

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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**CORRECTED BRIEF OF RESPONDENT CITY OF SEATTLE**

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**1. Statement of the Case**

Since 2004, Robert Davis<sup>1</sup> has attempted to open a strip club in Seattle at various locations. Although four strip clubs proposed by others have opened in Seattle during that period,<sup>2</sup> Davis has been unsuccessful in opening a club. Each of Davis' three attempts to open a club has resulted in litigation with the City of Seattle, as described below.

**1.1. The proposed downtown 5<sup>th</sup> Avenue strip club.**

In 2004, Davis applied to the City's Revenue and Consumer Affairs Department ("Revenue") for an "adult entertainment premises license" to open a strip club across the street from the Westin Hotel in downtown Seattle. An adult entertainment premises license is different than a general business license, which is also issued by Revenue, and different than land use and building permits, which are issued by the City's Department of Planning and Development ("DPD").

The license was denied because the City had in effect a moratorium on the issuance of permits for new strip clubs. Davis

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<sup>1</sup> In *ATL Corporation v. City of Seattle*, United States District Court, W.D. Washington, No. C09-1240RSL, Amended Second Order Regarding Cross-Motions for Summary Judgment, p. 6, the Honorable Robert S. Lasnik held, for purposes of collateral estoppel, that an identity of parties exists between the Appellants in this case, Robert D. Davis and his corporation ASF, Inc., and the plaintiff in that case, ATL, Inc., a "sister corporation" of Mr. Davis. A copy of that decision is Appendix 1 to this brief. Robert D. Davis individually and his two corporations, ASF, Inc. and ATL, Inc., are identified as "Davis" in this brief.

<sup>2</sup> "Dreamgirls" near Safeco Field, "Fantasy Unlimited" on Westlake, "Pandora's" on Lake City Way, and "Dreamgirls at Ricks" on Lake City Way.

successfully sued the City to overturn the moratorium, ASF, Inc. v. City of Seattle, 408 F. Supp. 2d 1102 (2005), and the City subsequently settled the suit. The site of the proposed strip club was later acquired by the Seattle Popular Monorail Authority,<sup>3</sup> leaving Davis to look for a new location for a strip club.

In response to the invalidation of the moratorium, the City decided to reconsider where new strip clubs could be located in the City. Prior to the invalidation, strip clubs were permitted in various zones without regard to whether a strip club was located in proximity to other land uses. When the Seattle City Council took up the question of strip club zoning after the moratorium was invalidated, it decided to require that new strip clubs be located 800 feet or more from certain locations where children congregate: schools, child care centers, community centers and parks; and 600 feet or more from any other strip club. Seattle Municipal Code (SMC) 23.47A.004.H. CP 35. This dispersion standard, referred to as the “buffer” requirement, is the target of Davis’ constitutional challenge in this case.

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<sup>3</sup> The Monorail Authority was not an agency of the City of Seattle.

**1.2. The proposed Aurora Avenue strip club.**

In February, 2008, Davis submitted an application to Revenue for an adult entertainment premises license for a proposed strip club at 10507 Aurora Ave. N, the site of Cyndy's House of Pancakes. CP 38. Revenue initially denied the license because Davis had not shown compliance with zoning and other regulatory requirements. CP 38. When Davis contacted DPD to ascertain whether the City's zoning, including the new buffer requirement, would allow a strip club at that location, he was told that regulatory decisions regarding compliance with applicable codes, including the zoning ordinance and Building Code, are made only after an application for a permit and proposed project plans are submitted to DPD for review. CP 47-48. DPD reiterated its position that a land use permit application is necessary to trigger a land use regulatory decision in a letter to Davis on May 23, 2008, in response to Davis' inquiry about opening a strip club at 2015 Fifth Avenue. CP 49-50.

Davis' attorney, Kristin Olsen, then contacted the Seattle City Attorney's Office and citing FW/PBS, Inc. City of Dallas, 493 U.S. 215, 227, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), demanded that the City issue the adult entertainment premises license to Davis. CP 51-55. In response, "the City agreed to issue the adult entertainment premises license, but made it clear that a number of other approvals had to be obtained before

plaintiff could lawfully operate a strip club at the proposed location. . . . In particular, the City reminded the plaintiff that the dispersion requirements of SMC 23.47A.004.H had to be satisfied.” CP 39.

Citing City of Littleton, Colo. v. Z.J. Gifts, D-4, LLC, 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004), the City’s position in response to Davis’ demand was that although FW/PBS, Inc. appeared to require issuance of the adult entertainment premises license based upon the Court’s First Amendment prior restraint analysis, the Supreme Court had not extended that case to the issuance of routine building and zoning permits. CP 56-57. The City Attorney reiterated the City’s position in a second letter to Kristin Olsen, on July 22, 2009. CP 58-59.

Davis then applied to DPD for a permit, but failed to disclose to DPD that he planned to convert the existing restaurant to a strip club. When nearby owners and residents informed the City of the proposed strip club, DPD told Davis that he would need to demonstrate compliance with the zoning buffer requirement in order for the permit to be approved. CP 39-40. On September 1, 2009, the City denied the permit because the proposed strip club did not meet the buffer requirement. CP 40-41.

On September 2, 2009, Davis sued the City in the United States District Court for Western Washington, alleging that the City’s licensing and zoning ordinances were unconstitutional, facially and as applied, that

the City misapplied its zoning ordinance in denying the zoning permit, and seeking damages pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983. ATL Corporation v. City of Seattle, 758 F. Supp. 2d 1147 (W.D. Wash., 2010) CP 36-46.

Davis attacked the facial constitutionality of the City's zoning ordinance in two sequential motions for partial summary judgment. In the first motion, Davis argued that the City's zoning for strip clubs was facially unconstitutional because the zoning allegedly provided insufficient locations for the establishment of new strip clubs. The Honorable Robert S. Lasnik rejected Davis' argument on July 19, 2010. CP 43-46.

Davis then filed his second motion for partial summary judgment. He argued as he does here that the City's Land Use Code (SMC 23.76.005), which establishes a 120-day deadline within which to review a proposed development project, and which was adopted to comply with RCW 36.70B.080 (1), facially violates the First Amendment when the proposed development project contains land uses protected by the First Amendment, because 120 days is, according to Davis, an unreasonable length of time within which to perform that regulatory review. Davis also argued, as he does here, that the buffer requirement itself violates the First Amendment because 120 days is allegedly an unreasonable time within

which to determine if a proposed strip club complies with the buffer requirement.

On June 10, 2011, and after entry of the trial court's judgment in this case, Judge Lasnik rejected Davis' second facial constitutional challenge on alternative grounds. First, he held that Davis was "collaterally estopped from re-litigating the facial validity of the 120-day permit processing deadline" on the basis of the trial court's judgment in this case. ATL Corporation v. City of Seattle, United States District Court, W.D. Washington, No. C09-1240RSL, Amended Second Order Regarding Cross-Motions for Summary Judgment, p. 6, Appendix 1 to this brief.<sup>4</sup> Second, Judge Lasnik held on the merits that the 120-day ordinance and the buffer requirement are facially constitutional. Id. at 5-6. Summarizing his holding, the court stated:

In the alternative, the Court finds that a four month period in which to evaluate all of the permitting issues that arise from a given project is not unreasonable. Plaintiff's facial challenge fails as a matter of law and fact.

**1.3. The University District (Jiggles) location.**

On January 9, 2008, Davis submitted a complete application to Revenue for an adult entertainment premises license at 5220 Roosevelt

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<sup>4</sup> Unpublished federal court decisions may be considered by this court. S.S. v. Alexander, 143 Wn. App. 75, 93, 177 P.3d 724 (2008).

Way NE in the University District neighborhood (Jiggles), for license year 2007. CP 77, 350-351. Because Davis did not pay the premises license fee until November 4, 2008, the 2007 premises license was not issued until that date. CP 77, 350-351. (Although Davis obtained premises licenses for the Jiggles location between 2007 and 2011, he did not open Jiggles until December, 2010.)

On May 26, 2010, Davis submitted a building permit application to DPD for the Jiggles location, “for alterations to establish occupancy for existing restaurant/nightclub per plans.” The plans described the proposed use as “restaurant and office”, which was the permitted use of the property. CP 73. Once again, Davis did not disclose to DPD that he planned to convert the existing use into a strip club. DPD issued the building permit on June 25, 2010.

In early November, 2010, the City began receiving inquiries and complaints from citizens concerned about the possible opening of a strip club at the Jiggles location, CP 61, and subsequently received over 40 complaints. On November 12, 2010, DPD sent a letter to Davis stating that the City had received information from the public that Davis intended to open a strip club at the Jiggles location, and reminding him that a Master Use Permit (“MUP”) would be required to establish an “adult

cabaret”<sup>5</sup> zoning use. CP 61. The DPD letter also notified Davis that it did not appear a strip club would meet the zoning buffer requirements at that time, but that a final regulatory determination regarding compliance with the buffer requirement would not occur until a MUP application had been received and reviewed by DPD. Referring to the temporal nature of land uses, including the five protected uses that trigger the buffer requirement<sup>6</sup>, DPD noted that “[b]ecause the status of protected uses may change with time, a proposed adult cabaret that would be prohibited today might be allowed in the future and vice versa.” CP 61.

In response to DPD’s letter, Davis sent a letter to DPD on November 29, 2010, alleging that because he had applied to Revenue for an adult entertainment premises license on May 15, 2007, before the City Council adopted the zoning buffer requirement in June, 2007, and because he had renewed that license annually since then, he therefore had “everything in place to properly operate an adult entertainment premises at this location.” CP 62. Davis also stated that he no longer intended to do any work at the premises that would required a building permit, and that he planned to let the building permit he had obtained in June 2010 expire.

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<sup>5</sup> “Adult cabaret” is the terminology used in Seattle’s zoning ordinance to describe a strip club.

<sup>6</sup> Schools, child care centers, community centers, parks and other strip clubs.

On December 16, 2010, Davis opened the Jiggles strip club for business, without having sought or obtained a MUP from DPD allowing an adult cabaret use at that location.

The City filed this lawsuit on January 27, 2011. CP 1-6. On February 2, 2011 the City filed a motion for a preliminary and permanent injunction to enjoin the operation of Jiggles. CP 15-78. At the same time, the City filed a motion to advance trial on the merits of its request for a permanent injunction with the hearing on its motion for a preliminary injunction. CP 7-10. The trial court, the Honorable Suzanne Barnett, held a hearing on March 11, 2011 and granted the City's motions. CP 361-366. This appeal followed.

## 2. Argument

### 2.1 **The Trial Court did not err by consolidating the hearing on the merits with the hearing on the City's motion for a preliminary injunction.**

Davis' first argument is that the trial court erred by consolidating the hearing on the merits of the City's request for a permanent injunction with the hearing on the City's motion for a preliminary injunction.<sup>7</sup> Davis argues that consolidation was improper because, he alleges, there were disputed issues of material fact related to whether Davis had acquired vested rights against application of the zoning buffer requirement. Specifically, Davis

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<sup>7</sup> Brief of Appellant, p. 6-9.

alleges that Davis and the City dispute when Davis applied for and obtained the 2007 adult entertainment premises license for Jiggles.

The City argued to the trial court that as a matter of law, a person vests against the application of new zoning laws only by filing a complete application for a building permit or upon issuance of a MUP, citing the City's vesting ordinance, SMC 23.76.026 and Erickson v. McLerran, 123 Wn.2d 864, 872 P.2d 1090 (1994) (upholding Seattle's vesting ordinance). CP 25-26, 319-323. Accordingly, the City argued, alleged disputes regarding the dates of application and issuance of an adult entertainment premises licenses are immaterial to the question whether vested rights have been established under the zoning and building codes. CP 357. The trial court evidently agreed, and consolidated the hearing on the merits with the City's motion for a preliminary injunction. CP 364-365.

The trial court was correct. A person acquires vested rights against the application of new zoning or building regulations only by filing a complete application for a building permit or upon issuance of a MUP. SMC 23.76.026, Erickson v. McLerran, 123 Wn.2d 864, 872 P.2d 1090 (1994) (upholding Seattle's vesting ordinance). Filing an application for an adult entertainment premises license or any other type of license, permit or approval is simply not one of the actions that establishes vested rights under SMC 23.76.026. Therefore, any alleged dispute regarding the date of

application or issuance of any such approval is immaterial to the vesting issue, and the trial court correctly decided that the vesting issue could be decided as a matter of law. Accordingly, the court properly consolidated the hearing on the merits with the City's motion for a preliminary injunction.

Even if the trial court had erred in deciding that issuance of an adult entertainment premises license does not establish vested rights as to the Land Use and Building Codes, that fact would avail Davis nothing because the operative adult entertainment premises license in effect when he opened Jiggles in December, 2010 was the 2010 license, not Davis' 2007 license. Adult entertainment premises licenses are issued and effective for a period of one year that begins on January 1. SMC 6.270.060. There is no dispute regarding the application or issuance dates for the 2010 license. Because the 2010 license is the operative license, any alleged dispute about the dates of application or issuance of the 2007 license, the basis for Davis' first claim of error, is immaterial.

Third, even if 2007 license dates were deemed material to the vesting issue, Davis errs when he alleges that there is a dispute of fact regarding those dates. Although Davis' brief (p. 3) claims that Davis applied for an adult entertainment premises license on May 11, 2007, the record cited by Davis does not support that claim. The record cited by Davis shows that Davis applied for a general business license, not an adult entertainment

premise license, on May 11, 2007. CP 150. Indeed, Davis states that when he asked Revenue about an adult entertainment premises license on that date, he was allegedly told that no adult entertainment premises license was required. CP 106, 351. Therefore, there is no dispute that Davis did not submit an application for an adult entertainment premises license on May 11, 2007. (The zoning buffer requirement took effect on June 22, 2007. CP 100, 102).

Similarly, although Davis claims that Revenue issued an adult entertainment premises license to him in May, 2007,<sup>8</sup> Davis fails to cite to the record in support of that claim. The record shows that Davis did not submit a complete application for his 2007 adult entertainment premises license until January 9, 2008, and that he did not pay a fee for that license until November 4, 2008, whereupon the 2007 license was issued. CP 350-354. (Davis' after-the-fact acquisition of the 2007 license was presumably done to support his argument that he has maintained an unbroken string of licenses back to 2007, when the buffer requirement was adopted.) In short, because there are no factual disputes supported by the record regarding the

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<sup>8</sup> Brief of Appellant, p. 11.

2007 licensing dates, Davis' argument that the trial court erred by deciding the vesting argument as a matter of law should be rejected for this reason as well.

In summary, Davis' first argument should be rejected because 1) the date license applications were submitted or licenses issued is immaterial to the zoning vesting issue, 2) even if licensing dates were material to the vesting issue, the operative license would be the 2010 license, not the 2007 license, and 3) there are no disputed issues of fact regarding the 2007 license in any event. Therefore, because the vesting issue could be decided as a matter of law, the trial court did not err by consolidating the hearing on the merits with the hearing on the City's motion for a temporary injunction.

## **2.2 Davis' Equitable Estoppel Argument Should Be Rejected.**

Davis' second argument is that the trial court erred by failing to hold that the City is equitably estopped from arguing that the City did not decide whether Jiggles complied with the City's Land Use and Building Code when the 2007 adult entertainment premises license was issued for Jiggles in 2008.<sup>9</sup> There are several problems with Davis' argument.

First, Davis did not present his equitable estoppel argument to the trial court. CP 82-92. Generally, appellate courts do not consider issues or

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<sup>9</sup> Brief of Appellant, p. 9-13.

theories raised for the first time on appeal. Wilson Son Ranch, LLC v. Hintz, 162 Wn. App. 297, 303, 253 P.3d 470 (2011), Sourlaki v. Kryakos, Inc., 144 Wn. App 501, 509, 182 P.3d 985 (2008). In response to the City's complaint for an injunction, Davis argued that the zoning buffer requirement was unconstitutional, CP 83-89, that Davis was vested against application of the buffer requirement as a nonconforming use, CP 89-90, 319-323, and that a MUP is not required to establish a new strip club. CP 90-91. Nowhere in Davis' response brief below did he identify and apply the elements of equitable estoppel, as he does now on appeal. Because Davis failed to do so, this court should not consider that argument now.

If the court nonetheless decides to consider that argument, the argument should be rejected. Davis correctly identifies the three elements that must be proved to establish the defense of equitable estoppel.<sup>10</sup> The first element requires proof that the party against whom estoppel is sought to be applied made an admission, statement or act inconsistent with a claim afterwards asserted. But Davis is incorrect when he claims that the City took inconsistent positions regarding the legal effect of issuance of an adult entertainment premises license in relation to determinations of compliance with the City's zoning and building codes and other laws.

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<sup>10</sup> Brief of Appellant, p. 10.

The premise of Davis' estoppel syllogism is that the City's licensing ordinance for license year 2007 required the City's Department of Revenue to determine if a proposed strip club complied with zoning, building code, and other regulatory requirements before issuing an adult entertainment premises license. Davis then argues that because the City issued him an adult entertainment premises license in 2008, the City must necessarily have decided that Jiggles complied with those laws, should now be estopped from arguing that it did not so decide, and therefore that he did not need to obtain any land use or building permits from the City before opening Jiggles in 2010. The problem with this argument is that it is unsupported by the facts.

As described in the Statement of the Case above, when Davis applied for a strip club license for his proposed new strip club on Aurora Avenue North in February, 2008, he was told that, pursuant to the terms of the licensing ordinance, the license could not be approved until he submitted an application and plans to DPD, which is the triggering event for regulatory compliance decisions under the City's Land Use and Building Codes. CP 38. In response, Davis' lawyer contacted the Seattle City Attorney's Office and demanded that the City issue the license in light of FW/PBS, Inc., supra. The City agreed that FW/PBS, Inc. appeared to require issuance of the license, and the license was issued. However, in agreeing to issue the license, the City expressly disclaimed that issuance of the license entailed

any regulatory compliance determination with respect to the zoning and building codes. CP 56-59. Therefore when, on November 4, 2008, Davis finally paid for and was issued an adult entertainment premises license for Jiggles, Davis knew of the City's position that issuance of the adult entertainment premises license did not entail any regulatory approval under the zoning and building codes, including any decision whether Jiggles complied with the zoning buffer requirement.<sup>11</sup> Furthermore, Davis has identified no facts supporting a claim that anyone at the City ever told Davis that approval of the license constituted regulatory approval of zoning and building permits.

As the City repeatedly told Davis, regulatory compliance decisions under the zoning and building codes require submittal of permit applications and proposed plans;<sup>12</sup> the City does not issue advisory opinions having regulatory effect. In particular, because application of the zoning buffer requirement depends upon the existence of facts at any moment in time, and which change,<sup>13</sup> it is the process of permit vesting that fixes the facts at a moment in time and enables the application of the buffer requirement. As

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<sup>11</sup> Finding of Fact No. 11, CP 370.

<sup>12</sup> Finding of Fact No. 10, CP 370.

<sup>13</sup> The City described this fact to Davis on several occasions. CP 61, 56, 58.

argued above, one vests to the Land Use Code and Building Code only by submitting an application for a building permit or upon issuance of a MUP, not by obtaining a business license, adult entertainment premises license, or any other type of license, permit or approval. In light of the City's repeated, express disclaimers that issuance of the adult entertainment premises license does not entail regulatory approval under zoning and other laws, Davis' claim to the contrary is incorrect.

Also, at the hearing below Judge Barnett noted that Revenue's 2007 business license form (CP 149) contained the following boilerplate disclaimer:<sup>14</sup>

**Zoning Limitations**—A business license does not authorize the holder to conduct business in violation of any zoning ordinance. (bold emphasis in original).

In light of this language, Judge Barnett expressed skepticism regarding Davis' claim that he believed that issuance of licenses also included regulatory approval under the zoning and building codes.

In short, the City never represented to Davis that issuance of an adult entertainment premise license included necessary approvals under the zoning and building codes. To the contrary, Davis knew the City's position to be precisely the opposite. Because the City did not assert inconsistent positions

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<sup>14</sup> Report of Proceedings, verbatim transcript p. 24-25.

to Davis regarding the effect of issuance of licenses on compliance with the zoning and building codes, the first element of equitable estoppel is lacking.

It follows that the second element is also lacking. That element requires action by the other party (Davis) in reliance upon the City's alleged misrepresentation. But because the City never represented to Davis that issuance of an adult entertainment premises license entailed regulatory approval under zoning and building codes and other laws, there is no misrepresentation to support Davis' reliance claim. Thus, the second required element for application of equitable estoppel is also lacking.

The third element is also not satisfied. That requires Davis to show that he was injured as a result of an inconsistent position allegedly taken by the City. As shown above, the City did not take an inconsistent position, and therefore this element fails as well.

Additionally, Washington courts decline to balance the equities when a developer is on notice that a dispute exists regarding the necessity of obtaining regulatory permits and the developer nonetheless proceeds with development. In Responsible Urban Growth Group v. City of Kent, 123 Wn.2d 376, 868 P.2d 861 (1994), the court affirmed an injunction that halted construction of a building in violation of the zoning ordinance. The court stated that if the trial court balances the equities to determine whether to grant a requested injunction, "the equities must be very

compelling to avoid an injunction to correct a clear violation of a zoning ordinance.” Id. at 390, footnote 5. When the developer claimed that the equities favored him because he had already begun construction and therefore had vested rights, the court disagreed. The court held that “the balancing of the equities doctrine is reserved for the innocent purchaser who proceeds without any knowledge of problems associated with the construction.” Id. at 390. Because the developer had knowledge of the permitting dispute, the developer “proceeded with construction at its own risk,” id., and could not defeat the requested injunction by arguing for a balancing of the equities. Here, Davis was on notice from the City that a MUP permit was required to establish an “adult cabaret” use at the Jiggles location and that Jiggles appeared to violate the buffer requirement, CP 61, yet Davis brazenly opened Jiggles for business in December, 2010.

Even if the elements of equitable estoppel could otherwise be established, courts generally will not apply equitable estoppel to bar the exercise of the governmental police power, such as the enforcement of the City’s zoning ordinance here. This rule is expressed in City of Mercer Island v. Steinmann, 9 Wn. App. 479, 483, 513 P.2d 80 (1973):

Therefore a municipality is not precluded from enforcing zoning regulations if its officers have issued building permits allowing construction contrary to such regulations, have given general approval

contrary to such regulations, or have remained inactive in the face of such violations.

\* \* \*

The want of fundamental power cannot be indirectly supplied by the application of the doctrine of estoppel *in pais*. The elements of estoppel are wanting. The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught.

See Chelan County v. Nykreim, 146 Wn.2d 904, 921, 52 P.3d 1 (2002), Buechel v. State Department of Ecology, 125 Wn.2d 196, 211, 884 P.2d 910 (1994), Ford v. Bellingham-Whatcom County District Board of Health, 16 Wn. App. 709, 716, 538 P.2d 821 (1977).

Washington courts have frequently enjoined the violation of zoning and other ordinances, including ordinances regulating strip clubs. In Kitsap County v. KEV, Inc., 106 Wn.2d 135, 720 P.2d 818 (1986), the Washington Supreme Court upheld the issuance of an injunction against operation of a strip club that had violated a strip club licensing ordinance. In City of Shoreline v. Club for Free Speech Rights, 109 Wn. App. 696, 36 P.3d 1058 (2001), the court affirmed the issuance of a permanent injunction enjoining the operation of a strip club that violated standards of

conduct (the stripper “four foot rule”) contained in the city’s adult cabaret ordinance.

In Radach v. Gunderson, 39 Wn. App. 392, 695 P.2d 128 (1985), review denied 103 Wn.2d 1027 (1985), the court reversed a trial court decision denying an injunction to enforce zoning code requirements. The court stated:

The public interest is properly considered in determining if a zoning ordinance violation should be enjoined. ‘The enforcement of a zoning ordinance by injunction is essential if the amenities of the area sought to be protected are to be preserved.’

Id. at 400 (internal citations omitted).

Examples of other cases allowing injunctions to enforce land use regulations include Department of Ecology v. Pacesetter Constr. Co. Inc., 89 Wn.2d 203, 571 P.2d 196 (1977) (enjoining construction of house in violation of zoning height and setback regulations and ordering its removal), Mercer Island v. Kaltenbach, 60 Wn.2d 105, 371 P.2d 1009 (1962) (enjoining operation of a use not permitted in the zone), Park v. Stolzheiser, 24 Wn.2d 781, 167 P.2d 412 (1946) (enjoining operation of a use not permitted in the zone), Larsen v. Town of Colton, 94 Wn. App. 383, 973 P.2d 1066 (1999) (enjoining construction of a use not permitted in the zone), City of Burlington v. Kutzer, 23 Wn. App. 677, 597 P.2d 387

(1979), review denied 92 Wn.2d 1036 (1979) (enjoining operation of a use not permitted in the zone), and City of Mercer Island v. Steinmann, 9 Wn. App. 479, 486, 513 P.2d 80 (1973) (enjoining operation of a use not permitted in the zone).

The only case cited by Davis in support of his estoppel argument, Finch v. Mathews, 74 Wn.2d. 161, 443 P.2d 833 (1968), applied equitable estoppel against the government operating in its proprietary capacity, not in its regulatory capacity. In short, even if Revenue had improperly issued an adult entertainment premises license to Davis in 2010 (it did not) or in 2007 (it did not), that would not bar the City from enforcing the zoning buffer requirement to prevent the operation of Jiggles across the street from a school and within 800 feet of a child care center, two community centers, and a public park.

In summary, Davis' equitable estoppel argument fails because 1) he failed to make the argument to the trial court, 2) the City did not take inconsistent positions regarding the issuance of licenses and the City's regulatory determinations, and therefore the elements of estoppel are lacking, 3) Davis was aware of the City's position that Jiggles was unlawful, but opened Jiggles nonetheless, at his own risk, and 4) equitable estoppel should not be applied to prevent government from enforcing land use or other police power regulations.

**2.3 The City's 120-day ordinance and zoning buffer ordinance are not facially unconstitutional.**

Davis' third and final argument is that the 120-day permit decision deadline in SMC 23.76.005 facially violates the First Amendment with respect to proposed development projects that contain First Amendment uses, and that the zoning buffer requirement in SMC 23.47A.004.H is therefore also facially unconstitutional.<sup>15</sup> Davis' argument should be rejected for the following reasons.

**2.3.1 ATL Corp. v. City of Seattle is persuasive authority that Davis' constitutional argument should be rejected.**

Davis cites a number of cases in support of his constitutional argument, but remarkably fails to inform this court of Judge Lasnik's recent decision rejecting the identical argument that Davis makes here.<sup>16</sup> In ATL Corp. v. City of Seattle, United States District Court, W.D. Washington, No. C09-1240RSL, Amended Second Order Regarding Cross-Motions for Summary Judgment, p. 5-6 (Appendix 1 to this brief), Judge Lasnik held, on the merits, that the 120-day deadline and zoning buffer requirement do not violate the First Amendment. In addition, and in the alternative, he held that Davis' First Amendment claim in ATL Corp. was barred by

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<sup>15</sup> Brief of Appellant, p. 13-26.

<sup>16</sup> A lawyer should disclose legal authority to the court that is directly adverse to the position of her client. *Cf.* RPC 3.3.

collateral estoppel, on the basis of the trial court's First Amendment holding in this case. Id. at 6.

Although this court is not bound by a decision of an inferior federal court, Washington courts consider decisions of the federal courts highly persuasive on issues of federal law. S.S. v. Alexander, 143 Wn. App. 75, 92, 177 P.3d 724 (2008), citing Home Ins. Co. of New York v. N. Pac. Ry. Co., 18 Wn.2d 798, 808, 140 P.2d 507 (1943). Davis' constitutional argument is based solely upon the First Amendment. Judge Lasnik's decision should carry additional weight in this case in light of his finding that the First Amendment issue and identity of parties between that case and this required the application of collateral estoppel.

Judge Lasnik rejected all of the arguments that Davis makes here. First, he rejected Davis' argument that each development standard applicable to a proposed development project, such as the zoning buffer requirement, must have its own regulatory review deadline. ATL Corp. Amended Second Order Regarding Cross-Motions for Summary Judgment, supra at pp. 5-6. The court recognized that the City has developed an integrated and consolidated land use permit process, which is subject to the 120-day "default" deadline for review of proposed development projects considered as a whole. The 120-day deadline

contained in SMC 23.76.005 was adopted pursuant to the 120-day mandate prescribed by RCW 36.70B.080 (1).

Second, Judge Lasnik held that the 120-day deadline to review proposed development projects is not unreasonable in all cases, and is therefore facially constitutional. ATL Corp., Amended Second Order Regarding Cross-Motions for Summary Judgment, supra at pp. 5-6. In so holding, he acknowledged Davis' concession that a regulatory review period of up to 120 days may be reasonable for certain development projects, and recognized that Davis' facial challenge necessarily fails as a result. Id. at p. 5. This is consistent with the argument and evidence considered by Judge Barnett in this case, that regulatory review of development projects, including those containing First Amendment uses, varies greatly in complexity depending upon the nature of the proposed project and the range of development regulations applicable to a project. CP 310-313, CP 341-342. Davis made the same concession to Judge Barnett as he did to Judge Lasnik.<sup>17</sup> That concession to Judge Barnett should defeat Davis' facial constitutional challenge in this case just as it defeated the identical challenge in ATL Corp.

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<sup>17</sup> Report of Proceedings, verbatim transcript p. 22, lines 2-6: Ms. Olson: "So if someone's building a skyscraper downtown, certainly they can take longer, because you have got all that complicated stuff to do. And you can keep requiring more and more. It could take way more than 120 days. But you have to give justification."

Judge Lasnik considered many of the cases cited by Davis here, yet rejected Davis' argument that the 120-day deadline was facially unreasonable. Citing City of Littleton, Colo. v. Z.J. Gifts D-4 LLC, 541 U.S. 774, 783, 787, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004) and Redner v. Dean, 29 F.3d 1495, 1497-98, 1501 (11<sup>th</sup> Cir. 1994), Judge Lasnik stated that federal law does not require preferential, expedited regulatory review for development projects that contain First Amendment uses when the permit scheme, like Seattle's Land Use and Building codes, apply reasonably objective, nondiscretionary criteria unrelated to the expression of protected speech. ATL Corp., Amended Second Order Regarding Cross-Motions for Summary Judgment, supra at p. 5-6. In short, Judge Lasnik's decision is persuasive authority that Davis' constitutional argument should be rejected.

### **2.3.2 The zoning buffer requirement applies even if the 120-day requirement is unconstitutional.**

Another answer to Davis' constitutional argument is that even if this court were to hold that the 120-day requirement is facially unconstitutional, the zoning buffer requirement would remain effective and apply to prohibit Jiggles at its location. That is because the 120-day

requirement can be severed from the substantive buffer requirement itself. Seattle's Land Use Code has a severability clause.<sup>18</sup>

A statute is not to be declared unconstitutional in its entirety unless the remainder of the act is incapable of achieving the legislative purposes. Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9<sup>th</sup> Cir. 1986). This rule is illustrated by Tollis, Inc. v. County of San Diego, 505 F.3d 935 (9<sup>th</sup> Cir. 2007). In Tollis the Ninth Circuit held that an unreasonably long time limit for the regulatory review of a zoning permit application for an adult use did not require invalidation of the entire ordinance. Rather, the permit requirements were severed leaving the substantive provisions of the zoning code intact. Tollis, 505 F.3d at 943.

Judge Lasnik applied this rule in ATL Corp. when he invalidated the City's licensing requirement for strip clubs. He held that although the City's license requirement for adult entertainment premises was facially unconstitutional because it did not have a deadline for acting on a license application<sup>19</sup>, and that a license could therefore not be required, ATL still

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<sup>18</sup> "The Land Use Code is declared to be severable. If any section, subsection, paragraph, clause or other portion of any part adopted by reference is for any reason held to be invalid or unconstitutional by any court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of the Land Use Code. If any section, subsection, paragraph, clause or any portion is adjudged invalid or unconstitutional as applied to a particular property, use, building or other structure, the application of such portion of the Land Use Code to other property, uses or structures shall not be affected." Ord. 110381 § 1, 1982.

<sup>19</sup> A 30-day license deadline originally enacted by the Seattle City Council did not take effect as a result of a successful voter referendum that prevented that deadline and other

had to comply with the substantive requirements of the licensing ordinance. ATL Corp. v City of Seattle, 758 F. Supp. 2d 1147, 1154, (W.D. Wash. 2010).<sup>20</sup>

Therefore, if this court were to hold that 120 days is an unreasonable period of time in which to conduct regulatory review of proposed development projects containing First Amendment uses, Jiggles would still need to comply with the zoning buffer requirement. Because it is undisputed that Jiggles does not comply with that requirement,<sup>21</sup> the decision of the trial court enjoining the operation of Jiggles should be affirmed.

### **2.3.3 The 120-day requirement is not facially unconstitutional.**

In order to decide Davis' claim that the 120-day permit process deadline is facially unconstitutional, and with it the buffer requirement, it is first necessary to understand the statutory context that regulates the timing of review of development proposals.

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licensing provisions from taking effect, including the controversial "four foot" rule that would have required strippers and their customers to be separated by a distance of at least four feet.

<sup>20</sup> "The provisions of SMC Chapter 6.270 requiring an adult entertainment premises license are hereby severed and invalidated because they have no reasonable time limits. The ordinance's other provisions, including but not limited to, the standards of conduct, disclosure requirements, and operational requirements, remain intact."

<sup>21</sup> Findings of Fact 5-8, CP 369.

### 2.3.3.1 The 120-day deadline.

Washington law requires that local land use and building code decisions be made within 120 days unless a local government makes written findings that more time is necessary to process specific complete project permit applications or project types. RCW 36.70B.080 (1).<sup>22</sup> The 120-day deadline applies to

any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.

RCW 36.70B.020 (4).

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<sup>22</sup> RCW 36.70B.080 (1) states:

(1) Development regulations adopted pursuant to RCW 36.70A.040 must establish and implement time periods for local government actions for each type of project permit application and provide timely and predictable procedures to determine whether a completed project permit application meets the requirements of those development regulations. The time periods for local government actions for each type of complete project permit application or project type should not exceed one hundred twenty days, unless the local government makes written findings that a specified amount of additional time is needed to process specific complete project permit applications or project types.

The development regulations must, for each type of permit application, specify the contents of a completed project permit application necessary for the complete compliance with the time periods and procedures.

As anticipated by RCW 36.70B.080 (1), Seattle recognizes a wide variety of development projects. Seattle land use decisions are classified into five categories based on the amount of discretion and level of impact associated with each decision. SMC 23.76.004.A. An application that is solely for a change of use to allow the operation of an adult cabaret is a “Type I” land use decision, because it is a non-appealable decision requiring “the exercise of little or no discretion.” SMC 23.76.004.B;<sup>23</sup> SMC 23.76.006.B. As part of a project permit application, review for compliance with development standards, which includes compliance with

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<sup>23</sup> SMC 23.76.004.A through C describe Seattle’s land use decision framework, designating the five separate types of decisions:

A. Land use decisions are classified into five (5) categories based on the amount of discretion and level of impact associated with each decision. Procedures for the five (5) different categories are distinguished according to who makes the decision, the type and amount of public notice required, and whether appeal opportunities are provided.

B. Type I and II decisions are made by the Director and are consolidated in Master Use Permits. Type I decisions are nonappealable decisions made by the Director which require the exercise of little or no discretion. Type II decisions are discretionary decisions made by the Director which are subject to an administrative open record appeal hearing to the Hearing Examiner; provided that Type II decisions enumerated in Section 23.76.006 C2 shall be made by the Council when associated with a Council land use decision and are not subject to administrative appeal. Type III decisions are made by the Hearing Examiner after conducting an open record hearing and not subject to administrative appeal.

C. Type IV and V decisions are Council land use decisions. Type IV decisions are quasi-judicial decisions made by the Council pursuant to existing legislative standards and based upon the Hearing Examiner's record and recommendation. Type V decisions are legislative decisions made by the Council in its capacity to establish policy and manage public lands. (Emphasis added)

the zoning buffer standard, is also a Type I decision. SMC 23.76.006 (B) (1).

To implement the permit processing deadlines required by RCW 36.70B.080 (1), the City adopted SMC 23.76.005. Subsection (A) of that section provides for a 120 day time limit for Type I land use decisions, as follows:

**SMC 23.76.005 Time for decisions.**

A. Except as otherwise provided in this section or otherwise agreed to by the applicant, land use decisions on applications shall be made within one hundred twenty (120) days after the applicant has been notified that the application is complete. In determining the number of days that have elapsed after the notification that the application is complete, the following periods shall be excluded:

1. All periods of time during which the applicant has been requested by the Director to correct plans, perform required studies, or provide additional required information, until the determination that the request has been satisfied;
2. Any extension of time mutually agreed upon by the Director and the applicant;
3. For projects which an environmental impact statement (EIS) has been required, the EIS process time period; and

4. Any time period for filing an appeal of the land use decision to the Hearing Examiner, and the time period to consider and decide the appeal.

In short, the Washington Legislature has adopted a generally applicable regulatory requirement that local project permit decisions be made within 120 days of receipt of a complete permit application, and the City has implemented this requirement through its Land Use Code, as described above.

**2.3.3.2 The requirement for a “complete application.”**

The statutory duty to act on an application within 120 days is triggered by the receipt of a “complete application.” RCW 36.70B.080 (1). In addition, RCW 36.70B.060 requires local development regulations to contain procedures for determining the completeness of permit applications. RCW 36.70B.070 requires local governments to notify permit applicants in writing within 28 days whether the application is complete or, if the application is incomplete, to state what additional information is required. Within 14 days of receiving the additional information, the local government must notify the applicant in writing whether the application is now complete or, if not, what additional information is necessary. RCW 36.70B.070 (4) (b). If the local

government fails to notify the applicant that the application is incomplete within 28 days, it is deemed complete. RCW 36.70B.070 (4) (a).

RCW 36.70B.070 identifies factors that local government may take into account in determining whether an application is deemed complete. However, an application is complete when it meets the submittal requirements even though additional information may be required or project modifications may be undertaken subsequently. RCW 36.70B.070 (2).

Pursuant to these statutory requirements, Seattle incorporated the requirements of RCW 36.70B.070 in its Land Use Code at SMC 23.76.010.

**2.3.3.3 Regulatory review that entails analysis of multiple regulatory requirements warrants longer periods to conduct that review.**

Davis mischaracterizes the nature of the time limits issue by arguing that the reasonableness inquiry is directed to the time required to evaluate compliance with any given regulatory requirement, in this case the zoning buffer requirement, rather than the time required to evaluate compliance with all regulatory requirements that apply to a development project. However, the correct object of constitutional analysis is the time required to issue the permit that authorizes or prohibits the constitutionally protected use, not the time required to review and analyze the project's

compliance with any particular development requirement that may apply to the review of a proposed development project, e.g., building height, yard setbacks, structural loads, fire sprinklers, etc. A determination that a proposed project does or does not comply with any particular development standard does not, standing alone, constitute authorization to proceed with development. It is only after the project has been reviewed for compliance with all applicable regulatory requirements that a permit is approved and the applicant has a legal right to undertake the development.

Therefore, whether a time limit is reasonable varies depending on the number and type of decisions that must be made when reviewing a proposed development. In Fantasyland Video, Inc. v. County of San Diego, 373 F. Supp. 2d 1094 (S.D.Cal. 2005), the court found unreasonable a 130-day time limit for a permit process that addressed just one regulatory requirement: whether the dispersion requirements were met, a question that could be “quickly verified through the County’s GIS system.” Fantasyland, at 1146. The court, however, distinguished that ordinance from one approved by the Eleventh Circuit in Redner v. Dean, 29 F.3d 1495 (11th Cir.1994), where the permit required compliance determinations with respect to a number of regulatory requirements:

The ordinance at issue in Redner placed a 45-day time limit on the government’s decision to grant or deny an application,

which was found constitutionally reasonable. (Footnote and cite omitted). In the 45 days, the government was to determine whether the adult entertainment business complies with the building, fire, health and zoning regulations. (Cite omitted). The Redner ordinance is distinguishable because all the County has to do before deciding whether to issue a permit in this case, is to determine whether the business meets the distance and separation requirements of the zoning ordinance. (Emphasis added).

Fantasyland, 373 F. Supp. 2d at 1145-46.

Davis also cites BJ's No. 2, Inc. v. City of Troy, Ohio, 87 F. Supp. 2d 800 (S.D. Ohio 1999) in support of his argument. That case involved a challenge to the 120-day review period for a conditional use permit for adult uses. However, the only review standard applicable to the permit decision was a general and subjective question whether the proposed use was compatible with surrounding properties. Id. at 813. In contrast, the 120-day project review period prescribed by SMC 23.76.005 is generally applicable to all proposed development projects in Seattle, and potentially encompasses compliance determinations for hundreds of development standards contained in numerous City codes, including the Land Use Code and Building Code. Although 120 days might be excessive if only one review standard exists, a different standard of reasonableness applies when

multiple development standards must be evaluated as part of the project review process.

In concluding that 120 days was excessive in BJS No. 2, the court largely relied upon several other cases in which license review periods were deemed excessive. However, those cases involved adult use licensing schemes that did not entail general compliance determinations for land use and building codes. Once again, Davis is comparing apples and oranges.

Moreover, the city in BJS No. 2, Inc. “raised no substantive argument challenging BJS’ claims”, Id. at 809. Even more significantly, the case was decided before City of Littleton, Colo. v. Z.J. Gifts D-4, LLC, 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004), in which the Supreme Court held that special expedited judicial review is not required for adult entertainment permitting.

In contrast to the ordinances at issue in Fantasyland and BJS No. 2, Inc., state law requires Seattle’s regulatory review process to analyze consistency with numerous development standards. RCW 36.70B.060. The reasonableness of the length of time to review a proposed development project depends on the nature and scale of the entire

development proposal<sup>24</sup>. If the project is large and complex, such as the construction of a downtown skyscraper, it is highly unlikely that regulatory review could reasonably be completed within 120 days. On the other hand if the project is the construction of a garage for a single family home, then 120 days is likely ample time for regulatory review.

This principle applies equally to proposed land use projects that contain First Amendment uses, such as movie theaters, bookstores, performing arts theaters, libraries, concert halls, television and radio studios and broadcast facilities, newspaper offices and printing plants. As described in the Declaration of Susan G. Putnam, CP 341-342, the permit processing time for the Northgate Barnes and Noble bookstore was 15 months for the zoning permit and 14 months for the building permit; for the Capital Hill public library, 21 months for the zoning permit and 8 months for the building permit; for the Northgate Theater, 24 months for the zoning permit and 14 months for the building permit. Based on the scale of these projects and the multitude of development standards applicable to the projects, the permits processing times were reasonable.

Even with respect to review of a proposed strip clubs, the time required for review depends on the nature of the proposed project and the scope of applicable development regulations. The new “Dreamgirls” strip

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<sup>24</sup> Finding of Fact No. 12, CP 370; Conclusion of Law No. 8, CP 371.

club located near Safeco Field was permitted in approximately six months, even though the project only involved the remodel of an existing building. Declaration of Sue Putnam, CP 341-342. Even then, regulatory analysis can be complex, as evidenced by the documents included in the Declaration of Randy Bernard. CP 170-291.

On the other hand, if a person were to propose building a new strip club adjacent to south Lake Union, the applicant would need to obtain a Shoreline substantial development permit (required by State law), possibly a Shoreline variance (which requires final approval by the State Department of Ecology), possibly a rezone and/or a Comprehensive Plan amendment (for which public hearings are required by law), environmental review pursuant to the State Environmental Policy Act (“SEPA”), RCW 43.21C, possibly subdivision approval if the land is divided for sale or lease (required by state law), as well as compliance with the Seattle Land Use Code, Building Code and other applicable codes. In short, the scale of the project and the nature and complexity of applicable regulatory requirements determines the reasonableness of the regulatory review period, not the time required to review any particular development standard.

**2.3.3.4 Seattle’s zoning buffer requirement is not an unconstitutional prior restraint.**

Davis argues that the 120-day time limit is an unconstitutional prior restraint on free speech because 120 days is an unreasonable time limit for regulatory review of proposed development projects containing First Amendment uses. However, content-neutral laws, such as the 120-day requirement and the zoning buffer requirement that targets negative secondary effects rather than the content of speech, are “properly analyzed as a form of time, place, and manner regulation.” City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50, 62, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310 (1976). Such a system “applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display.” City of Littleton, Colo. v. Z.J. Gifts D-4, LLC, 541 U.S. 774, 783, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004). “Nor should zoning requirements suppress that material, for a constitutional zoning system seeks to determine *where*, not *whether*, protected adult material can be sold.” Id. (Italics in original).

SMC 23.76.005.A is a law of general applicability. It applies to all proposed buildings and uses in the City of Seattle, not just those containing First Amendment uses, or to proposed strip clubs. Referring to

a proposed adult use, the Court stated that “[s]uch activity, when subjected to a general permit requirement unrelated to censorship of content, has no special claim to priority in the judicial process.” City of Littleton, Colo. v. Z.J. Gifts D-4, LLC, 541 U.S. 774, 787, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004) (Scalia, J., Concurring). As further stated by Justice Scalia, “[t]he notion that media corporations have constitutional entitlement to accelerated judicial review of the denial of zoning variances is absurd.” Littleton, 541 U.S. at 787 (Scalia, J., Concurring). After Littleton it cannot be argued that the First Amendment demands expedited regulatory review of building and zoning permit applications for projects that contain First Amendment uses.

Under FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), a permitting scheme may rise to the level of an unconstitutional prior restraint if it “fails to place limits on the time within which the decisionmaker must issue the license.” Id., 493 U.S. at 226. The Court refrained, however, from applying the strict “prior restraint” standards established in Freedman v. State of Md., 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965),<sup>25</sup> to Dallas’ license code, stating that

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<sup>25</sup> In Freedman, movie theater owners were required to submit films to the Maryland Board of Censors for approval prior to showing. In striking down the law, the Supreme Court held that three procedural safeguards were necessary to ensure expeditious decisionmaking by a motion picture censorship board: “(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must

“[t]he licensing scheme we examine today is significantly different from the censorship scheme examined in Freedman.” Id., 493 U.S. at 606. The Court noted that “[i]n Freedman, the censor engaged in direct censorship of particular expressive material.” Id., 493 U.S. at 606-607. In contrast, “[u]nder the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.” Id.

Fourteen years after FW/PBS, the Littleton Court sharpened the distinction between Freedman-type censorship laws and adult entertainment zoning and licensing laws, rejecting the notion that expedited judicial review is required for proposed adult uses. The court recognized that there is a significantly lower risk of First Amendment harm in an adult entertainment licensing and zoning scheme than in a typical prior restraint situation. Littleton at 782-783. Freedman’s strict requirements, therefore, do not apply to Seattle’s 120-day ordinance, to RCW 36.70B.080 (1), which established the 120-day deadline, or to Seattle’s zoning buffer requirement for new strip clubs.

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be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.” FW/PBS, 493 U.S. at 227, citing, Freedman, 380 U.S., at 58-60, 85 S.Ct., at 738-740.

### 2.3.3.5 Seattle's time limit is reasonable.

- (a) **Other similar limits were struck down because the municipalities failed to present evidence.**

Contrary to Davis' argument, case law does not hold that a 120, 130 or 150 day time limit for conducting regulatory review of proposed development projects *per se* violate the First Amendment. Rather, in cases cited by Davis, the municipalities failed to provide *any* evidence to show that time limits imposed in their ordinances were reasonable.

In 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988 (4<sup>th</sup> Cir. 1995), the Fourth Circuit noted that "the record is devoid of any evidence that would support the necessity of a 150-day delay to complete the administrative review process for the zoning scheme implemented by the County." *Id.*, 58 F.3d at 998. In Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9<sup>th</sup> Cir. 1986), the Ninth Circuit noted that Kitsap County had "failed to demonstrate a need for [a] five-day delay period between the dancer's filing of an application and the County's granting of a license." In Fantasyland, *supra*, the district court observed that San Diego County "has offered no evidence to show why it needs 130 days" to decide whether dispersion requirements were met. *Id.*, at 1146. (Emphasis added). Edinburgh Restaurant v. Edinburgh Township, 203 F. Supp. 2d 865 (N.D. Ohio 2001), cited by Davis, is inapposite because the

ordinance at issue contained no deadline for issuing a permit. In contrast to these cases, the City provided the trial court here with ample evidence that Seattle's time limit, mandated by state law, is reasonable.

**(b) Seattle provided ample evidence to support its time limit.**

Washington State's requirement to consolidate multiple land use reviews within a single project permit process, and which entails compliance determinations for multiple regulatory standards, provides ample justification that the 120-day time limit to review development proposals is reasonable. See discussion in section 2.3.3.3 above. Even if a project proposal were to involve nothing more than a proposed change of use to an adult cabaret and application of the zoning buffer standard, there is ample evidence to support a 120-day time limit for that regulatory review.

In Fantasyland the court found that “[c]ompliance 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.” Id., at 1146. Unlike San Diego County in Fantasyland, however, Seattle cannot rely solely on computers to conduct its analysis. Rather, due to technical constraints, a time-consuming search of microfilm records is necessary.

Andrew McKim, Land Use Planner Supervisor for DPD, stated that a definitive dispersion analysis for an adult cabaret requires the examination of the legally established uses of hundreds of parcels. In the case of Jiggles, for example, there are 386 parcels. CP 344-348.

Unlike San Diego, Seattle does not have a GIS system that enables it to quickly analyze dispersion. Rather, DPD has access to the King County Assessor's GIS; however, King County does not designate uses in accordance with Seattle's Land Use Code. In cases where the most recent use permit was issued within the past six years, the City has computer records that sometimes allow DPD to draw a conclusion about the established uses. However, research of buildings that don't have recent use permits on the computer requires research of microfilm records. CP 344-348.

Mr. McKim stated that even if residential lots are eliminated from the records search, the microfilm research would require approximately 80 hours of employee time. Such a task, however, requires several weeks if not months because of staffing levels and the volume of other assignments.

Davis suggests that "staffing levels" is the reason given by the City for not having a review deadline for proposed development that is shorter

than 120 days.<sup>26</sup> That is incorrect. Local land use permitting is subject to multiple requirements imposed pursuant to state and sometimes federal law, that require review and analysis of many regulatory factors. Public notice, public comment and public hearing requirements are just one example of the types of procedural requirements that cause regulatory review for proposed development to be extended. Review of potential environmental impacts under SEPA and other laws is another. Although resource considerations are a factor to be considered in determining the reasonableness of a regulatory review period, it is primarily the character and complexity of the modern, land use regulatory scheme that informs the reasonableness of the regulatory review period.

**(c) State and City laws do not allow indefinite delays.**

Davis argues that because the 120-day time limit is subject to exceptions, there is no guarantee that a permit will be issued within 120 days. Seattle's Land Use Code, however, does not allow for indefinite delays resulting from the unfettered discretion to require more information from an applicant, as in Huber Hts. v. Liakos, 145 Ohio App.3d 35, 761 N.E.2d 1083 (2001) and other cases cited by Davis. In Liakos the city manager could indefinitely delay a sexually oriented business permit if he

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<sup>26</sup> Brief of Appellant, p. 24-26.

or she “conclude[d] that the applicant ‘has failed to provide information’ required or has ‘falsely’ answered a question or request for information.”

Id.

As described above, Seattle and Washington law contrasts greatly with that in Liakos. RCW 36.70B.070 provides strict and detailed requirements that a local government must follow when an application has been submitted, including providing a written determination within 28 days that the application is complete, or if incomplete, a statement of what is necessary to make it complete. Within 14 days of an applicant having submitted the additional information, the agency must notify an applicant whether the application is complete or state what additional information is necessary.

SMC 23.76.010.D specifically identifies the requirements for complete applications, and once the requirements are met the application is deemed complete even though further information may be required. SMC 23.76.010.E. Finally, the City cannot make exceptions to the general 120 day requirement, unless it makes “written findings that a specified amount of additional time is needed to process specific complete project permit applications or project types.” RCW 36.70B.080 (1). (Emphasis added).

These laws circumscribe local government's ability to delay permit processing by limiting the time local government may take to determine if a development application is "complete". RCW 36.70B.060. Seattle's ordinance, therefore, does not afford discretion to request further information to indefinitely delay an application as in Liakos.

In summary, the City's 120-day permit processing deadline, which embodies the 120-day deadline prescribed by RCW 36.70B.080 (1), is not an unconstitutional prior restraint because the time limit for reviewing proposed development projects is reasonable. Those laws are content-neutral laws of general applicability. Furthermore, even if the court were to hold that those time limits are unreasonable for any development project containing First Amendment uses, and therefore unconstitutional, the zoning buffer requirement would still apply because it is a substantive development standard that is severable from the 120-day review period. Accordingly, the trial court's decision that the 120-day ordinance and zoning buffer requirement do not violate the First Amendment should be affirmed.

### **3. Conclusion**

The three arguments Davis presents to reverse the decision of the trial court should be rejected. Because the trial court could decide the vesting issue as a matter of law, the court did not err by consolidating the

hearing on the request for a permanent injunction with the hearing on the motion for a preliminary injunction. Davis' equitable estoppel argument lacks merit for the reasons described. Finally, the City's zoning buffer requirement and 120-day ordinance do not violate the First Amendment. Therefore this court should affirm the decision of the trial court enjoining Davis from operating the Jiggles strip club in violation of the City's land use laws.

DATED: December 20, 2011.

PETER S. HOLMES  
Seattle City Attorney

By:



ROBERT D. TOBIN, WSBA #7517  
Assistant City Attorney  
*Attorneys for Respondent*

**CERTIFICATE OF SERVICE**

I certify that on the 20<sup>th</sup> day of December, 2011, I sent a copy of  
this document to the following party in the manner indicated below:

Kristin G. Olson  
O'Shea Barnard Martin & Olson, P.S.  
10900 NE 4<sup>th</sup> Street, Suite 1500  
Bellevue, WA 98004-5844  
**Via messenger**

the foregoing being the last known address of the above-named party.

  
ROSIE LEE HAILEY

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ATL CORPORATION,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

No. C09-1240RSL

AMENDED SECOND ORDER  
REGARDING CROSS-MOTIONS FOR  
SUMMARY JUDGMENT

This matter comes before the Court on “Plaintiff’s Motion for Partial Summary Judgment” (Dkt. # 68) and the “City of Seattle’s Cross-Motion for Partial Summary Judgment” (Dkt. # 69). Summary judgment is appropriate where admissible evidence, read in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact that would preclude entry of judgment in favor of the moving party. Bruce v. Ylst, 351 F.3d 1283, 1287 (9th Cir. 2003). The parties agree that the facts related to plaintiff’s First Amendment challenges to SMC 23.47A.004(H) are not in dispute.<sup>1</sup> Having reviewed the memoranda, declarations, and exhibits submitted by the parties, and having heard the arguments of counsel, the Court finds as follows:

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<sup>1</sup> Other than one sentence in the City’s reply memorandum (Dkt. # 79 at 18), the parties have not addressed issues related to damages.

AMENDED SECOND ORDER REGARDING CROSS-  
MOTIONS FOR SUMMARY JUDGMENT

1 **BACKGROUND**

2 The City of Seattle regulates adult entertainment businesses through licensing and  
3 permitting requirements.<sup>2</sup> Plaintiff alleges that one of the factors considered when issuing a  
4 building or land use permit, the dispersion requirement of SMC 23.47A.004.H, is  
5 unconstitutional on its face because the deadline for making a decision is unreasonably long, that  
6 the ordinance was applied in an unconstitutional manner when the City refused to accept  
7 plaintiff's application for a permit when originally tendered, and that the ordinance is not  
8 narrowly tailored to serve a significant government interest.

9 In early 2009, plaintiff sought permission to remodel a building located at 10504  
10 Aurora Avenue North. At the time, the relevant portions of the City's commercial zoning and  
11 land use ordinance stated:

12 H. Adult Cabarets.

13 1. Any lot line of property containing any proposed new or expanding adult  
14 cabaret must be eight hundred (800) feet or more from any lot line of property  
15 containing any community center; child care center; school, elementary or  
16 secondary; or public parks and open space use.

17 2. Any lot line of property containing any proposed new or expanding adult  
18 cabaret must be six hundred (600) feet or more from any lot line of property  
19 containing any other adult cabaret.

20 SMC 23.47A.004.H. Although the dispersion requirement does not contain its own deadline for

21  
22 <sup>2</sup> Earlier in this litigation, the licensing requirement contained in SMC 6.270.090 was struck  
23 down because the ordinance did not contain a time limit within which the government was required to  
24 make a decision on a license application. The Court found that, in the absence of a deadline for  
25 government action, the ordinance granted unbridled discretion to the City to delay, and thereby prohibit,  
26 speech protected by the First Amendment of the United States Constitution. The requirement that an  
adult entertainment business obtain a license was therefore invalidated and severed. The ordinance's  
other provisions, including, but not limited to, the standards of conduct, disclosure requirements, and  
operational requirements, were left intact and are not at issue in this motion. "Order Regarding Cross-  
Motions for Summary Judgment," Dkt. # 43 at 6-7 and 11 (dated July 19, 2010).

1 government action, the City has imposed a default 120 day time limit in which to rule on all land  
2 use applications. SMC 23.76.005. The time limit is part of a larger effort to integrate,  
3 consolidate, and expedite the land use permitting process to avoid redundancy, minimize delays,  
4 and reduce the cost of development. SMC 23.76.002.

5 On December 31, 2008, plaintiff contacted the City's Department of Planning and  
6 Development ("DPD") to determine what land use permits would be necessary in order to add a  
7 stage to an existing restaurant facility at 10504 Aurora Avenue North. Plaintiff was told which  
8 permits would be required and what information had to be submitted. Decl. of Judy Singh (Dkt.  
9 # 27), Ex. A. At some point in mid-January 2009, the "neighborhood" surrounding the proposed  
10 facility informed DPD that plaintiff was planning to open an adult cabaret at the facility and that  
11 there were incompatible uses in the immediate vicinity. Id. When plaintiff attempted to file a  
12 building permit application for the proposed remodel on January 23, 2009, DPD refused to  
13 accept the application because the dispersion criteria of SMC 23.47A.004.H had not been  
14 addressed. DPD provided information regarding how to make measurements for purposes of  
15 the dispersion criteria and requested additional changes to the plans regarding construction and  
16 safety details. Id. Plaintiff attempted to resubmit its plans on February 9, 2009, asserting that  
17 two potentially problematic facilities in the vicinity of the property were not actually  
18 inconsistent uses under the dispersion criteria. DPD disagreed and again rejected the plans on  
19 the ground that plaintiff had not demonstrated compliance with the dispersion requirements. Id.  
20 In July 2009, plaintiff's counsel contacted the City and successfully argued that DPD's refusal to  
21 accept plaintiff's permit application was an unconstitutional prior restraint on protected speech.  
22 Decl. of Kristin Olson (Dkt. # 19), Ex. 10. DPD staff were instructed to accept plaintiff's  
23 application for an adult cabaret if it met the submittal requirements and included a representation  
24 that the applicant believed the dispersion requirements were satisfied. Decl. of Judy Singh (Dkt.  
25 # 27), Ex. A.

26 When plaintiff submitted its permit application for a third time on August 18,

1 2009, it was accepted by DPD. The application to establish a new adult cabaret at 10507 Aurora  
2 Avenue North was denied, however, on September 1, 2009. DPD's review of the permit history  
3 for the properties identified by the neighbors showed that a facility with a day care center permit  
4 was located 742 feet east of the property and that a facility in which another adult cabaret was  
5 permitted to operate was located 342 feet from the property. Decl. of Kristin Olson (Dkt. # 19),  
6 Ex. 15. These prior uses had been permitted in 1971 and 1989, respectively, but were not  
7 operating at the time plaintiff applied for its building permit.<sup>3</sup>

## 8 DISCUSSION

### 9 I. UNBRIDLED DISCRETION

10 The right to open and operate an adult cabaret featuring topless, exotic, or nude  
11 dancing is protected speech under the First Amendment. Young v. City of Simi Valley, 216  
12 F.3d 807, 815 (9th Cir. 2000). Cities are permitted to impose time, place, and manner  
13 restrictions on such speech in order to "combat the undesirable secondary effects" of adult  
14 businesses (City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986)), but certain  
15 procedural safeguards must be in place to ensure that the government does not have unbridled  
16 discretion to suppress the protected speech (Jersey's All-American Sports Bar, Inc. v. Wash.  
17 State Liquor Control Bd., 55 F. Supp.2d 1131, 1138 (W.D. Wash. 1999)). A permitting scheme  
18 "that fails to place limits on the time within which the decisionmaker must issue the license is  
19 impermissible" because it creates the possibility of suppression through delay. FW/PBS, Inc. v.  
20 City of Dallas, 493 U.S. 215, 227 (1990).

21 SMC 23.47A.004.H does not confine the time within which the government must  
22 make a decision regarding compliance with the dispersion criteria. The City argues that the  
23 default 120-day deadline contained in SMC 23.76.005 brings SMC 23.47A.004.H into  
24 compliance with the constitutional requirements discussed above by limiting the municipality's  
25

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26 <sup>3</sup> The adult cabaret has since reopened its doors and is again in operation.

1 ability to delay protected speech.

2 **A. Facial Challenge**

3 In its motion, plaintiff asserts that SMC 23.47A.004.H is unconstitutional both on  
4 its face and as applied. Motion (Dkt. # 65) at 18-19. Plaintiff subsequently acknowledged,  
5 however, that the 120-day deadline is not always unreasonable: “ATL is not arguing that just  
6 because a project is subject to First Amendment protection, that a decision on a construction  
7 permit for a large and complex project, such as a downtown skyscraper must be made within 120  
8 days or that SMC 23.76.005 by itself is unconstitutional.” Reply (Dkt. # 72) at 5 (internal  
9 quotation marks and footnote omitted). The difference between a facial and an as-applied  
10 challenge is the scope of the remedy. A successful facial challenge will result in a finding that a  
11 particular law can never be validly enforced, whereas a successful as-applied challenge will  
12 prevent the law from being enforced in some, but not all, circumstances. See, e.g., 4805  
13 Convoy, Inc. v. City of San Diego, 183 F.3d 1108, 1111 (9th Cir. 1999). Having conceded that  
14 the government would, in some circumstances, need 120-days to conduct a dispersion analysis as  
15 part of a large-scale project, plaintiff is not entitled to a declaration that SMC 23.47A.004.H is  
16 unconstitutional on its face.

17 At oral argument, plaintiff took the position that, because it plans to engage in First  
18 Amendment protected activities, the City should be required to perform the dispersion analysis  
19 of SMC 23.47A.004H in less than 120 days. The existence of inconsistent uses is simply one  
20 factor that must be considered when a property owner requests a land use permit from the City of  
21 Seattle. The City has developed an “integrated and consolidated land use permit process” (SMC  
22 23.76.002) designed to ameliorate the delays, conflicts, and duplication that arose when local  
23 and state authorities required a number of separate land use permits and environmental reviews  
24 for a single project (RCW 36.70B.010). Plaintiff apparently wants the Court to undo the  
25 consolidated process so that the dispersion analysis has its own application process and review  
26 deadline. Plaintiff offers no authority for its underlying assumption that it is entitled to an

1 expedited and/or separate permit process simply because a First Amendment activity is at issue.  
2 Courts have upheld municipal regulations that combine adult licensure, building permit, and  
3 health, fire, and zoning reviews. See Redner v. Dean, 29 F.3d 1495, 1497-98, 1501 (11th Cir.  
4 1994). In addition, a permit scheme that “applies reasonably objective, nondiscretionary criteria  
5 unrelated to the content of the expressive materials that an adult business may sell or display” is  
6 unlikely to suppress protected speech in the community and does not require accelerated  
7 consideration. See City of Littleton, Colo. v. Z.J. Gifts D-4, LLC, 541 U.S. 774, 783, 787  
8 (2004). Thus, the City is not required to provide a separate application process or expedited  
9 review for projects that are subject to the dispersal requirements of SMC 23.47A.004(H).

10 To the extent plaintiff is arguing that 120 days is an unreasonably long period of  
11 time in which to consider a consolidated land use permit application, the Court finds that  
12 plaintiff is collaterally estopped from re-litigating the facial validity of the 120-day permit  
13 processing deadline. The Honorable Suzanne Barnett of the King County Superior Court  
14 addressed precisely this issue on March 11, 2011, resulting in a final judgment in the City’s  
15 favor. City of Seattle v. Robert A. Davis, et al., C11-2-04927-SEA. ATL, the plaintiff in this  
16 matter, is controlled by Robert Davis, a named party in the state court litigation. Despite the fact  
17 that this litigation was pending long before the City initiated its enforcement action before Judge  
18 Barnett, the application of the doctrine of collateral estoppel will not work an injustice on  
19 plaintiff. Through its president and sister corporation, plaintiff had a full and fair opportunity to  
20 litigate its facial challenge in state court and was unsuccessful. Considerations of comity,  
21 consistency, and efficiency support the application of collateral estoppel: plaintiff may not seek  
22 a different result in this litigation.<sup>4</sup>

23  
24  
25 <sup>4</sup> In the alternative, the Court finds that a four month period in which to evaluate all of the  
26 permitting issues that arise from a given project is not unreasonable. Plaintiff’s facial challenge fails as  
a matter of law and of fact.

1           **B. As Applied Challenge**

2           Plaintiff's as-applied challenge is based on the fact that the City refused to make a  
3 relatively simple dispersion determination for over six months, thereby suppressing plaintiff's  
4 protected speech for an extended and, in the circumstances presented here, unreasonable period  
5 of time. The Court agrees. Even if one assumes that the City properly rejected plaintiff's  
6 building permit application in January 2009 because the application was not complete, once  
7 plaintiff addressed the dispersion criteria, the application should have been accepted and ruled  
8 upon in a timely fashion. By rejecting the application, the City effectively prevented a decision  
9 on the merits, thereby barring plaintiff's speech without ever evaluating the time, place, and  
10 manner in which the speech would be offered. Having failed to conduct the required dispersion  
11 analysis, the City had no basis for restraining plaintiff's proposed speech.<sup>5</sup>

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14           <sup>5</sup> The City argues that plaintiff is responsible for much, if not all, of the delay in considering  
15 plaintiff's building permit application. As recounted above, plaintiff submitted an application for a  
16 building permit in February 2009. Instead of identifying a deficiency or making a determination on the  
17 application, the City refused to accept the submission, thereby depriving plaintiff of both a decision and  
18 the normal land use appeal processes. It is not clear whether the City is arguing that (a) plaintiff should  
19 have submitted its application over and over again until it was accepted by DPD or (b) plaintiff should  
20 have enlisted the services of its attorney more quickly. An applicant should not have to repeatedly ask a  
21 municipality to follow its own ordinances, nor should it have to enlist the services of a lawyer or file a  
22 lawsuit in order to obtain a land use decision. The City's attempt to impose such duties on plaintiff is  
23 unavailing.

24           At oral argument, the City for the first time argued that its rejection of the February 2009  
25 application was actually an acceptance, review, and denial of the permit application. There is no  
26 evidence to support this interpretation of the facts. The record shows that intake was told in mid-  
January that the "[p]roject should not be accepted at intake without documentation regarding dispersion,  
or a written statement on the plans documented that this permit will not include approval of an adult  
cabaret." Decl. of Robert Davis (Dkt. # 66), Ex. A at 7. Consistent with those instructions, the  
"[p]roposal was not taken in at intake" on January 23, 2009 and was "rejected" on February 9, 2009,  
because the applicant had not demonstrated on the dispersion site plan he provided that he met the  
dispersion requirements. *Id.* at 7-8. Neither the site plan provided by the applicant nor the DPD project  
summary indicates that a review of permitted uses was conducted at any time before that task was  
finally accomplished by Mr. McKim in August 2009. When plaintiff's counsel contacted the City in  
July, she was not told that her client's application had been denied. Rather, the City agreed to accept the  
application when offered the third time. Had the City actually made a determination on the merits of

1           The extent of the City's unconstitutional delay in conducting a dispersion analysis  
2 and whether that delay caused plaintiff compensable injury cannot be ascertained from the  
3 current record. As the City points out, had it accepted and considered plaintiff's building permit  
4 application in February 2009, it would have had a reasonable period of time in which to consider  
5 the application and it ultimately would have denied it for the same reasons it did so in September  
6 2009.<sup>6</sup> Whether any damages arose from the period of unreasonable delay has not been  
7 adequately briefed by the parties.

## 8 **II. INTERMEDIATE SCRUTINY**

9           A government regulation aimed at sexual or pornographic speech is constitutional  
10 if it (a) is not a complete ban on such speech, (b) is predominately concerned with ameliorating  
11 the secondary effects of such speech on the community, and (c) passes intermediate scrutiny  
12 (*i.e.*, is narrowly tailored to serve a substantial governmental interest). Tollis Inc. v. County of  
13 San Diego, 505 F.3d 935, 939 (9th Cir. 2007). Plaintiff argues that the version of SMC  
14 23.47A.004.H that was in effect when it applied for a building permit did not pass constitutional  
15 muster because it was not narrowly tailored to serve the government interest identified by the  
16 City.

17           In the process of developing land use regulations for adult cabarets, the City  
18 identified a number of negative secondary effects associated with such establishments, including  
19 litter, noise, traffic, inappropriate signage, declining property values, and potential hazards for  
20 children and personal safety. See Decl. of Martha Lester (Dkt. # 21), Ex. A at 3-5. The City  
21 opted to address these effects by preventing adult cabarets from crowding together in one area  
22 and by ensuring a sizeable buffer between cabarets and any facility in which children are likely

23 \_\_\_\_\_  
24 plaintiff's application in February 2009, the parties and the Court certainly should have and would have  
25 been informed of that fact at some point before oral argument was held in May 2011.

26           <sup>6</sup> As of mid-January, the neighborhood had already identified the inconsistent uses that formed  
the basis of the denial six months later. Reply (Dkt. # 79) at 18.

1 to congregate. This method of addressing the negative secondary effects of adult uses – through  
2 dispersal – has been approved by the Supreme Court in a number of cases. See, e.g., City of  
3 Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Plaintiff does not take issue with the  
4 dispersion concept and implicitly agrees that the City has a substantial interest in separating  
5 adult uses from each other and from places where children congregate. Plaintiff argues,  
6 however, that former SMC 23.47A.004.H was too broad in that it prevented adult uses even  
7 where surrounding facilities were not actually being used by children or other adult cabarets.

8           At the time plaintiff sought permission to remodel the building located at 10504  
9 Aurora Avenue North, the City’s dispersion ordinance prevented any new or expanded adult  
10 cabaret from operating within 800 feet of a “property containing any community center; child  
11 care center; school, elementary or secondary; or public parks and open space use” or within 600  
12 feet of a “property containing any other adult cabaret.” In order to determine whether a property  
13 “contained” an incompatible use, DPD reviewed its permit files to determine what uses were  
14 legally authorized at the surrounding properties. Plaintiff argues that, in order to satisfy the  
15 “narrowly-tailored” prong of intermediate scrutiny, the City should have interpreted  
16 “containing” to mean “actively engaged in” or “currently used as” lest plaintiff’s protected  
17 speech be curtailed even when there was no incompatible use actually occurring in the area.

18           The Court finds that the City’s application of former SMC 23.47A.004.H was a  
19 reasonable and measured effort to avoid the negative secondary effects associated with adult  
20 uses. While the reach of the ordinance could have been limited in any number of ways (such as  
21 by precluding new adult businesses within a smaller distance of an inconsistent use and/or only  
22 where the inconsistent use is both permitted and currently operating), it could also have been  
23 expanded to preclude adult uses near any facility serving children, including places like  
24 children’s theaters, skate halls, and cinemas, and without regard to the permitting status of the  
25 facility. The political branches of government are best suited to draw these lines: the judiciary  
26 is tasked not with identifying the best way to advance the government’s interest, but with

1 determining whether the scheme chosen by the City can withstand an intermediate level of  
2 scrutiny. Given the nature of the government's interest and the competing property interests at  
3 stake, SMC 23.47A.004.H easily passes constitutional muster.

4 Under the City's zoning and land use scheme, a permit constitutes an on-going  
5 authorization for a particular use without the need for further governmental approvals.<sup>7</sup> Because  
6 the child care facility and adult cabaret identified by DPD were legally permitted uses, allowing  
7 plaintiff to open a new adult cabaret at the desired location posed the very real possibility that  
8 the goals of the dispersion ordinance would be subverted. In fact, the previously-permitted adult  
9 cabaret has since resumed operations. Had the City interpreted "containing" as "currently  
10 operating," there would now be two adult cabarets operating within 600 feet of each other, a  
11 situation which the City Council clearly sought to avoid when it enacted former SMC  
12 23.47A.004.H. On the flip side, consideration of "currently operating" facilities rather than  
13 lawfully permitted facilities would give the reviewing government official considerable  
14 discretion (and the surrounding neighborhood considerable power) to restrict First Amendment  
15 speech. An unpermitted childcare facility or, as was the case near 10507 Aurora Avenue North,  
16 an unpermitted school operating in the vicinity of a proposed adult cabaret could preclude a later  
17 adult use even though the earlier operation was not sanctioned. The City's interpretation of  
18 SMC 23.47A.004.H, which has now been explicitly incorporated into the ordinance, is a  
19 reasonable attempt to balance multiple competing interests. The Court finds that SMC  
20 23.47A.004.H is narrowly-tailored to reduce the negative secondary effects of sexual or  
21 pornographic speech on the community.<sup>8</sup>

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22  
23 <sup>7</sup> In some instances an annual license may be needed to conduct a particular business, but that  
24 approval process is separate from the building and land use codes at issue in this litigation.

25 <sup>8</sup> The Court finds plaintiff's statutory construction arguments unpersuasive. The City's  
26 interpretation of the word "containing" is reasonable in the context of SMC 23.47A.004.H, and the rule  
of *in pari materia* is inapplicable where, as here, the regulatory language differs in material respects.

1 Finally, plaintiff asserts that the dispersion criteria are unconstitutionally vague  
2 because “containing” is not defined in the ordinance. Vagueness challenges to undefined but  
3 commonly understood terms are rarely successful. See Comite de Jornaleros de Redondo Beach  
4 v. City of Redondo Beach, 607 F.3d 1178, 1194 (9th Cir. 2010); Gospel Missions of Am. v. City  
5 of Los Angeles, 419 F.3d 1042, 1047-48 (9th Cir. 2005). Because we are “[c]ondemned to the  
6 use of words, we can never expect mathematical certainty from our language.” Grayned v. City  
7 of Rockford, 408 U.S. 104, 110 (1972). In the context of the City’s building permit and land use  
8 scheme, a person of ordinary intelligence would have fair notice that permitted uses, even if not  
9 currently operating, would have to be taken into account when applying the dispersion criteria.  
10 See Holder v. Humanitarian Law Project, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2705, 2720 (2010) (in order to  
11 withstand a vagueness challenge, the statute must provide “a person of ordinary intelligence fair  
12 notice of what is prohibited.”) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).  
13 Even if the word “containing” is taken out of its narrowing context so that it could be disputed  
14 based on the temporal distinction drawn by plaintiff, the City has construed the ordinance in a  
15 reasonable manner that avoids all subjective judgments. Plaintiff’s vagueness argument  
16 therefore fails.

### 17 CONCLUSION

18 For all of the foregoing reasons, plaintiff’s motion for partial summary judgment  
19 (Dkt. # 68) and defendant’s cross-motion (Dkt. # 69) are GRANTED in part and DENIED in  
20 part. The dispersion requirements of SMC 23.47A.004.H are constitutional on their face. The  
21 ordinance was applied unconstitutionally, however, when the City refused to accept plaintiff’s  
22 building permit application in February of 2009, thereby barring plaintiff’s protected speech  
23 without evaluating the time, place, and manner in which that speech would be offered. Whether  
24 this delay caused plaintiff any cognizable injury cannot be determined on the existing record.

25 This order involves controlling questions of law as to which there is substantial  
26 ground for difference of opinion. Those controlling questions are:



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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**ERRATA TO BRIEF OF RESPONDENT CITY OF SEATTLE**

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 DEC 20 AM 10:49

ORIGINAL

Respondent The City of Seattle files this errata sheet to Brief of Respondent City of Seattle filed and served December 19, 2011. The errata 1) corrects errors in citations; revises the Table of Contents to correspond to content headings within the brief, and 2) corrects pagination errors within the brief and the Table of Contents and Table of Authorities. A corrected copy of Brief of Respondent City of Seattle is attached hereto.

- Page i, insert “2. Argument, p. 9”
- Page i, 2.3.3.1: replace “28” with “29”
- Page ii, 2.3.3.4: replace “38” with “39”
- Page ii, 2.3.3.5: replace “41” with “42”
- Page ii, (a): replace “41” with “42”
- Page ii, (b): replace “42” with “43”
- Page ii, 2. Conclusion: “replace “2” with “3”
- Page iii, delete “2011 WL 2077122” and add “Document 98, Amended Second Order Regarding Cross-Motions for Summary Judgment”
- Page iv, delete “2011 WL 2077122” and add “Amended Second Order Regarding Cross-Motions for Summary Judgment”
- Page v, Huber Hts. v. Liakos: add “47”
- Page vi, RCW 36.70B.060: replace “46” with “47”
- Page vi, RCW 36.70B.070: replace “45” with “46”
- Page vi, RCW 36.70B.070 (4) (a): replace “32” with “33”
- Page vii, First Amendment: replace “41” with “42”
- Page vii, SMC Chapter 6.270: replace “27” with “28”
- Page vii, Seattle City Ordinance 110381 § 1, 1982: replace “26” with “27”

- Page 1, footnote 1: delete “2011 WL 2077122, p. 3-4” and add “Amended Second Order Regarding Cross-Motions for Summary Judgment, p. 6”
- Page 6, line 3: delete “19” and add “10”
- Page 6, line 9: delete “2011 WL 2077122, p. 3-4” and add “Amended Second Order Regarding Cross-Motions for Summary Judgment, p. 6”
- Page 6, line 12: delete “3-4.” and add “5-6.”
- Page 23, line 16: delete “2011 WL 2077122, p. 2-4” and add Amended Second Order Regarding Cross-Motions for Summary Judgment, p. 5-6”
- Page 24, line 2: delete “3-4” and add “6”
- Page 24, line 16: delete “(2011 WL 2077122)” and add “Amended Second Order Regarding Cross-Motions for Summary Judgment”
- Page 24, line 16: delete “2-4” and add “5-6”
- Page 25, line 3: delete “(2011 WL 2077122)” and add “Amended Second Order Regarding Cross-Motions for Summary Judgment”
- Page 25, line 4: delete “2-4” and add “5-6”
- Page 25, line 7: delete “3” and add “5”
- Page 26, line 7: delete “(2011 WL 2077122)” and add “Amended Second Order Regarding Cross-Motions for Summary Judgment”
- Page 26, line 7: delete “3” and add “5-6”
- Appendix 1: Substitute “Amended Second Order Regarding Cross-Motions for Summary Judgment”

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**Pagination changes:**

- Pages 6-7
- Page 23-48

DATED: December 20, 2011.

PETER S. HOLMES  
Seattle City Attorney

By:



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**CERTIFICATE OF SERVICE**

I certify that on the 20<sup>th</sup> day of December, 2011, I sent a copy of  
this document to the following party in the manner indicated below:

Kristin G. Olson  
O'Shea Barnard Martin & Olson, P.S.  
10900 NE 4<sup>th</sup> Street, Suite 1500  
Bellevue, WA 98004-5844  
**Via messenger**

the foregoing being the last known address of the above-named party.

  
ROSIE LEE HAILEY