduct in vehicles parked adjacent to HEB, as well as discarded "and contaminated" "toys" purchased from HEB, together with a noted "increase in criminal behavior since the start up of business of Hollywood." CP 1272. Female employees of adjacent businesses have had cause to feel threatened, particularly when arriving at work early or late in the day. *Id.* Used condoms have been found in the parking lots of adjacent

businesses. CP 1274. Other nearby persons have observed "video covers with explicit pictures of what the video's [sic] about." CP 1276.

The secondary effects with which the City was legitimately concerned have indeed been occurring both inside and outside of the HEB building.

2. Narrowly tailored.

The second prong of intermediate scrutiny asks whether the regulation is "narrowly tailored" to serve the purported government interest. *Fantasyland Video*, 505 F.3d at 1001.

This test requires demonstrating that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation and the means chosen are not substantially broader than necessary." *Fantasyland Video*, 505 F.3d at 1004 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799-800 (1989)). This test specifically disavows any requirement of showing that less drastic measures can be posited. *Fantasyland Video*, 505 F.3d at 1004. Courts have consistently applied a low threshold for finding this requirement satisfied. *Dream Palace*, 384 F.3d at 1016; *World Wide Video of Washington*, 368 F.3d at 1197 ("...it is self-evident that Spokane's asserted interest would be achieved less effectively absent the ordinances.").

CAWA disputes this element of *Renton* as applied to both the licensing regulation and the zoning regulation. Br. 37-39; 60-61. But CAWA does not address the extensive case law establishing a minimal standard for this review. CAWA ignores the settled formulation that finds this test satisfied when the stated purpose would be achieved less effectively absent the regulation and the means chosen are not substantially broader than necessary to achieve that purpose. Instead of engaging the relevant standard, CAWA cites two unrelated cases.

First, CAWA cites *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 757 F.3d 936 (9th Cir. 2011). CAWA implies that *Comite de Jornaleros* has something to do with *Renton* and sexually oriented businesses. But *Comite de Jornaleros* dealt solely with local ordinances regulating panhandling and solicitation. *Comite de Jornaleros*, 657 F.3d at 940. Day-laborers were restricted from contacting potential employers while the laborers were standing on public sidewalks. *Id.* at 941. The decision contains no reference to *Renton*. The speech at issue there occurred on public sidewalks and was of an entirely different kind. *Id.* at 945; *compare Young,* 427 U.S. at 61 (distinguishing types of speech and degrees of First Amendment protection).

CAWA's second citation on this point is *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 18 (1991). In *World Wide Video,*

this Court found that Tukwila's regulation of adult businesses that sold "take-home" merchandise was unsupportable because Tukwila failed to show that such businesses "have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows...." *World Wide Video,* 117 Wn.2d at 389.

Here, the City's regulations distinguish adult retail sales from adult entertainment establishments. *Compare* SVMC 5.10.010 (definition of "adult entertainment establishment") with SVMC Appendix A (definition of "adult retail use establishment."). CP 319; 4243. No license is required for adult merchandise sales and only the adult entertainment establishment portion of HEB's business is at issue. CP 4497-4499. The Tukwila decision upheld the local regulations that governed licensing for adult movie theaters and peep shows. *Id.* at 394. Later cases have recognized this distinction. *See, e.g., Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 136, 937 P.2d 154 (1997) (distinction between movie theaters and retail sales); *World Wide Video of Washington, Inc. v. City of Spokane,* 227 F. Supp. 2d. 1143, 1165 (E.D. Wash. 2002), *aff'd*, 368 F.3d 1168 (9th Cir. 2004) (limitation of *World Wide Video* to adult retail sales).

CAWA pursues its narrow tailoring argument by criticizing the relationship between the City's regulations and the local legislative record. CAWA levels this criticism equally against the licensing code and the

zoning code. Br. 38-39; 60-61. CAWA claims that the legislative record does not show adverse secondary effects associated with: 1) ordinary movie theaters in which sexually oriented content is not the predominant theme of the movie; and 2) hotels and motels that provide sexually oriented movies to their guests.[3]

First, CAWA's argument is wrong because it ignores the text of the relevant ordinances. The licensing regulation is applicable to HEB because it applies to sexually oriented businesses that use any device to exhibit or display in an enclosure graphic sexual images to a member of the public on a regular basis or as a substantial part of the premises' activity. SVMC 5.10.010. Ordinary movie theaters (e.g., multiplexes) are not sexually oriented businesses and do not exhibit or display graphic sexual images on a regular basis or as a substantial part of the premises' activity. The zoning code definition for a movie "theater" is unconnected to the display of graphic sexual images. *See* definitions at Appendix A hereto. Because "theater" is separately defined, and because the term "theater" is omitted from the City's adult entertainment establishment code, CAWA is wrong to claim that the City has indiscriminately failed to narrowly tailor the applicability of its adult entertainment establishment regulations. No ordinary movie theater falls under this regulatory scheme. This Court has

[3] CAWA's narrowly tailored argument is probably misplaced. CAWA's point has more to do with doctrines of overbreadth and vagueness, addressed below.

found the "general nature of a conventional motion picture theater is so well known as to be properly the subject of judicial notice." *Bitts, Inc. v. Seattle*, 86 Wn.2d 395, 398, 544 P.2d 1242 (1976).

CAWA claims that the regulations might apply to hotels and motels. But the City's zoning code also provides a specific definition for "hotel/motel." *See* definitions at Appendix A hereto. To constitute a hotel or motel, a building must offer guest rooms for lodging in exchange for compensation. *Id.* The adult entertainment operations at HEB do not meet this definition. The definition of hotel and motel has distinguishing characteristics that are not mutually shared with a business like HEB. Hotels and motels are not places held out to the public for the purpose of viewing graphic sexual images.

Second, CAWA is wrong as a matter of law. Courts have never endorsed a stringent First Amendment inquiry into the correlation between an ordinance and its legislative record regarding secondary effects. The Ninth Circuit upheld regulations even though the appellant could identify certain forms of adult entertainment performance that met the applicable regulatory definition but which were not tied to the secondary effects the regulations were designed to address. *Gammoh,* 395 F.3d at 1121. There was "no realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court. If

an overbroad application of the ordinance exists, it is insubstantial when judged in relation to the statute's plainly legitimate sweep." *Id.* at 1122 (citation and quotation omitted).

A similar argument failed in *World Wide Video of Washington*, where a challenge was made to Spokane's use of studies that failed to show that businesses possessing a de minimis quantity of sexually explicit materials would cause the same degree of adverse secondary effects as would businesses dedicating a "significant or substantial" portion of trade in such materials. *World Wide Video of Washington*, 368 F.3d at 1198-1199. The Ninth Circuit noted that "cases directly addressing the phrase 'significant or substantial' in this context have upheld its validity." *Id.* at 1198. It is unnecessary for a city's legislative record to correspond to the exact activity that it wishes to regulate: "the City is only required to rely on evidence reasonably believed to be relevant to the problem being addressed." *Gammoh,* 395 F.3d at 1127. (quotation omitted).

CAWA's basic premise on its narrowly tailored argument is mistaken. A city's legitimate interest in preserving the quality of urban life "must be accorded high respect" which prohibits "an unnecessarily rigid burden of proof" regarding the relationship of secondary effects and the relevant legislative record. *Renton*, 475 U.S. at 41-42; *see also Northend Cinema, Inc. v. Seattle*, 90 Wn.2d 709, 718, 585 P.2d 1153 (1978); *Alameda*

Books, 535 U.S. at 439; *N.W. Enter. Inc. v. FTU Inc.*, 352 F.3d 162, 180 (5th Cir. 2003), *cert. denied*, 543 U.S. 958 (2004) (common sense, not empirical proof, is sufficient).

Third, CAWA's argument fails because of a lack of contrary evidence on summary judgment. CAWA might have attempted to discredit the rationale of the City in adopting the regulations. But in order to shift the evidentiary burden back to the City regarding the suitability of the legislative record, CAWA was required to "succeed in casting direct doubt" on the rationale behind the ordinances with its own "actual and convincing evidence." *World Wide Video of Washington*, 368 F.3d at 1195 (quotation omitted). CAWA never supplied any summary judgment evidence relating to the correlation between the City's record and the intended suppression of adverse secondary effects.

E. There is no unconstitutional overbreadth.

Despite CAWA's comingling of overbreadth and narrow tailoring, courts typically treat overbreadth as a separate inquiry distinct from intermediate scrutiny under *Renton*. CAWA's standing to raise constitutional arguments relating to overbreadth and vagueness is debatable. Washington and federal courts have adopted special rules of standing for overbreadth claims in the First Amendment context. The test probably does not differ between the jurisdictions. *O'Day v. King County*, 109 Wn.2d

796, 803, 749 P.2d 142 (1988) (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). Both Washington and federal cases would deny CAWA standing for vagueness purposes. *Northend Cinema*, 90 Wn.2d at 716; *World Wide Video of Washington,* 227 F. Supp. 2d. at 1163 n.15. This brief assumes, without conceding, that CAWA has standing as to both theories.

Whether as a matter of standing or the merits -- the cases are sometimes unclear[4] -- overbreadth requires showing a deterrent effect on legitimate expression that is "both real and substantial," and that the statute cannot be "readily subject to a narrowing construction by the state courts." *Young*, 427 U.S. at 60; *State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 217 (1993). CAWA has never shown how any deterrent effect of Ch. 5.10 SVMC on legitimate expression is "both real and substantial." CAWA speculates that conventional movie theaters and hotels/motels might be required to obtain adult entertainment licenses. There is no evidence that the ordinance has been (or might be) applied in this way.

There is no indication that the City would fail to recognize that conventional movie theaters (defined by the zoning code in a manner exclusive of adult entertainment establishments) are not within the coverage of Ch. 5.10 SVMC. Additional assurances against an overbreadth problem

[4] *Northend Cinema* suggests that CAWA's overbreadth claim should be denied for lack of standing because of CAWA's failure to demonstrate "real and substantial" overbreadth. *Northend Cinema*, 90 Wn.2d at 716-717.

can be found in the "dramatic works" exemption for non-obscene material. SVMC 5.10.080(B)(1). A "dramatic works" exception has twice been accepted by this Court as an appropriate safeguard against overbreadth. *O'Day*, 109 Wn.2d at 806-807; *Ino Ino,* 132 Wn.2d at 137-138. CAWA relies upon the same cases distinguished above (*Comite de Jornaleros* and *World Wide Video v. Tukwila*). Br. 38-39.

Conversely, showing erotic movies in small, dark, partitioned cubicles is within the ordinance's plainly legitimate sweep. The actual adult entertainment business of HEB is based entirely on the "exhibit or display [of] a graphic picture, view, film, videotape, or digital display of specified sexual activities or sexual conduct." SVMC 5.10.010.

Erotic movies that are incidentally shown in hotels and motels are, as noted above, outside the scope of the ordinance because hotels and motels are specifically, and therefore distinctly, defined by the zoning code. The real point of CAWA's argument is that it is possible to imagine seemingly inappropriate applications of the definitions. But the potential for conceptualizing impermissible applications of a local regulation is not a measure of unconstitutional overbreadth. *Gammoh*, 395 F.3d at 1121.

Because CAWA's theory is based on speculation[5] and not "demonstration or reasoned argument," there is no basis for the Court to find a real or substantial threat to expression.

F. There is no unconstitutional vagueness.

CAWA raises a vagueness challenge to the "regular basis" and "substantial" terms of SVMC 5.10.010. Br. 36-37. CAWA's brief cites no First Amendment case addressing the test for vagueness.

Vagueness challenges in this context fare poorly. The vagueness doctrine "cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms." *Gammoh*, 395 F.3d at 1121. The combination of subjective and objective terms, particularly when defined clearly enough to give notice to those regulated, is sufficient. *Id.* (citing *Cal. Teacher's Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) ("perfect clarity is not required even when a law regulates protected speech")).

The terms "regular basis" and "substantial part" are not unconstitutionally overbroad or vague. *See World Wide Video of Washington*, 368 F.3d at 1198-1199 ("significant or substantial" upheld);

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[5] CAWA claims that the trial court would construe Ch. 5.10 to apply to conventional movie theaters. Br. 23; 28. The trial court never stated this. CAWA's somewhat unfair attack on the trial court's memorandum opinion is not the equivalent of an actual showing of a real and substantial deterrent. The memorandum opinion is not controlling anyway. *Chandler v. Doran Co.*, 44 Wn.2d 396, 400, 267 P.2d 907 (1954).

Whatley v. Indiana, 928 N.E.2d 202, 206 (Ind. 2010) (rejecting constitutional vagueness challenge to term "on a regular basis"); *VIP v. Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 190 (2nd Cir. 2010) ("a substantial or significant portion of its stock in trade" in adult materials not unconstitutionally vague); *ILQ Investments, Inc. v. Cit of Rochester*, 25 F.3d 1413 (8th Cir. 1994) ("substantial or significant portion" of sexually explicit material not unconstitutionally vague).

HEB intends to continue showing graphic images of specified sexual activities in its establishment on a regular basis or as a substantial part of the premises' activity. The licensing regulations are applicable to HEB. The combination of objective and subjective terms, in context, gives ample guidance on who is and is not subject to the law. *Gammoh*, 395 F.3d at 1120; *see also Young*, 427 U.S. at 58-59.

G. Washington law on prior restraints, overbreadth, and vagueness.

1. Washington law on prior restraints.

Washington courts have considered sexually oriented businesses under the Washington State Constitution. The retail sale of sexually explicit materials is not entitled to any broader protection under the state constitution. *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 303-304, 103 P.3d 1265 (2005), *review denied*, 155 Wn.2d 1014 (2005). There is also no greater protection for the expressive conduct

of erotic dance unless a prior restraint is involved. *Ino Ino*, 132 Wn.2d at 122. Prior restraint analysis of zoning for adult businesses mirrors the federal standard. *World Wide Video of Washington*, 125 Wn. App. at 304 (citing *Ino Ino*, 132 Wn.2d at 126; *Collier v. City of Tacoma*, 121 Wn.2d 737, 747, 854 P.2d 1046 (1993)). Time, place, and manner restrictions on adult entertainment (or "temporal or geographic limitations" and specifically including zoning) are not prior restraints and do not merit the more rigorous analysis afforded under the state constitution for pure speech in a traditional public forum. *Northend Cinema*, 90 Wn.2d at 717; *Ino Ino*, 132 Wn.2d at 121, 126. The exact causal relationship between a regulation and targeted adverse secondary effects need not be proved under prior restraint analysis; it is enough that a regulation is related to an overall problem a city seeks to correct. *Ino Ino*, 132 Wn.2d at 127. Even where conclusive proof of a connection between antisocial behavior and obscene material may be lacking, government could "quite reasonably determine that such a connection does or might exist." *Adult Ent. Ctr. v. Pierce County*, 57 Wn. App. 435, 439, 788 P.2d 1102 (1990), *review denied*, 115 Wn.2d 1006 (1990).

Although Washington courts seek to resolve issues under the state constitution before turning to federal law, Washington cases have adopted

much of the federal methodology[6] for application to state constitutional cases. *Collier*, 121 Wn.2d at 746; *World Wide Video*, 117 Wn.2d at 387-388.

2. Washington law on overbreadth.

Washington courts have described the overbreadth doctrine as "strong medicine" to be employed only as a "last resort." *O'Day*, 109 Wn.2d at 804. Washington courts apply a federal analysis to claims of overbroad restrictions on speech unless a prior restraint is involved. *Ino Ino*, 132 Wn.2d at 119; *Holland v. City of Tacoma*, 90 Wn. App. 533, 542-543, 954 P.2d 290 (1998), *review denied*, 136 Wn.2d 1015 (1998) ("both real and substantial"). Courts must strive to construe ordinances to uphold their constitutionality. *O'Day*, 109 Wn.2d at 806.

Zoning and licensing are not prior restraints. CAWA's theory of overbreadth (suppression of speech at conventional movie theaters and hotels/motels) is based on speculation. CAWA's facial challenge asserts an inevitable effect on expression but has no tangible basis. *Holland*, 90 Wn. App. at 543-544. Courts will not pass on the constitutionality of a statute abstractly, but only as it is sought to be enforced by the government in a

[6] Washington may slightly vary from the federal test by requiring a "compelling state interest" but public masturbation in retail premises has been held "more than enough" to substantiate regulation. *Adult Ent. Ctr.*, 57 Wn. App. at 440; *see also Ino Ino*, 132 Wn.2d at 128-129.

particular case before the court. *Adult Ent. Ctr.*, 57 Wn. App. at 446; *see also Bitts*, 86 Wn.2d at 397 (speculative objection that movie theaters were treated differently from peepshow premises rejected).

Here, if deemed necessary, the Court could cure any overbreadth relating to conventional movie theaters and hotels/motels by simply ruling that said uses, which are specifically defined elsewhere in the code, shall not require an adult entertainment license. *See O'Day*, 109 Wn.2d at 805 (ordinance construed to affect only non-protected speech).

3. Washington law on vagueness.

Under Washington law, a statute is void for vagueness if it is framed in terms so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991).

The vagueness doctrine is limited in two important ways. First, a party challenging an ordinance's constitutionality on vagueness grounds has the burden of proving vagueness beyond a reasonable doubt. *State v. Halstein*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993). Second, "impossible standards of specificity" or "mathematical certainty" are not required because some degree of vagueness is inherent in the use of language. *Halstein*, 122 Wn.2d at 118.

Here, an ordinary person of common intelligence can ascertain the scope of the City's ordinance. The ordinance cannot be reasonably construed to apply to the Regal Spokane Valley 12 or other conventional movie theaters in the City. No reasonable person would construe the ordinance to apply to hotels or motels that provide entertainment services incidental to their primary hospitality function.

H. The City's regulations allow constitutionally sufficient opportunities for CAWA to disseminate its speech.

The final prong of intermediate scrutiny inquires into whether alternative avenues of communication remain available under the challenged regulation. *Fantasyland Video*, 505 F.3d at 1001.

1. Introduction to the adequate relocation sites requirement.

This test analyzes whether local zoning restrictions that affect sexually oriented businesses nevertheless allow such businesses "a reasonable opportunity to open and operate." *Renton*, 475 U.S. at 53-54; *Ctr. for Fair Pub. Policy* 336 F.3d at 1159.

There is no constitutional requirement that a city make available a certain number of relocation sites. *Diamond v City of Taft*, 215 F.3d 1052, 1056 (9th Cir. 2000). Additionally, "the economic feasibility of relocating to a site is not a First Amendment concern." *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1334 (11th Cir. 2000); *see also Topanga Press v City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993).

2. There is no material factual dispute regarding the availability of 39 alternative sites.

The City had the initial burden on this issue. *Tollis, Inc. v. County of San Diego,* 505 F.3d 935, 941 (9th Cir. 2007), *cert. denied*, 553 U.S. 1066 (2008). The City was required to produce a list of potential relocation sites for HEB that reflected relevant zoning restrictions. *Id.* Next, the burden shifted to CAWA to demonstrate that the City's list included unavailable sites or was compiled in an absence of reasonableness and good faith. *Id.*; *see also Lim v. City of Long Beach*, 217 F.3d 1050, 1055 (9th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

After a list of potential sites has been determined, the issue becomes assessing whether the available sites are sufficient to allow adult businesses an opportunity to relocate. *Tollis*, 505 F.3d at 942. The initial calculation of available relocation sites is a factual issue and the sufficiency of the sites for allowing adult expression is a question of law. *David Vincent*, 200 F.3d. at 1333, 1335.

On summary judgment courts may reduce a city's proffered list of sites by the number of specific sites that are subject to a factual dispute. If the number of undisputed sites passes constitutional muster as a matter of law, then fact disputes over specific sites do not preclude entry of summary judgment. *See, e.g., Fantasyland Video, Inc. v. County of San Diego*, 373 F. Supp. 2d 1094, 1132-1143 (C.D. Cal. 2005), *rev'd on other grounds sub*

nom. Tollis, Inc. v. County of San Diego 505 F.3d 935 (2007), *and cert. denied*, 553 U.S. 1066 (2008) (list of sites reduced due to factual disputes; resulting number sufficient as a matter of law); *World Wide Video of Washington*, 227 F. Supp. 2d at 1162 (summary judgment granted); *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 980 F. Supp. 329, 339 (C.D. Cal. 1997) (challenged sites discarded from computation; summary judgment granted).

The City supported its motion for summary judgment with a list of parcels lawfully zoned for adult entertainment uses. CP 4057-4065. The City's expert, Bruce Jolicoeur, determined that there were 54 available relocation parcels, none of which were in an industrial or manufacturing zone,[7] and all of which were commercially zoned. CP 4043. Mr. Jolicoeur then excluded nine of these parcels as lacking road frontage, leaving 45 relocation sites. CP 4043-4044.

In response, CAWA provided the opinion of a land use planning consultant, Lee Michaelis. CP 4182-4222. Mr. Michaelis found 39 parcels zoned for adult entertainment. CP 4192.

The City's motion was also supported by the opinion of a land use planning consultant, Reid Shockey. CP 3997-4039. Mr. Shockey compared the percentage of land in the City eligible for adult entertainment

[7] Rendering the second through fourth *Topanga* factors irrelevant. *See 3570 East Foothill Blvd*, 980 F. Supp. at 340.

uses with other nearby cities and unincorporated Spokane County. CP 4001-4004. Mr. Shockey studied the number of adult businesses located within the City relative to other comparable Washington cities. CP 4002-4004.

CAWA also supplied a declaration of a real estate broker, Rich Crisler. CP 4317-4323. The declaration of Mr. Crisler responded to the opinion of Mr. Jolicoeur but said nothing of Mr. Shockey's work. Mr. Crisler asserted that some of the parcels identified by Mr. Jolicoeur were subject to long-term leases; were occupied by commercial businesses; or were owner-occupied properties. CP 4322-4323. Mr. Crisler's declaration was essentially identical to a declaration he offered in *World Wide Video of Washington, Inc. v. City of Spokane*. CP 4357-4376. *See World Wide Video of Washington*, 227 F. Supp. 2d at 1160-1162.

Despite motions to strike, the trial court considered all the declarations filed by both parties and granted summary judgment to the City. CP 4481-4485.

Summary judgment should be affirmed because there is no factual dispute that 39 relocation sites are available. CP 4159; 4192. This figure was arrived at by CAWA's own expert. CAWA cannot now complain that the trial court erred in making any erroneous individual determination with respect to these parcels.

CAWA argues that there is a factual dispute as to whether the City acted reasonably and in good faith in compiling its initial list of available sites. CAWA never supported this allegation with any summary judgment evidence.

3. The 39 available sites allow CAWA a sufficient opportunity to relocate.

The inquiry turns to an analysis of whether the 39 available relocation sites are legally sufficient. With this change of inquiry, the burden shifts from the City to CAWA. *Tollis*, 505 F.3d at 941. To carry its burden, CAWA was required to show that the relocation sites were unavailable to any generic commercial enterprise regardless of actual suitability for adult businesses. *Lim*, 217 F.3d at 1055-1056.

Somewhat confusingly, CAWA attempted to cast doubt on the availability of the 39 sites arrived at by its own expert, Mr. Michaelis, through the declaration of CAWA's other expert, Mr. Crisler. CP 4317-4323. Mr. Crisler offered opinions as to whether the owners of the various sites were likely to make their land available to an adult entertainment business. CP 4318.

CAWA inexplicably reproduced the exact error that Mr. Crisler made in *World Wide Video of Washington*. *See World Wide Video of Washington*, 227 F. Supp. 2d at 1161-1162. Mr. Crisler ignored *Topanga,* under which any site that could "ever become available to any commercial

enterprise" must be counted as a relocation site. *Topanga,* 989 F.2d at 1531. It does not matter if a site might not be available specifically to adult businesses, whether due to a restrictive lease covenant or otherwise. *Lim*, 217 F.3d at 1055. Sites that are under the ocean, airstrips of international airports, swamps, and sewage treatment plants may not be "available" but even the presence of toxic waste is not a disqualifier.[8] *See Woodall v. City of El Paso*, 49 F.3d 1120, 1124 (5th Cir. 1995), *cert. denied*, 516 U.S. 988 (1995) (have held "time and again" that commercial viability is irrelevant); *Topanga*, 989 F.2d at 1529-1530 (agreeing with *Woodall*); *Fantasyland*, 373 F. Supp. 2d at 1137-1138. Parcels that are commercially zoned -- as all of the 39 are -- are per se part of the available inventory. *Topanga*, 989 F.2d at 1531. All that is necessary is that a given site "must be considered part of an actual business real estate market for commercial enterprises generally." *Tollis*, 505 F.3d at 941.

CAWA also failed to produce any evidence responding to a declaration of the City's planning manager, Scott Kuhta, which described the historical presence of adult businesses in the City. CP 4079-4086. Mr. Kuhta observed that there were four adult businesses since 1999 in the geographic area that later became incorporated as the City of Spokane Valley. CP 4082. Because each of these adult businesses was in lawful

[8] CAWA implies that that a large portion of the available sites "consist of a railroad yard." Br. 63. But CAWA's expert found only four sites owned by the Union Pacific. CP 4196.

operation, each possessed legal nonconforming use rights pursuant to SVMC 19.20.060 and was not required by the City to relocate. CP 4083. A fifth adult retail business closed in late 2003 or early 2004. *Id.* Since that time, the City's total number of adult businesses (including HEB) has been steady with no new applications filed. CP 4084.

Supply and demand bears on the standard for determining constitutional adequacy. *See Tollis*, 505 F.3d at 942; *David Vincent*, 200 F.3d at 1335-1337 (decided as matter of law); *Lund v City of Fall River*, 714 F.3d 65, 72-73 (1st Cir. 2013) (Souter, J.) (matter of law based on "dispositive evaluative considerations"); *3570 East Foothill Blvd.*, 980 F. Supp. at 341-343 (matter of law).

CAWA's brief repeats verbatim the criticisms it made below against Mr. Shockey. *Compare* CP 4165-4167 and Br. 50-52. But CAWA does not argue that it provided any summary judgment evidence responding to Mr. Shockey. Indeed, CAWA provided no summary judgment evidence responding to the City's analysis of the prevalence of adult businesses in the City relative to other jurisdictions or to any other factors of supply and demand.

4. The root of this case is CAWA's illegal land use and not an increase in zoning restrictions.

This case is unlike a wholesale revision to a zoning code that may require multiple adult businesses to compete for a minimal number of

relocation sites. HEB is not in jeopardy because of new zoning recently adopted by the City. CAWA's real problem is that, for years, it failed to obtain a license so that its business would be a legal nonconforming use under the zoning code. CAWA's choice does not create a First Amendment zoning problem for the City.

CAWA's refusal to make its business compliant with the licensing requirements precludes it from being a lawful nonconforming land use. And an adult entertainment license cannot be granted to CAWA because its site is not properly zoned. SVMC 5.10.040(A)(9). This is the root cause why HEB's adult entertainment business must relocate. The net effect is that HEB is indisputably the only adult business competing for a relocation site among the 39 sites that CAWA admits are available. Unlike a case where a number of businesses all must relocate at once, CAWA may select from any of the 39 sites without consideration of whether these sites would support a lesser number of new adult businesses seeking to operate simultaneously. Consideration of a zoning code's "separation requirement" is applicable upon the simultaneous forced relocation of multiple businesses but is irrelevant when there is only one aspiring relocation applicant.[9] *See*

[9] This should not be confused with the separation requirement that pertains to existing adult businesses in the City under SVMC 19.80.030(B)(6), which was taken into account by Mr. Jolicoeur. CP 4056-4058. *See Isbell v. City of San Diego*, 258 F.3d 1108, 1113-1114 (9th Cir. 2001). Even with the concept of *simultaneous* relocation, the separation requirement would allow up to nine coexisting adult entertainment businesses. CP 4049. This sum exceeds any evidence of demand and its legal sufficiency was not rebutted by CAWA on

Fantasyland Video, 373 F. Supp. 2d at 1140-1141(sole business seeking to relocate); *Lund* 714 F.3d at 72 n.3 (absence of evidence of competition from other adult entertainment companies vying for scarce real estate); *Diamond*, 215 F.3d at 1057-1058 (may choose among any available site).

CAWA argued below that it was denied a reasonable opportunity to relocate because, according to its owner, it would be difficult to do so. CP 4324-4325. But so long as there is not a legislated bar to the market it does not matter whether a regulation may "prove to be commercially infeasible for an adult business." *Topanga*, 989 F.2d at 1531. The relevant test is not affected by limitations on speech due to market effects. *Lund*, 714 F.3d at 70; *see also Fantasyland Video*, 373 F. Supp. 2d at 1134 (economic difficulty).

The City's inventory of relocation sites allows existing and potentially new adult businesses. For a decade there have been no new applicants. Demand appears to be met. No evidence shows that the City's zoning prevents HEB from relocating. The trial court correctly concluded that the City's zoning code was constitutional. The form of speech offered by HEB has not been coercively suppressed by zoning.

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summary judgment. This would allow more new adult businesses (up to five) than currently exist in the City. The simultaneous separation concept is inapplicable here also because HEB is an unlawful use in its current location. *See Young v. City of Simi Valley*, 216 F.3d 807, 821-826 (9th Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001) (three or four sites not per se unconstitutional unless shown to be inadequate in relation to demand).

5. No different result on the alternative avenues of communication test is required under the Washington Constitution.

CAWA argues that the Washington Constitution, following a *Gunwall* analysis, should lead to the conclusion that the City's zoning code is a prior restraint. Br. 59. *See State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

Before the trial court, CAWA merely stated that it "adopt[s] and hereby incorporate[s] the *State v. Gunwall* analysis in *Ino Ino*, *supra*, and *World Wide Video of Washington, Inc. v. City of Spokane*, *supra*." CP 4178. CAWA's brief below did not meet the standard for presenting a *Gunwall* issue. It is not sufficient to make passing reference to *Gunwall*. *Guimont v. Clarke*, 121 Wn.2d 586, 604, 854 P.2d 1 (1993) (failure to brief *Gunwall* factors). This Court may nonetheless choose to consider CAWA's argument.

CAWA focuses on the fourth *Gunwall* factor (i.e., preexisting state law). Br. 59; 66-68. CAWA supports its argument with *Northend Cinema*. *Id.* But *Northend Cinema* does not date from the time of the constitution's ratification and provides no evidence of the intent of the constitution's drafters. *See Ino Ino*, 132 Wn.2d at 120. *Northend Cinema* also cannot show anything about "alternative avenues" analysis under *Renton* because no such analysis existed when *Northend Cinema* was decided.

CAWA is also wrong that the fourth *Gunwall* factor would favor its position. Washington "criminalized obscenity" prior to and after ratification of the state constitution. *Ino Ino*, 132 Wn.2d at 120 (citing *State v. Brown*, 7 Wash. 10, 13, 34 P. 132 (1893)). There is no evidence that the state constitution's drafters were concerned about economic disadvantage to unlawful adult entertainment businesses occasioned as a result of municipal enforcement of zoning regulations.

CAWA's argument is unpersuasive. An earlier *Gunwall* analysis addressing adult merchandise sales refutes CAWA. *See World Wide Video of Washington*, 125 Wn. App. at 300-305. It is true that the present case is based on adult entertainment rather than retail sales. The common thread is the zoning of sexually oriented businesses. CAWA does not show how the *Gunwall* analysis of *World Wide Video of Washington* would have been any different if the zoning regulations there affected adult entertainment. CAWA's argument attempts to revive the dissent in *Ino Ino*, 132 Wn.2d at 155-157 (Sanders, J., dissenting). The dissent was not the result of an application of *Gunwall* to the alternative avenues inquiry and adopted the unprecedented view that economic impact was a relevant concern. *Id.* at 156. The dissent made no reference to the established tradition of *Young*, *Renton*, and *Topanga*, including to the extent previously adopted by this Court. *Id.* To find an "effective ban" of adult businesses under this

approach, as CAWA urges, would require this Court to venture beyond well-settled cases on alternative channels and into a new approach to this jurisprudence, which the *Ino Ino* dissent scarcely articulates. CAWA cites no cases from any jurisdiction that support its sweeping claims. Br. 68.

CAWA asserts that adult entertainment has been effectively banned by the City's zoning ordinance. Br. 68. But this is patently false. There are at least 39 sites presently zoned for an adult entertainment business. Lawful nonconforming businesses, including adult entertainment, exist and may continue. CP 4080-4082. The effect of the real estate market on CAWA's choices is not the issue.

In 2003, after incorporation, the City Council considered and decided not to adopt an amortization provision that would have forced the closure of all nonconforming adult businesses, as allowed by *World Wide Video of Washington v. Spokane*, 368 F.3d at 1200. CP 3770. The amortization requirement was a legacy from the County code and was not carried forward by the City. CP 692-693; 703. In the City, nonconforming adult businesses were treated the same as any other lawful nonconforming use and were not required to relocate. CP 703.

I. The licensing regulations apply to HEB.

1. HEB is not a legal nonconforming use under the County code, but it would make no difference if it were.

CAWA argues that HEB was and remains a legal nonconforming use. According to CAWA, in 2002 when HEB began to operate its "mini-theaters," the County required only arcade "booths" (but not "mini-theaters") to obtain a license.[10] Br. 43-44.

CAWA misreads the code that was in effect in the County in 2002 and exaggerates the difference between the County's code and the City's current version, adopted in 2010. The applicable County code is SCC 7.80.040, which defines "adult entertainment establishments" to include "adult arcade establishments." CP 278. The main characteristic of an "adult arcade establishment" is the presence of an "adult arcade device." This term includes "any device" "used to exhibit or display...specified sexual activity." The pertinent language is as follows:

> 'Adult arcade device,' sometimes also known as a 'panoram,' 'preview,' 'picture arcade,' 'adult arcade,' or 'peep show,' means any device which, for payment of a fee, membership fee, or other charge, is used to exhibit or display a graphic picture, view, film, videotape, or digital display of specified sexual activity, ***or*** live adult entertainment in a booth setting. All such devices are denominated under this ordinance by the term 'adult arcade device.' SCC 7.80.040 (emphasis added).

CAWA argues that the phrase "in a booth setting" (which was later omitted) modifies the term "device." Br. 44. But under the last antecedent

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[10] In its statement of facts CAWA implies that HEB was permitted to operate an adult entertainment establishment at 9611 E. Sprague Ave. prior to the City's incorporation. Br. 10. This is not correct. The County ordinance prohibited *any* "adult entertainment establishment" from locating at 9611 E. Sprague Ave. because the property was located within 1,000 feet of other property zoned UR-22. CP 861.

rule, a qualifying phrase refers to the last antecedent, and a comma before the qualifying phrase is evidence that the phrase applies to all antecedents. *Clark County Pub. Util. Dist. No. 1 v. State of Washington Dep't of Revenue*, 153 Wn. App. 737, 754, 222 P.3d 1232 (2009). The absence of a comma before the phrase "in a booth setting" means that the term applies only to the last antecedent, i.e., "live adult entertainment."

The conclusion that CAWA has misread the ordinance is reinforced by the fact that the County's definition of "adult arcade station" or "booth" is: "an enclosure where a patron, member, or customer would ordinarily be positioned while using an arcade device ***or*** viewing a live adult entertainment performance, exhibition or dance in a booth." The term "enclosure" thus does not limit the definition of "adult arcade station" to only "booths." The County defined both "adult arcade station" and "booth" as "an ***enclosure*** where a patron, member, or customer would ordinarily be positioned while using an adult arcade device...." The County possibly could have -- but did not -- define adult arcade stations based on dimensional physical size, number of seating surfaces, number of occupants allowed, or other particular concepts. There is no basis in the text or the legislative history to support CAWA's view that the code is limited solely to "an enclosure designed to accommodate a single patron." Br. 26.

The use of the broader term "enclosure," in conjunction with the overall context, demonstrates an intent to regulate what CAWA chooses to call "mini-theaters" but which are precisely the kind of thing that breeds the adverse secondary effects at issue: dimly-lit small spaces where lewd acts occur.

2. The definitions do not proscribe adult theaters.

In terms of usage, the word "booth" has commonality with "enclosure" although the two may not be synonyms. One important difference is a less specific connotation of single-person occupancy for the latter term. *See Webster's New Collegiate Dictionary.* But the concept of "enclosure" is improperly exaggerated by CAWA to support its claim that the effect of the licensing code (in conjunction with similar terminology in the zoning code) is to effectively ban adult theaters.

The City recognizes that non-obscene erotic films are "pure speech" for purposes of Washington constitutional analysis. *World Wide Video*, 117 Wn.2d at 388. CAWA's argument that the licensing code is an effective ban on all adult theaters is a reiteration of its groundless overbreadth claim and is wrong in this posture as well.

Courts should strive to discover the intent of the legislative body and give effect to that intent. *Stewart Carpet Service, Inc. v. Contractors Bonding and Ins. Co.*, 105 Wn.2d 353, 358, 715 P.2d 115 (1986).

Legislative intent was discussed extensively above. The relationship between that intent and the licensing text is obvious. In darkened, closely confined (yet public) spaces that are beyond the gaze of management or the general public, erotic material is apt to foster lewd sexual behavior. It makes no difference whether the patrons in these close spaces "use" an "arcade" by quaintly inserting quarters into a slot or by paying an admission fee for hours of digital image streaming. HEB's modern use of technology is still within the code's definition because the definition's flexibility tracks the very characteristics of HEB's business that promote secondary effects.

This Court has recognized that a conventional movie theater, in which "customers are seated in a single large room" and "in view from all parts of the theater when the lights are on" is a classification "based upon obvious differences." *Bitts*, 86 Wn.2d at 398-399. This would still be true in the event that a theater showed erotic films. The adult entertainment licensing code definition manifestly does not use the separately defined term "theater." *See* definitions at Appendix A hereto. The City has never insisted that adult theaters obtain a license.

The notion that the licensing regulations would permit only one occupant in a theater auditorium (and thereby effectively ban adult movie theaters) is a chimera created by CAWA. Indeed, such an application would probably be an effective ban on all adult theaters. *Keego Harbor Co.*

v. City of Keego Harbor, 657 F.2d 94, 96 (1981). But the term "booth" remains part of the definitional context, if not a limitation, on "enclosure." *See* definitions at Appendix A for "adult arcade establishment" and "booth" references at Ch. 5.10 SVMC. The code may be (and should be) fairly understood to apply to something less than a "theater" but, again, contrary to CAWA's claim, is not restricted to only a single occupancy concept of "booth." "Flexibility and reasonable breadth" is to be permitted in enactments. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). In this way, the term "enclosure" is given meaning as a venue smaller than a theater auditorium. There is no effective ban on adult theaters. The context indicates that "enclosure" should be synonymous with "cubicle" or "partitioned portion of a room."

CAWA's theory that its small, close, multi-occupant mini-theaters are outside the scope of the regulations leads to an absurd result. According to CAWA, an owner of an unlicensed single-occupancy type of adult arcade could expand to small partitioned multi-person rooms (that are not so large as to inhibit unlawful public sexual conduct) and thus evade regulation. As discussed at length above, HEB's actual experience has shown that nominally increasing the size of the viewing space causes *more* adverse secondary effects because it promotes a sense of semi-privacy.[11] In

[11] See CP 408 (multiple persons masturbating, etc.); 411-412 (same); 422-423 (same); 452-453 (same); 551- 552 (same).

addition, the legislative record explains the difficulty for law enforcement personnel who may encounter in-progress criminal activity in a darkened maze-like interior such as present at HEB. CP 3424; 3449-3450; 3471-3472; 3514-3515; 3610.

A complaint that this result is discriminatory because it treats adult movie theaters differently from HEB's "mini-theaters" fails. *Renton* recognized that a city cannot be faulted for an "under-inclusive" ordinance by which some kinds of adult businesses are addressed first and other businesses that have the same kinds of secondary effects are addressed later. *Renton*, 475 U.S. at 52-53; *see also Dream Palace*, 384 F.3d at 1016 n.18 (claim of "singling out" is not grounds for finding prior restraint in zoning); *Ctr. for Fair Pub. Policy*, 336 F.3d at 1170-1171 (same). This does not mean that any form of adult entertainment has been prohibited, nor its content regulated. *Compare Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (live adult entertainment prohibited throughout municipality).

The ordinances in this case sufficiently direct their application to the type of forum that the City is attempting to regulate. CAWA's suggestion that it has legal nonconforming use rights to an earlier set of definitions, or that the applicable definitions are unconstitutional, is without merit and should be rejected. 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. This result effectuates the intent of the local legislative body. *O'Day*, 109 Wn.2d at 806-807.

IV. CONCLUSION

The decisions of the trial court should be affirmed. In the event that this Court finds any unconstitutionality, it should be made clear whether the same relates to the federal or state constitution. Any request of CAWA for an award of reasonable attorneys' fees must be made pursuant to 42 U.S.C. 1988 and must be denied unless the City's ordinances are in violation of the United States Constitution under 42 U.S.C. 1983.

RESPECTFULLY SUBMITTED this 29th day of August, 2014.

Menke Jackson Beyer, LLP

By: 

Kenneth W. Harper, WSBA #25578

Attorneys for Respondent
City of Spokane Valley

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
County of Yakima)

COMES NOW Kathy S. Lyczewski, being first duly sworn on oath, and deposes and says:

That she is employed as a legal assistant by Menke Jackson Beyer, LLP, and makes this affidavit in that capacity.

I hereby certify that on the 29th day of August, 2014, a copy of the foregoing was delivered to the following in the manner indicated:

Mr. Gilbert H. Levy
Attorney at Law
Law Offices of Gilbert H. Levy
2003 Western Avenue, Suite 300
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DATED THIS 29th day of August, 2014.

KATHY S. LYCZEWSKI

JULIE M KIHN
COMMISSION EXPIRES
NOTARY PUBLIC
SEPTEMBER 15, 2014
STATE OF WASHINGTON

Signed and sworn to before me this 29th day of August, 2014.

Notary public in and for the State of Washington, residing at YAKIMA.
My appointment expires: 09/15/2014

Appendix A

CITY OF SPOKANE VALLEY MUNICIPAL CODE

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.

* * * * *

Hotel/motel: A building in which there are six or more guest rooms where lodging with or without meals is provided for compensation, and where no provision is made for cooking in any individual room or suite. See "Lodging, use category."

* * * * *

Theater, indoor: An establishment for the indoor viewing of motion pictures by patrons. See "Entertainment,

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Dear Clerk of the Court: Attached for filing is Brief of Respondent City of Spokane Valley in the above-entitled matter. Please consider this an original, no hard copy will be sent by regular mail.

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