

NO. 66852-8

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,

Respondent,

vs.

ROBERT D. DAVIS and ASF, INC.,

Appellants.

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BRIEF OF APPELLANT

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Kristin G. Olson  
WSBA No. 21106  
Attorneys for Appellant  
O'Shea Barnard Martin & Olson, P.S.  
10900 NE Fourth Street, Suite 1500  
Bellevue, WA 98004-5841  
PHONE: 425-454-4800  
FAX: 425-454-6575

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## I. ASSIGNMENTS OF ERROR

### 1.1 Assignments of Error.

1. The trial court erred when it combined the hearing on the preliminary injunction with the hearing on the permanent injunction and heard no testimony.

2. The trial court erred when it granted the City's motion for a permanent injunction.

### 1.2 Issues Pertaining to Assignment of Error.

1. Whether the trial court erroneously ruled, as a matter of law, that ASF, Inc. had not obtained its license for an adult cabaret before the dispersion ordinance was enacted, despite the existence of issues of material fact?

2. Whether the trial court erroneously ruled, as a matter of law, that ASF, Inc. was not vested in the pre-dispersion zoning, when the City failed to follow its own municipal code when it issued ASF, Inc's 2007 adult entertainment license?

3. Whether the trial court erroneously ruled that the City's 120-day delay to determine adult cabaret zoning is facially constitutional when the City failed to cite a single case holding that such a long delay is constitutional?

### III. STATEMENT OF FACTS

3.1 On May 11, 2007, Robert Davis went to the City's Department of Revenue and Consumer Affairs to apply for an adult entertainment license for ASF, Inc. CP 106. He was given a form to fill out and on it on page two, he indicated that he would be operating an "adult entertainment club with live nude dancers and food service." CP 150.

3.2 Contrary to the statements in Jackie Mitchell's declaration that ASF, Inc. did not have an adult entertainment license until November 4, 2008, (CP 350, ¶3), ASF, Inc. had both a business license and an adult entertainment premises license for the year 2007. CP 152 and 153.

3.3 The exhibits to Ms. Mitchell's declaration (CP 352, 353, and 354), do not establish otherwise. They are both dated December 31, 2007 and CP 354 indicates that it is a "renewal."

3.4 The City renewed both the business license and the adult entertainment license for "Elegance Gentleman's Club" located at 5220 Roosevelt Way, Seattle, WA 98105 for four more years, 2008, 2009, 2010 and 2011. CP 155, 156, 157 and 158.

3.5 When Mr. Davis applied for the adult entertainment license on May 11, 2001, the City did not have an ordinance dispersing adult cabarets. It was passed by the City Council on June 11, 2007 and became law on June 22, 2007. CP 100 and 102. There is no dispute, that prior to that time, an adult cabaret would have been allowed at the Roosevelt Way location. CP 82 (Ins. 1 - 2).

3.6 However, the City did have a municipal code section regarding the issuance of adult entertainment licenses on May 11, 2007. It provided in pertinent part as follows:

*SMC 6.270.090 Issuance of Licenses.*

*A. After an investigation, the Director shall issue the applicable license or licenses authorized by this chapter if the Director finds:*

- 1. That the business for which a license is required herein will be conducted in a building, structure and location which complies with the requirements and meets the standards of the applicable health, zoning, building, fire and safety laws of the State, the ordinances of the City, as well as the requirements of this chapter; . . .*

showing that the various approvals had been obtained before the license was issued. CP 297 and 293.

3.9 When ASF, Inc. opened the adult cabaret “Jiggles” at 5220 Roosevelt Way, the City moved for a permanent injunction to shut Jiggles down because the City said it did not comply with the City’s zoning dispersion requirements. CP 15-70.

3.10 ASF, Inc. did not need a building permit or a new certificate of occupancy to open an adult cabaret at 5220 Roosevelt Way. CP 107, 160, 161 and 162. The certificate of occupancy for that location was already the correct designation for an adult cabaret. CP 107 and 187. No changes requiring a building permit were going to be made. CP 160.

3.11 The City’s zoning ordinances have no time limit in which the City must make a decision whether an adult cabaret meets the dispersion requirements. CP 127. Thus, the City applies the “default” time period of 120 days contained in SMC 23.76.005, which applies generally to all land use decisions. CP 305.

3.12 The 120-day time limit can be extended indefinitely if the Director deems the plans to be “incomplete” or the Director needs more “information.” The time can be extended until the Director is “satisfied.” CP 140 and 309.

(emphasis added). CP 94. The City now claims that when the ASF, Inc. adult cabaret license was issued for 2007 that the investigation was not done and compliance with zoning was not established before the license was issued. CP 326.

3.7 Then, for some unknown reason, at some point in 2008, the Department of Executive Administration (“Department”) simply decided not to issue licenses for adult cabarets until the applicant proved that it complied with zoning requirements. CP 164.

3.8 When that practice was challenged in August 2008, the City Attorneys’ office decided that licenses would be issued without the Director doing the required investigation that the location complied with the City’s zoning requirements. CP 98. At that time, there had been no change to the Seattle Municipal Code that allowed the “Director” to ignore the requirement of SMC 6.270.090, *supra*.<sup>1</sup> In 2007 and as late as 2009, the City’s form contained a gray box on the bottom for the Department to fill out

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<sup>1</sup> That code section was not changed until January 15, 2011 (CP 26, n. 4).

## IV. ARGUMENT

### 4.1 The Trial Court Violated CR 65 When it

### Determined, as a Matter of Law, that ASF, Inc. did not Have its Adult Entertainment Premises License Prior to June 22, 2007.

CR 65(a)(2) provides that “[b]efore or after the commencement of the hearing of an application for a preliminary injunction, the court may advance the trial of the action on the merits to be advanced and consolidated” with the preliminary injunction hearing. However, the Court may not decide factual issues without the parties being allowed to present their evidence at an actual trial. Only purely legal issues may be decided at an injunction hearing where, as here, no testimony is presented. N.W. Gas Ass'n v. WUTC, 141 Wn. App. 98, 113, 114, 168 P.3d 443 (2007); Rabon v. City of Seattle; 135 Wn.2d 278, 286, 957 P.2d 621 (1998).

Here, the trial court stated:

*As counsel are aware, the Court may combine a hearing on preliminary injunction with a hearing on permanent injunction if the issues permit. And I think that certainly these issues have been fully briefed, and counsel have very ably presented to the Court ample evidence regarding the issues before it today.*

RP, p. 33, Ins. 15-20. Thus, at the City's urging, (CP 8, p. 2, Ins. 9 - 10) the trial court decided this case as a matter of law.<sup>2</sup>

However, summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Marincovich v. Tarabocchia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). The party moving for summary judgment has the burden of establishing the absence of dispute as to material facts. In ruling on the motion the court will consider the material evidence and all reasonable inferences therefrom most favorably toward the nonmoving party. Olympic Fish Prods. v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980).

The guiding principles of summary judgments are set out in Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963):

*We, in the company with other courts and text writers, have frequently cultivated the field of summary judgment. At the expense of repetition, our disposition of this case renders another walk around the field desirable. The following principles we conceive to be well established.*

(1) *The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. (Citations omitted.)*

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<sup>2</sup> ASF, Inc's counsel objected at the hearing to material issues of fact being decided in a summary fashion without any testimony on the disputed facts. RP, p. 24, Ins. 3-8.

(2) Summary judgments shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. (Citations omitted.)

(3) A material fact is one upon which the outcome of the litigation depends. (Citations omitted.)

(4) In ruling on a motion of summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue. (Citations omitted.)

(5) The court, in ruling upon a motion for summary judgment, is permitted to pierce the formal allegations of facts in pleadings and grant relief by summary judgment, when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions or admissions on file, that there are, as a matter of fact, no genuine issues. (Citations omitted.)

(6) One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent, at the trial, would have the burden of proof on the issue concerned. (Citation omitted.)

(7) In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party and, when so considered, if reasonable men might reach different conclusions the motion should be denied. (Citation omitted.)

Id. at 198. (emphasis added).

Here, it was error for the trial court to decide issues of material fact without the opportunity for ASF, Inc. to present

evidence at trial. Jackie Mitchell claimed that ASF, Inc. did not have an adult entertainment premises license until November 2008. Directly contradicting that testimony, ASF, Inc. submitted a copy of its 2007 business license and its adult entertainment premises license. CP 152 and 154. And Mr. Davis stated that he applied for it on May 11, 2007, before the dispersion ordinances went into effect. CP 106. This, is important, as discussed below, because when the 2007 license was issued, the City was to first determine whether 5220 Roosevelt Way complied with the zoning laws in place at that time. CP 94 and CP 297.

**4.2 The City is Estopped from Claiming that It did Not Check the 5220 Roosevelt Way location for Zoning Compliance when it Issued the 2007 Adult Entertainment License.**

When ASF, Inc. applied for its adult entertainment license on May 11, 2007, there were no dispersion ordinances for adult cabarets. The adult cabaret would have been allowed in the commercial zone on Roosevelt Way. CP 82 (Ins. 1 – 2).

The City issued the adult entertainment license because the location complied with current zoning. Now, after the City enacted its dispersion ordinance, the City argues that zoning compliance does not have to be determined when an adult cabaret license is

issued. The City claims that it can ignore SMC 6.270.090 when it issues adult entertainment licenses. The City argues that despite issuance of the adult entertainment license pursuant to SMC 6.270.090, the City is allowed to determine compliance with zoning at some much later date, when an operator applies for a master use or building permit. CP 26, Ins. 9 – 16. The City is estopped from ignoring its own municipal code.

In May 2007, SMC 6.270.090 required the “Director” to “investigate” and to issue the license if the location complies with “zoning,” among other things. Thus, the City was required to determine that 5220 Roosevelt Way complied with current zoning on May 11, 2007 before issuing the adult entertainment premises license. The City is estopped from now claiming otherwise.

The elements of equitable estoppel are (1) An admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party from allowing the first party to contradict or repudiate such admission, statement or act. Finch v. Mathews, 74 Wn.2d 161, 443 P.2d 833 (1968). Equitable estoppel can be applied against a governmental entity. In Finch v. Mathews, *supra*, equitable estoppel was applied against

the City of Seattle. The City claimed that it owned annexed land that had been previously conveyed to the Plaintiffs by King County. The Plaintiffs had a deed from the county, had paid taxes and had improved the property. The City claimed that the acts of King County in transferring the property to the Plaintiffs had been *ultra vires* and were therefore void. The Court rejected that claim and applied principles of equitable estoppel and quieted title to the strip of land in the Plaintiffs. The Court stated:

*Equitable estoppel may be applied against the claim of the municipality where the acts are within the general powers granted to the municipality even though such powers have been exercised in an irregular and unauthorized manner , assuming that all of the other elements of the doctrine are present, as they are in this case.*

Id. at 171.

All of the elements of equitable estoppel are also satisfied in this case and it should be applied to prevent a “manifest injustice.” Here, the City had full authority to issue adult entertainment licenses in May 2007, after checking various things including proper zoning. The City issued the adult entertainment license at a time when no dispersion requirements existed in May 2007. In reliance upon having the 2007 license in May 2007, Robert Davis continued to lease the property, continued to renew his license for four more

years at a cost of \$720 per year and opened an adult cabaret in December 2011. CP 105 - 108, CP 150, and CP 152 – 158. If the City applied its powers “irregularly,” by failing to check zoning as it was required to, the City is equitably estopped from seeking to close the adult cabaret at this late date.

Because the City is estopped from claiming it did not follow the dictates of its own code, ASF, Inc. has a vested right to operate an adult cabaret at that location. The case and statute cited by the City regarding vested rights in zoning are distinguishable from this case. CP 26 (Ins. 9 – 16).

The City claims that to vest in the zoning that existed in May 2007 (no dispersion of adult cabarets) that ASF, Inc. would have had to apply for a building permit or a master use permit. However, at that time, because the proposed location was appropriate, no change of master use was required. No building permit was ever required because Mr. Davis did nothing to the premises that required a building permit. CP 160.

Thus, the City is estopped from claiming that ASF, Inc. would have to obtain a master use permit or a building permit at a much later date. When ASF, Inc. applied for the adult cabaret license in 2007, it was appropriately issued for that location at that

time, including appropriate compliance with zoning. The trial court should have determined that ASF, Inc. was vested in the zoning that should have been checked by the Department when ASF, Inc. applied for its adult entertainment license on May 11, 2007 (i.e. no dispersion requirements).

#### **4.3 The Dispersion Ordinance is Facially**

**Unconstitutional Because it Does Not have a Reasonable time Limit for Making a Zoning Decision; if the Ordinance is Facially Unconstitutional, the decision of the Trial Court must be Reversed.**

Even if this ordinance was correctly applied to ASF, Inc., the decision of the trial court must be reversed. As set forth in Exhibit 2 to the Davis Declaration (CP 124-147) and the arguments set forth in ASF, Inc.'s Response to Motion for Injunctive Relief (CP 79-92), ASF, Inc.'s activities at 5220 Roosevelt Way are protected by the First Amendment to the U.S. Constitution. ASF, Inc. intended to offer non-obscene adult entertainment which conveys a message of eroticism. Expressive speech of this kind is clearly protected by the First Amendment. Schad v. Mount Ephraim, 452 U.S. 61 (1981).

Whenever one is required to obtain a permit to engage in protected expression, the permitting scheme is a prior restraint on

activities protected by the First Amendment. A prior restraint stops protected speech before it starts. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975). A prior restraint is presumed to be unconstitutional; in such case, the government bears a heavy burden to demonstrate that the restriction is valid. Bantam Books v. Sullivan, 372 U.S. 58 (1963); Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11<sup>th</sup> Cir. 1999), *cert denied*, 520 U.S. 1053 (2000).

Whenever the government imposes a prior restraint on free speech it must provide certain procedural safeguards, to prevent the possibility of unbridled censorship. Those safeguards were established in the landmark case of Freedman v. Maryland, 380 U.S. 51 (1965) and were applied to zoning decisions for adult businesses in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990). The particular safeguard at issue in this case is that decisions regarding adult cabarets must be made “within a specified brief period” of time. Freedman v. Maryland, *supra*, at 59.

In FW/PBS v. Dallas, *supra*, the U. S. Supreme Court identified two evils that will not be tolerated in such schemes: (1) a prior restraint scheme that places unbridled discretion in the hands of a government official and (2) a prior restraint scheme that fails to

place reasonable limits on the time within which the decision maker must issue the license. Id. at 225. Regarding unbridled discretion, the Court said:

*“It is settled by a long line of recent decisions of this Court that an ordinance which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official--as by requiring a permit or license which may be granted or withheld in the discretion of such official--is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. ”*  
Shuttlesworth, supra, 494 U.S., at 151, 89 S.Ct., at 938-939 (quoting Staub, supra, 355 U.S., at 322, 78 S.Ct at 282).

FW/PBS v. Dallas at 226.

Regarding reasonable time limits, the Court said:

*The failure to confine the time within which the licensor must make a decision “contains the same vice as a statute delegating excessive administrative discretion,” Freedman, supra, 380 U.S. at 56-57, 85 S.Ct. at 737-738. Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.*

(emphasis added). FW/PBS v. Dallas at 227. Under the licensing scheme in FW/PBS v. Dallas, licenses were to be issued within thirty days following receipt of an application, and after the premises were inspected and approved by the health, fire and building officials. There was no time limit for completing the inspections, and applicants had no way to ensure the inspections

would occur within thirty days. The ordinance was found unconstitutional because it did not “provide for an effective limitation on the time within which the licensor’s decision must be made.” Id. at 227.

Here, protected speech is stopped before it is allowed to start. The indispensability of the zoning requirement requires courts to treat it as a license. Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11<sup>th</sup> Cir. 1999). The City’s dispersion ordinance is unconstitutional because it does not have a “reasonably brief” time limit for making a zoning decision. The “default” time limit of 120 days (which can be indefinitely extended) is not reasonable. If the dispersion ordinance is facially unconstitutional, it cannot be applied to ASF, Inc. or to anyone else until the constitutional infirmities are corrected.

In Edinburgh Restaurant v. Edinburg Township, 203 F.Supp.2d 865 (N.D. Ohio 2001), the proposed operator of an adult cabaret was warned by the city not to open because it did not comply with the city’s zoning. The operator challenged the zoning ordinance claiming that it was unconstitutional and sought injunctive relief to enjoin the city from enforcing the ordinance. The Court held that the ordinance was unconstitutional under FW/PBS

v. Dallas, *supra*, because it did not require a “prompt” decision on a conditional use permit. The Court stated:

*Overall, based upon the Resolution’s failure to mandate prompt decisions, this Court hold that Defendant’s Resolution regulating zoning in the Edinburgh Township is unconstitutional as applied to adult entertainment establishments, including the Plaintiff’s establishment . . . . The Court notes that Defendant can quite easily draft zoning regulations that pass First Amendment muster, yet deal with the societal problems associated with adult entertainment establishments. To clarify, the Defendant may still use the Resolution to regulate land uses that are not entitled to First Amendment protection.*

Id. at 873. The Court then enjoined the city from enforcing the zoning dispersion requirements of the ordinance. Here, the City should be enjoined from enforcing its unconstitutional ordinance and “Jiggles” should be allowed to re-open. The City may still apply its 120-day deadline to uses that are not entitled to First Amendment protection.

The prior restraint principles of FW/PBS v. Dallas, *supra*, were applied by the Ninth Circuit in Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 (9<sup>th</sup> Cir. 1986). The Court found the county’s requirement that erotic dancers wait five days for a license was unconstitutional because the county had “failed to demonstrate a need” for curtailing dancer’s First Amendment rights for five days while an application was pending. Id. The requirement that the

operators wait five days was found to be constitutional because the county established that it needed time to reallocate law enforcement resources and five days was a reasonable time. Key v. Kitsap County, supra, places the burden on the government to justify the time period it needs to decide whether to grant or deny a license.

Moreover, numerous federal courts have held that waiting periods similar in length to 120 days are facially unconstitutional. Fantasy Land Video v. San Diego, 373 F.Supp.2d 1094 (S.D. Calif. 2005).<sup>3</sup> In Fantasy Land Video v. San Diego, supra, the Court held that San Diego County's 130-day time period to decide whether a site met dispersion requirements was unconstitutional, as a matter of law. The Court said:

*The County's cases do not reach the heart of the issue raised by Déjà Vu: the reasonableness of the delay to issue permits under the circumstances of this case. Compliance with the distance and separation requirements, the only factor in the permit decision, can be quickly verified through the County's GIS system, which measures the distance between two points . . . . In addition, Déjà Vu submitted a copy of a final decision of the Zoning Administrator dated August 9, 2001, which indicates on one occasion the Director made a final determination on an administrative permit application only nine days after it was received for processing.*

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<sup>3</sup> Reversed in part on other grounds in Tollis v. San Diego County, 505 F.3d 935 (9<sup>th</sup> Cir. 2007), cert. denied, 553 U.S. 1066 (2008). The Ninth Circuit affirmed the holding that the 130-day time limit was unconstitutional.

Id. at 1146. It is apparent that if 130 days is unconstitutional, then 120 days is also unconstitutional. The City cited no contrary authority.

In 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988 (4<sup>th</sup> Cir. 1995), *cert. denied*, 516 U.S. 1010 (1995), the Court held that a 150-day wait to receive a decision on an adult license application was an unconstitutional prior restraint, as a matter of law. The Court found no evidence that would support the necessity of a 150-day delay to complete the review process for the City's zoning scheme. The Court rejected the county's argument that it could take as long as it wanted because it was a "zoning" decision. The Fourth Circuit held that it was properly analyzed as a prior restraint because, as here, the adult cabaret must refrain from operating until the decision on dispensation is made.

And in Howard and Emro v. City of Jacksonville, 109 F.Supp.2d 1360 (M.D. Florida 2000), the Court held that a 120-day moratorium was an unconstitutional prior restraint on free speech.

Here, as a matter of law, the City cannot substantiate a need for 120 days to decide whether an adult cabaret meets the City's dispensation requirements. In the case of ATL v. City of Seattle, for

the location on Aurora Avenue, the City made the decision in only 16 days. CP 134, ¶¶ 3.16 and 3.17.

Since FW/PBS v. Dallas *supra*, the U.S. Supreme Court has not said what is a “reasonable” time. However, many other federal courts have said what is not reasonable. All of these cases were cited in CP 124-127 and CP 79-92. The City failed to cite a single case that anything even close to 120 days is reasonable.

The closest and most compelling case is Fantasyland Video v. San Diego, *supra* holding that 130 days is not reasonable. There is also additional federal authority that 120 days is not reasonable. It is persuasive. In BJS No. 2, Inc. v. City of Troy, Ohio, 87 F.Supp.2d 800, 810 (S.D. Ohio 1999), the United States District Court for the Southern District of Ohio granted a preliminary injunction to an adult club owner, concluding that 120 days to decide whether an adult cabaret would receive a conditional use permit was not reasonable. The Court’s discussion about the time-frame is particularly instructive and is quoted here in its entirety:

[6][7] In the present case, the City's legislation requires all adult-entertainment facilities to apply for and receive a conditional use permit *before* engaging in business. Consequently, the Court finds a prior restraint analysis appropriate. As noted above, such prior restraints are not unconstitutional *per se*. After reviewing the City's legislation, however, the Court notes that it lacks the

requisite procedural safeguards needed to withstand BJS's constitutional challenge.

1. *Unreasonable Decisionmaking Delay*

[8] Title Five, as amended by Ordinance No. 0-8-97, does not require the Administrative Board to rule upon a conditional use permit application within a specific and prompt period of time. Section 1135.03(c)(3) requires the Administrative Board to conduct a hearing on a conditional use application within sixty days after the application is filed. Section 1135.03(c)(6) then requires the Board to issue a written decision on the application no later than 60 days after the hearing. Reading these two provisions in conjunction reveals that the legislation grants the Board 120 days to render a final decision on a conditional use permit application. Although the legislation requires a decision within a *specified* time, the Court concludes that the 120-day time limit is not *reasonable*, particularly when the delay impedes expression protected by the First Amendment. Relevant case law supports the Court's conclusion.

*In Cascade News, Inc. v. City of Cleveland, 1992 WL 808790 (N.D. Ohio June 15, 1992)* (Aldrich, J.), the court considered a constitutional challenge to a city ordinance that required licenses for operators of sexually explicit video and live viewing booths. Upon review, the court noted that the city's ordinance granted the licensor 66 days to complete an administrative review process and reach a final decision granting or denying a license. *Id.* at \*5. The court reasoned that such a delay constituted an impermissible prior restraint. *Id.* In support of its conclusion, the *Cascade News* court relied upon *Teitel Film Corp. v. Cusack, 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968)*. In that case, the Supreme Court determined that a 50 to 57-day administrative review process allowed by ordinance did not assure that a decision would be reached within a "specified brief period" of time. *Id.* at 141, 88 S.Ct. 754.

Similarly, in *Avenue Grill, Inc. v. Rootstown Township, No. 5:94CV67 (N.D. Ohio April 19, 1995)* (O'Malley, J.), the court declared unconstitutional a city licensing scheme regulating the operation of "adult cabarets." The resolution at issue prohibited the operation of a cabaret without a permit. *Id.* at 5. It also required the

submission of a written application by anyone wishing to operate a cabaret. *Id.* The resolution allowed sixty days for the city to grant or deny a license. *Id.* at 10-11. Upon review, the Avenue Grill court reasoned that "[t]his time period is simply too long to pass constitutional scrutiny." *Id.* at 11. In particular, the court concluded that the resolution did not compel the city to make a decision " 'within a specified and reasonable period' ... and expressive activity is censored during the interim." *Id.*, quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. at 228, 110 S.Ct. 596.

Viewed in light of the foregoing case law, the City's legislation appears unlikely to withstand BJS's constitutional challenge. Ordinance No. 0-8-97 grants the Administrative Board sixty days to hold a hearing and an additional sixty days to render a decision. As a result, the legislation authorizes a decisionmaking process lasting twice as long as the procedures deemed unconstitutional in *Cascade News* and *Avenue Grill*. Consequently, the Court finds a strong probability that the City's four-month prior restraint of constitutionally protected expression is unreasonable, and therefore, unconstitutional on its face. *Cf.* FW/PBS, 493 U.S. 215, 228, 110 S.Ct. 596, 107 L.Ed.2d 603 (recognizing that the decision whether to issue a license must be made within a specified and reasonable time period); 11126 Baltimore Boulevard, Inc. v. Prince George's County, 58 F.3d 988, 997-998 (4th Cir. 1995) (finding a 150-day delay before a decision on an adult bookstore license not "reasonably brief" and, therefore, unconstitutional); East Brooks Books, 48 F.3d at 225 (finding a three to five-month delay for judicial review of a permit denial unconstitutional).

Id. at 810.

Another compelling factor in this case is that, as written, SMC 23.76.005, does not require the Director to make a decision on a land use decision in 120 days. This time limit can be extended if the Director deems the plans to be "incomplete" or the Director needs more "information." The time is extended until the Director is "satisfied." Thus, the Director has unbridled discretion to delay a

decision indefinitely. A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain "narrow, objective, and definite standards to guide the licensing authority." Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

This principle was well-stated by the Court in City of Huber Heights v. Liakos, 145 Ohio App.3d 35, 761 N.E. 2d 1083 (2001):

*The reasoning is simple: If the permit scheme involves the appraisal of facts, the exercise of judgment and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.*

City of Huber Heights v. Liakos, citing Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123, 130-131 (1992 ).

City of Huber Heights v. Liakos, *supra*, is very similar to the instant case. In that case, the Court held an ordinance unconstitutional when a city manager could deny an application for a sexually oriented business if he concluded that the applicant had failed to provide "required information." The Court stated:

*However, instead of requiring information which is deemed sufficient on its face, or some proof of facts the sufficiency of which is subject to objective determination, the decision whether to issue the license depends on the city manager's individual subjective view concerning the adequacy and completeness of the information submitted.*

Id. at 44. (emphasis added). See also Doe v. City of Buffalo, 56 N.Y.2d 926, 439 N.E.2d 321 (N.Y. 1982) (holding that a requirement to disclose “such other information as the director of licenses and permits shall require” allowed unbridled discretion and was unconstitutional).<sup>4</sup>

Fantasyland Video v. San Diego, *supra*, and BJS v. City of Troy, *supra*, are not distinguishable from this case, as argued by the City in its Reply Brief at CP 315-317. The only decision that has to be made by the City is whether the dispersion requirements are met. It should not take 120 days. The City did not meet its burden to show why it would take that long, as required by Kev v. Kitsap County, *supra*.

The City’s proffered excuse for violating the First Amendment is without merit. The City claims that “staffing levels” and “volume of assignments” and that Andrew McKim is the “only staff person “ available to make zoning dispersion decisions justifies 120 days. CP 317. However, the City’s reason for

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<sup>4</sup> American Target Advertising v. Giani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), *cert. denied*, 531 U.S. 811 (2000), also held that a prior restraint ordinance giving the Director the authority to require “any additional information” was unconstitutional. Redner v. Dean, 29 F.3d 1495 (11<sup>th</sup> Cir. 1994) held that a 45-day time limit was “illusory.”

violating the First Amendment is irrelevant. This identical argument regarding staffing constraints was rejected by Judge James Robart in ASF v. City of Seattle, 408 F.Supp.2d 1102 (W.D. Wash. 2005). In ASF, Inc. v. City of Seattle, *supra*, the City argued that its 17 years of prohibiting new adult cabarets was justified because the DPD had an “extreme” work overload and a shortage of experienced staff and could thus not develop legislative proposals for the location of adult cabarets. The Court stated the City’s argument as follows:

*With each extension over the past six years, the council has issued a “Work Plan and Schedule” directing the City’s Department of Planning and Development (“DPD”) to develop proposed land use regulations for adult cabarets.*

*The DPD, however, has failed each year to develop any legislative proposals regarding the location of adult cabarets. The City attributes this failure to DPD’s “extreme work overload and its shortage of experienced staff. According to the City, other competing priorities superceded DPD’s development of adult entertainment legislation . . . .”*

Id. at 1104.

The Court rejected the City’s argument that the delay was justified by the City’s workload or shortage of staff. The Court stated:

*The City is not permitted to selectively uphold the First Amendment. Further, even assuming the City has blocked the issuance of new adult cabaret licenses for legitimate,*

*non-censorship reasons over the last 17 years, the City's intent and motive for violating the Constitution are of no consequence. Plain Dealer, 486 U.S. at 770, 108 S.Ct. 2138 (refusing to presume city's reasons for denying permit applications are motivated by good faith). The City fails to provide any authority, nor is the court aware of any authority, suggesting the government's reasons for suppressing constitutionally protected speech has any bearing on the prior restraint analysis.*

Id. at 1109. Here, the City's contention that the shortage of staff and the extreme work overload of DPD allow it to suppress protected speech is without merit.

Accordingly, the trial court erred in stating that a decision on a First Amendment protected activity should not get priority. RP p. 21, Ins. 1-9. The trial court erred in stating that the City's codes apply "across the board" to every zoning decision and that there is no "special section of the zoning code for adult cabarets." RP, p. 34, Ins. 1-7. There is a special section of the zoning code for adult cabarets; they must be dispersed. A simple decision on whether dispersion is met should not take 120 days. SMC 23.47.004(H) is unconstitutional both facially and as applied.

## **V. CONCLUSION**

If the Court reverses the trial court and rules that the dispersion ordinance is unconstitutional, then summary judgment should be entered for ASF, Inc. and the injunction should be

permanently dissolved. In the alternative, if the Court does not reverse on that issue, the case should be remanded for trial on the issue of whether ASF, Inc. had a vested right to open an adult cabaret at 5220 Roosevelt Way.

DATED this 18<sup>th</sup> day of November, 2011.

Respectfully submitted ,



Kristin G. Olson  
WSBA No. 21106  
Attorneys for Appellant

NO. 66852-8-1

COURT OF APPEALS  
DIVISION ONE  
OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

vs.

ROBERT D. DAVIS and ASF, INC.,

Appellants.

PROOF OF  
SERVICE

I, Irene Norse, declare that I am a person over eighteen years of age, competent to be a witness and not a party to the above-entitled and enumerated cause.

On November 18, 2011 I caused to be served via legal messenger an original, one copy of Brief of Appellant and this Proof of Service herein addressed to:

Court of Appeals Division I  
One Union Square  
600 University Street  
Seattle, WA 98101

PROOF OF SERVICE  
Page 1 of 2

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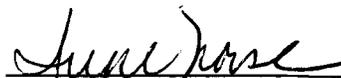
On November 18, 2011 I caused to be served via legal messenger service, true and correct copies of Brief of Appellant and this Proof of Service herein addressed to:

Robert D. Tobin  
Assistant City Attorney  
Seattle City Attorney's Office  
600 4th Ave Floor 4  
PO Box 94769  
Seattle, WA 98124-4769

Carlton Seu  
Assistant City Attorney  
Seattle City Attorney's Office  
600 4th Ave Floor 4  
PO Box 94769

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Bellevue this 18<sup>th</sup> day of November, 2011.

  
\_\_\_\_\_  
Irene Norse