COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 4th Floor Denver, Colorado 80203 District Court, Arapahoe County, Colorado, The Honorable Thomas C. Levi, District Court Judge, Case Number 98CV3862 Plaintiff-Appellant: Z.J. GIFTS D-2, an Oklahoma limited partnership Defendant-Appellee: CITY OF AURORA	π COURT USE ONLY π
ATTORNEYS FOR APPELLEE ARRINGTON & ASSOCIATES, P.C. Barry K. Arrington #16,486 2801 Youngfield Street, Suite 300 Golden, Colorado 80401 Phone: (303) 205-7870 Fax: (303) 205-7868 E-mail: barry.arrington@comcast.net Charles H. Richardson, #7934 Robert Werking #22161 OFFICE OF THE CITY ATTORNEY 15151 East Alameda Parkway Aurora, Colorado 80012-1553 Phone Number: (303) 739-7030 FAX Number: (303) 739-7042	Case Number: 03 CA 425
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellee City of Aurora adds the following issue presented for review:

5. Did the district court err in dismissing plaintiff's federal constitutional claims as *res judicata*.

SUMMARY OF THE ARGUMENT

Z.J. Gifts D-2, L.L.C. ("Z.J. Gifts") may sell as much sexually explicit material as it likes, so long as it does so in a proper zone. Z.J. Gifts is in violation of the zoning and licensing laws of the City of Aurora (the "City") and the trial court's injunction against that illegal operation was proper.

The trial court properly dismissed Z.J. Gifts' federal constitutional claims as *res judicata*. The state constitutional issues are the same as the issues under the federal constitution, and therefore Z.J. Gifts "legislative record" claim was barred by collateral estoppel. The injunction complies in all respects with C.R.C.P. 65(d), and its terms can be readily understood by persons of reasonable intelligence. Z.J. Gifts' attack on the licensing provisions of the ordinance is moot, because the City has amended the ordinance to comply with the *City of Littleton* decision. Senate Bill 251 does not apply to Z.J. Gifts, and if it did it would be an unconstitutional infringement on the City's home rule powers.

ARGUMENT

I. Introduction.

This is a zoning case. Z.J. Gifts wishes to operate a sexually oriented business in the City of Aurora. The City has no objection as long as it operates its business in compliance with applicable zoning laws. The City even wishes Z.J. Gifts well. Katherine Svoboda, the City's Deputy Manager for Administrative Services, testified:

> Q. Has the City attempted to shut down any business on the basis that it objects to the impression of what's going on there?
>
> A. No, we have not. . . . In view of the revenue functions in the city, we really do want to encourage businesses. We do everything we can to encourage businesses to come in. We're in an economic downturn in the State of Colorado and we'd like everybody to do well, make a lot of money, and give the city some portion of that . . . We want [Z.J. Gifts] to do well. We just simply want it to do well in another location, where it belongs.

Vol. V, 145:20 to 146:9.

The issue in this case is not, therefore, whether the City is trying to prevent Z.J. Gifts from operating a sexually oriented business. If Z.J. Gifts wants to it can apply to open a business in the appropriate zone and be lawfully operating in a matter of days. As the trial court found earlier in the case, "[the City's] ordinance does not prohibit Plaintiffs from operating their businesses. It simply requires that they do so within the zoned areas approved for such businesses." Vol. II, pg. 371.

Nor is the issue in this case whether the City is attempting to prevent plaintiffs from exercising their constitutionally-protected right to sell non-obscene pornography. If plaintiff will operate in the appropriate zone, as far as the City is concerned its business may sell 100% sexually explicit merchandise. Z.J. Gifts may even sell sexually explicit merchandise at its current location, so long as that portion of its business is not so great that it crosses the threshold of being a sexually oriented business.

The injunction entered by the trial court does not prohibit Z.J. Gifts from selling sexually explicit material. It only prohibits it from operating a sexually oriented business at its current location. Thus, the issue in this case is whether Z.J. Gifts may ignore the City's zoning laws, and the trial court properly determined that it may not.

Z.J. Gifts does not like the trial court's ruling because it believes it can make more money operating its sexually oriented business where it is now. The fact that the legally-available sites are not as economically attractive as its present location does not, however, give Z.J. Gifts the right to challenge the zoning ordinance as unconstitutional. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, (1986) (The First Amendment inquiry is not concerned with economic impact.). Nevertheless, Z.J. Gifts has raised several constitutional issues in an attempt to defeat the City's zoning laws, and the City will address each issue in turn. At the end of the day, however, this is a simple zoning case, and the trial court's simple and straightforward resolution of the case is clearly correct.

II. Z.J. Gifts is Operating a Sexually Oriented Business.

The only disputed factual issue at trial was whether Z.J. Gifts is a sexually oriented business. If it is not operating a sexually oriented business, the regulations are not applicable and the City cannot prevail on the merits. Conversely, if it is operating a sexually oriented business, there can be no question that it is an unlicensed and nonconforming use operating in clear violation of the statute, and the City is entitled to injunctive relief.

The Aurora Sexually Oriented Business Ordinance is codified as Sections 86-546, *et seq*. of the Aurora Municipal Code, and was admitted into evidence as Exhibit A. The Aurora ordinance defines the term "sexually oriented business" to include, *inter alia*, adult bookstores, adult novelty stores and adult video stores. Aurora Municipal Code § 86-546. The terms "adult bookstore, adult novelty store and adult video store" are in turn defined as follows:

> *Adult bookstore, adult novelty store or adult video store* means a commercial establishment which devotes a significant or substantial portion of its stock-in-trade or interior floor space to the sale, rental or viewing, for any form of consideration, of books, magazines, periodicals or other printed matter or

> photographs, films, motion pictures, videocassettes, slides or other visual representations which are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

Aurora Municipal Code § 86-546.

The terms "specified sexual activities" and specified anatomical areas" are further specifically defined in detail in Section 86-546 of the Code. Thus, a sexually oriented business is any commercial establishment that devotes a significant or substantial portion of its stock or floor space to sexually explicit material.

In determining whether Z.J. Gifts is operating a sexually oriented business the trial court first noted that Z.J. Gifts' manager does not dispute that the business offers for sale or rental "books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas." Vol. IV, pg. 908; Vol. V, 80:7-12 (Mr. Hughs' testimony). The only disputed factual issue at trial was whether a significant or substantial portion of Z.J. Gifts' stock-in-trade or interior floor space is devoted to such material. Vol. IV, pg. 908.

The trial court found that Z.J. Gifts did indeed devote a significant or substantial portion of its stock-in-trade or interior floor space to sexually explicit material and therefore met the ordinance's definition of a sexually oriented business. Vol. IV, pg. 909. This factual finding is supported by the evidence admitted at trial and thus must be taken as established on appeal. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383-4 (Colo. 1994) (trial court's factual determinations must be accepted on review unless they are so clearly erroneous as to find no support in the record.).

For the City, Katherine Svoboda testified that she inspected Z.J. Gifts the day before the trial. Vol. V, 112:17 to 113:1. With respect to the floor space of the store devoted to sexually explicit material, she testified that she physically measured the layout of the store with a tape measure and prepared the diagram of the store admitted as Exhibit E. Vol. V, 123:1-25. Ms. Svoboda testified that the pink shaded area of Exhibit E is the area of the store devoted to sexually explicit inventory. Vol. V, 126:10-22. She testified that this area is 527 square feet, which is approximately one-third of the retail space of the store. *Id.*

Concerning the store's stock in trade, Ms. Svoboda testified that she physically counted several hundred sexually explicit videos, and that in addition there were hundreds of sexually explicit magazines and novelties, including "dildos, artificial vaginas, blow-up dolls, anal plugs, [etc.]." Vol. V, 129:4 to 133:10. She also noted that even the management of the store seems to implicitly admit that it is a sexually oriented business, because there is a sign on the front door stating that one must be over 18 to enter. Vol. V, 132:10-15. The City also submitted the video tape admitted as Exhibit C. Vol. V, 171:2-10. This video tape shows in detail the sexually explicit nature of Z.J. Gifts' inventory. Finally, even Z.J. Gifts' manager, Terry Hughs, admitted that the store had literally thousands of sexually explicit items in its inventory. Vol. V, 78:21 to 79:8.

The Court will note that in its brief Z.J. Gifts does not seriously dispute this evidence. It makes no attempt to explain how the evidence admitted at trial could lead to any conclusion other than the one the trial court reached. Its sole argument on this matter is a bald, unsupported and conclusory statement that it "strenuously denies that it is operating an 'adult bookstore, adult novelty store, or adult video store.'" Brief, pg. 23. Conclusory denials, no matter how strenuously they are asserted, are not evidence.

This is particularly the case in this action, because Z.J. Gifts denied it was a sexually oriented business in the federal case, but the Tenth Circuit ruled that it was "indisputably" such a business. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 690 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998). Then, at the preliminary injunction stage of this case Z.J. Gifts again denied it was a sexually oriented business. This claim too was rejected by the trial court and a preliminary injunction was entered. Vol. II, pgs. 365-374 (preliminary injunction order). This Court specifically considered and then affirmed the trail court's factual determination in the first appeal and upheld the injuction. Vol. III, pgs. 500-513 (Court of Appeals Opinion in first appeal).

In summary, the history of this case is replete with instances of Z.J. Gifts denying that it is a sexually oriented business only to have this claim rejected by every court that has considered it. In light of this history, the fact that Z.J. Gifts once again denies the obvious should be of little interest to this Court. The trial court's factual determination that Z.J. Gifts is operating a sexually oriented business is supported by substantial evidence and must be upheld on appeal.

III. Z.J. Gifts' Operation Violates the Aurora Ordinance and the Trial Court Properly Enjoined It.

Section 86-548 of the ordinance requires all sexually oriented businesses to obtain a license. Section 86-556 requires sexually oriented businesses to operate within industrial zoning districts. The parties stipulated that Z.J. Gifts has never applied for a sexually oriented business license. Vol. V, 110:12-17. The parties also stipulated that Z.J. Gifts is located at 15451 East Mississippi Avenue in Aurora; that that location is zoned PZCD (Planned Community Zone District); and that that zoning district is not an industrial zone. Vol. IV, pgs. 882-883.

As discussed above, Z.J. Gifts is a sexually oriented business. It is therefore in clear violation of both Sections 86-548 and 86-556. It is well-established in Colorado that injunctive relief is an appropriate remedy for violation of a zoning ordinance. *City of Englewood v. Kingsley*, 497 P.2d 1004, 1006, 178 Colo. 338 (1972) (uses not in compliance with zoning may be enjoined); *City and County of Denver v. Chuck Ruwart Chevrolet, Inc.*, 32 Colo. App. 191 508, P.2d 789, 792 (1973) (same); *City of Colorado Springs v. Blanche*, 761 P.2d 212 (Colo. 1988) (same). Therefore, the trial court's decision to enjoin Z.J. Gifts' violation of the Aurora ordinance was correct and should be upheld by this Court.

IV. The Trial Court Properly Dismissed All of Z.J. Gifts' Federal Constitutional Claims as *Res Judicata*.

The most remarkable thing about Z.J. Gifts' brief is that it fails to even mention – far less address – the issue of *res judicata*, the ground on which the trial court dismissed all of the federal constitutional claims Z.J. Gifts discusses at such great length. It is almost as if Z.J. Gifts believes that by ignoring *res judicata* it will go away. But the issue will not go away. The trial court properly dismissed Z.J. Gifts' federal constitutional claims as *res judicata*, and Z.J. Gifts is not entitled to a "do over" on those claims in this Court.

The trial court dismissed Z.J. Gifts' constitutional claims, because those claims were litigated extensively in five years of expensive, protracted and hard-fought litigation. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998). In that case the Tenth Circuit summarized the history of the federal litigation, noting that in early 1993 Aurora officials became concerned that the City lacked regulatory and enforcement mechanisms to minimize the negative effects caused by sexually oriented businesses. *Id.*, 136 F.3d at 685. In response, an ordinance for the regulation of sexually oriented businesses was presented to the city council in September 1993. *Id.* The following

month Z.J. Gifts leased space in the Granada Park Shopping Center, located in a commercially zoned area, and prepared the space for retail sales of adult novelties, magazines, and videos. *Id.* Z.J. Gifts filed suit against the City challenging the constitutionality of several provisions of the City's sexually oriented business regulation. *Id.* The parties filed cross motions for summary judgment and the federal district court granted Z.J. Gifts' motion. *Id.* The Tenth Circuit reversed, holding that the Aurora ordinance "satisfies [*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)] and [*United States v. O'Brien*, 391 U.S. 367 (1968)], as it promotes the city's well-established interest in regulating harmful secondary effects caused by sexually oriented businesses . . ." *Id.*, 136 F.3d at 690.

After the case was remanded, the federal district court entered judgment against Z.J. Gifts and in favor of the City. The federal court's August 31, 1998 judgment dismissed all of Z.J. Gifts' federal claims with prejudice. Vol. I, pgs. 62-66. Lest there be the slightest doubt that the federal district court dismissed all of Z.J. Gifts' federal claims, the City submitted the transcript of the August 31, 1998 hearing in the federal court that preceded entry of the judgment. There the federal district court stated:

> . . . I do understand the [Tenth] Circuit's direction that all claims of unconstitutionality of [the Aurora sexually oriented business ordinance] have been determined, and there is no available defense to plaintiff under the United States Constitution. The federal claims in this case are determined.

Vol II, pg. 137, lns. 5-11.

At that same hearing even Z.J. Gifts' own counsel acknowledged that all federal issues had been resolved. Vol. II, pg. 143, lns. 15-16. Astonishingly, after admitting that the federal constitutional issues had been resolved, only 45 days later Z.J. Gifts asserted those exact same claims again in this case. Vol. I, pgs. 35-41. The City moved to dismiss those claims and

ultimately that motion was granted. In its November 18, 2003 Findings of Fact, Conclusions of Law and Order, the trial court stated:

> Plaintiff seeks a declaratory judgment that the Ordinance is unconstitutional. With regard to plaintiff's claims pursuant to the United States Constitution, the Court notes that in 1993 Z.J. Gifts sued the defendants in this matter in the United States District Court for the District of Colorado. *See, Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998). On August 31, 1998 the United States District Court entered judgment against Z.J. Gifts and in favor of the City dismissing all of Z.J. Gifts' federal constitutional claims against the City. Accordingly, the Court finds that all issues concerning the federal constitution have been fully litigated and decided, and Z.J. Gifts' claims under the federal constitution are *res judicata*.

Vol. IV, pg. 909-10.

The trial court's decision is undoubtedly correct. "The whole policy of the law is against the retrial of issues already litigated by the parties." *State Compensation Ins. Fund v. Luna*, 156 Colo. 109, 397 P.2d 231, 233 (1964). The doctrine of *res judicata* is the substantive vehicle that furthers this extremely strong policy in favor of the finality of judicial determinations. In *Labato v.Taylor*, 70 P.3d 1152 (Colo. 2003), the Colorado Supreme Court explained the doctrine as follows:

> The operation of res judicata works to preclude the relitigation of matters that have been litigated already as well as matters that could have been litigated in a prior proceeding. Wright, Miller, & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4403, 20 (2002). In barring the relitigation of tried matters, *res judicata* serves distinct and important public and private values. As the United States Supreme Court has stated, *res judicata* serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (citations omitted). Underlying these purposes of finality and efficiency is the vital interest in preserving the integrity of the judicial system. Wright, Miller, & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4403 at 23. **Specifically, if one matter could be easily relitigated with inconsistent results, judicial integrity would be compromised and the value of and respect for court rulings would be seriously devalued**.

Id., 70 P.3d at 1165-66 (emphasis supplied).

Under the doctrine a party is barred from re-litigating any claim litigated in a prior action if there is: (1) a final judgment; and (2) identity of subject matter, claims for relief, and parties. *City and County of Denver v. Block 173 Assoc.*, 814 P.2d 824, 830 (Colo. 1991). *Res judicata* bars not only issues actually litigated in the prior action, but also issues that could have been litigated but were not. *Id.*

Applying these principals to this case it is clear that all of the elements of *res judicata* are present. There was a final judgment dismissing all of Z.J. Gifts' federal constitutional claims with prejudice. Vol. I, pgs. 62-66. There was identity of subject matter, because the federal litigation concerned the constitutionality of the Aurora sexually oriented business ordinance as applied to Z.J. Gifts' operation, the exact subject matter of this case. There was identity of claims for relief. In the federal litigation Z.J. Gifts asserted that the Aurora ordinance was unconstitutional, the same claim it makes in this case. Finally, there was identity of parties. In the federal case Z.J. Gifts was the plaintiff and the City was the defendant, the same alignment of parties in this case.

In summary, therefore, this is not a close case. There can be no doubt that Z.J. Gifts' federal constitutional claims were litigated in the federal courts. It may not re-litigate those claims in state court, and the trial court properly dismissed those claims as *res judicata*.

V. *Alameda Books* Does Not Change The *Res Judicata* Analysis.

Z.J. Gifts states that the federal court judgment is "clearly subject to reexamination" because of the United States Supreme Court's holding in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). Brief, pg. 17. This assertion is wrong for several reasons. First, *Alameda Books* did not even mention the Tenth Circuit's decision in *Z.J. Gifts D-2, L.L.C. v.*

City of Aurora, far less overrule it. In *Z.J. Gifts* the Tenth Circuit joined the Eighth Circuit[1] in holding that the distinction between onsite and offsite consumption of sexually explicit materials is constitutionally irrelevant in terms of the legislative record a city must produce to support its sexually oriented business regulation. The Supreme Court's holding in *Alameda Books* concerned a completely different issue. There the court held that it was error to grant summary judgment against the City of Los Angles on the issue of whether its legislative record supported an amendment to its ordinance prohibiting two sexually oriented businesses from operating in the same building. *Id.*, 535 U.S. at 442.

In its brief Z.J. Gifts goes on for page after page about what Justice O'Conner said in her plurality opinion and what Justice Kennedy said in his concurring opinion and what Justice Souter said in his dissenting opinion.[2] The thing that is glaringly missing from plaintiff's analysis, however, is why any of this makes the slightest difference to this case. The plain fact of the matter is that the Supreme Court was dealing with a different issue than the Tenth Circuit, and its holding does not even call the Tenth Circuit's opinion into doubt.

It appears that the point of plaintiff's analysis has less to do with the Supreme Court's holding in *Alameda Books* than with what lower courts have done after that holding. Plaintiffs reasoning appears to be: (1) The Supreme Court made a ruling in *Alameda Books*; (2) after *Alameda Books* the Fifth Circuit disagreed with the Tenth Circuit and the Eight Circuit concerning the onsite/offsite issue; (3) therefore the Tenth Circuit decision is not good law and is subject to reexamination in this case. This is a massive *non sequiter*. The fact that the Fifth Circuit may disagree with the Tenth Circuit does not mean that *res judicata* no longer bars Z.J. Gifts from relitigating the claims decided against it in the federal case. Nor

[1] *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), *cert denied*, *513 U.S. 1017* (1994).
[2] Plaintiff refers to the Kennedy/Souter analysis as if the **dissenting opinion** is the controlling authority! Br. p. 17.

does the fact that the Fifth Circuit may disagree with the Tenth Circuit mean that *Z.J. Gifts v. City of Aurora* is not good law in the Tenth Circuit.

Finally, the interest in the finality of judicial determinations is so strong that even if *Z.J. Gifts v. City of Aurora* were wrongly decided (which the City by no means admits), *res judicata* would still prevent plaintiff from relitigating the issues determined in that case. Only a few months ago in the case of *Labato v.Taylor*, 70 P.3d 1152 (Colo. 2003), the Colorado Supreme Court explained this principle when it stated:

> **The application of *res judicata* is not thwarted simply because a prior, final ruling was based on law subsequently overruled**. See *Precision Air Parts, Inc. v. Avco Corp*., 736 F.2d 1499 (11th Cir.1984) (finding *res judicata* applicable despite a subsequent reinterpretation of Alabama's statute of limitations no longer barred claims as untimely filed). *Res judicata* cannot be so easily avoided here simply because the federal courts . . . misinterpreted Colorado law. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. at 398-99, 101 S.Ct. 2424 ("the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong. . . . 'The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert.'") (*quoting Reed v. Allen*, 286 U.S. 191, 201, 52 S.Ct. 532, 76 L.Ed. 1054 (1932)).

Id., 70 P.3d at 1166 (emphasis added).

The United States Supreme Court denied Z.J. Gifts petition for certiorari on October 5, 1998. *Z.J. Gifts, D-2 L.L.C. v. City of Aurora*, 525 U.S. 868 (1998). At that time the Tenth Circuit's decision became final and non-appealable. Therefore, under the doctrine in *Labato v.Taylor*, even assuming for the sake of argument that the Tenth Circuit misapplied the law, Z.J. Gifts is still bound by *res judicata* and it is simply not true that the Tenth Circuit's decision is "clearly subject to reexamination."

VI. The State Constitutional Issues Are Identical to the Federal Constitutional Issues.

Z.J. Gifts asserts that even though *Z.J. Gifts v. City of Aurora* might be dispositive on the federal issues, it did not resolve its claims under the state constitution. This is true as far as it goes but ultimately does not help plaintiff's case, because the Colorado Supreme Court has consistently held that the state constitutional standards for the regulation of sexually oriented businesses are identical to the federal standards.

Plaintiff correctly observes that in certain contexts (especially in the area of obscenity law) the Colorado Supreme Court has used Article II, Section 10 of the Colorado Constitution to extend broader protections for expression than those guaranteed by the First Amendment. In contrast to its treatment of obscenity regulations, however, the Supreme Court has consistently declined to extend greater protections under the state constitution in the context of sexually oriented business regulations. In case after case dealing with this type of regulation, the Supreme Court has limited its analysis to First Amendment principles.

For example, in *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo. 1995) the Supreme Court upheld in all material respects a Colorado Springs ordinance almost identical to the ordinance under review in this case. The plaintiffs in that case specifically invited the court to apply Article II, Section 10 in its review. The court declined the invitation, however, and specifically limited its review to First Amendment principles. *Id.*, 896 P.2d at 278, n3. *See also*, *7250 Corp. v. Board of County Com'rs of Adams County*, 799 P.2d 917 (Colo. 1990) (applying First Amendment analysis to sexually oriented business regulation); *Regency Svcs. Corp. v. Bd. of County Comm'rs of Adams County*, 819 P.2d 1049 (Colo. 1991) (same); and *People v. Business at 2896 West 64th*, 937 P.2d 873 (Colo.App. 1997) (same).

In summary, therefore, the Supreme Court has had a number of opportunities to apply state constitutional principles to sexually oriented business regulations, but it has always declined to do so. Therefore, the trial court was correct when it concluded that the state constitutional issues are not different from the federal constitutional issues already decided against Z.J. Gifts in the federal litigation, Vol. IV, pg. 910-11, and Z.J. Gifts' appeal to the state constitution is unavailing.

VII. The Constitutional Issue Regarding the "Legislative Record" Claim is Barred By Collateral Estoppel.

Citing *Alameda Books*, Z.J. Gifts asserts that the legislative record the City produced to support its ordinance ten years ago should be reexamined. This, however, was the exact issue litigated in the federal case. Hence, in the state case there was no need for the City to produce additional proof. The issue had already been finally resolved and relitigation of the issue was barred by collateral estoppel.[3]

In the federal case Z.J. Gifts asserted that the City's legislative record did not support the regulation of sexually oriented businesses where the materials were viewed off site. The Tenth Circuit categorically rejected this assertion, stating:

> Most importantly, we disagree that the ordinance's content-neutrality is affected by the city's reliance on studies utilizing slightly dissimilar businesses. . . . where, as here, the studies relied upon adequately support the city's purpose in enacting the ordinance – regulating the harmful secondary effects associated with sexually oriented businesses – the government's regulation of such businesses is "*justified* without reference to the content of the regulated speech." *Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. at 2753 (emphasis in original). Thus, we are satisfied that differences in the mode

[3] The trial court noted that the constitutional issues were the same under the federal and state constitutions. Vol IV, pgs. 910-11. It did not specifically use the words "collateral estoppel," but nevertheless applied the doctrine. Even if this were not the case, however, the Court may still affirm on collateral estoppel grounds, because this Court may affirm on any appropriate ground, even one not specifically discussed by the trial court. *Western Colorado Congress v. Umetco Minerals Corp.*, 919 P.2d 887 (Colo.App.1996) (appellate court may affirm on grounds different from the trial court).

> of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining an ordinance's content-neutrality. . . .
>
> Given the uncontroverted sexual nature of Z.J. Gifts' business, we are convinced the city has met its burden. The record indicates several of the studies examine the effects of adult businesses or sexually oriented businesses generally. Significantly, at least three of these studies examine the effects of adult bookstores on surrounding communities. Although Z.J. Gifts argues and attempts to prove that all other adult bookstores provide some form of on-premises viewing of sexually explicit materials . . . we think the record fully supports the city's regulation of sexually oriented businesses providing both on- and off-site viewing of sexually explicit materials. . . .
>
> The legislative record before the city fully supported the city's concerns regarding the negative secondary effects caused by sexually oriented businesses, such as decreased property values and increased crime, which were precisely the problems Aurora sought to regulate by enacting the ordinance.

Z.J. Gifts v. City of Aurora, 136 F.3d at 687 and 690.

Thus the specific **issue** of whether the legislative record supported the City's ordinance was litigated extensively in *Z.J. Gifts v. City of Aurora*. Under these circumstances Z.J. Gifts is barred from relitigating this issue under the state constitution not by *res judicata*, but by the doctrine of collateral estoppel. The Supreme Court explained this principle in *City and County of Denver v. Block 173 Associates*, 814 P.2d 824 (Colo. 1991), a case similar to this one with respect to this matter. In that case a landowner sued the City of Denver in federal court, and the federal court granted summary judgment to the city. The landowner also filed suit in state district court, and the issue in the case was whether its claims were barred by *res judicata* or collateral estoppel. The court first noted that when a party loses on summary judgment in federal court its state law claims were not truly available, and "*res judicata* does not apply to bar the state action." *Id.*, 814 P.2d at 831. In an analysis highly applicable to Z.J. Gifts' state law claims, the court then stated:

> Collateral estoppel, however, is not so limited. Rather than claim preclusion, collateral estoppel is directed to 'issue preclusion.' *Pomeroy v. Waitkus*, 183

> Colo. at 350, 517 P.2d at 399. 'When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' Restatement (Second) of Judgments § 27 (1980). Collateral estoppel is broader than *res judicata* since it applies to claims for relief different from those litigated in the first action, but narrower in that it only applies to issues actually litigated. *Industrial Comm'n v. Moffat County School Dist. RE No. 1*, 732 P.2d 616, 620 (Colo.1987). Collateral estoppel bars relitigation of issues if (1) the issue is identical to an issue actually and necessarily adjudicated at a prior proceeding; (2) the party against whom estoppel is asserted is a party or in privity with a party in the prior proceeding; (3) there was a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* at 619-20

Id.

In this case all of the elements of collateral estoppel are present with respect to whether the City developed an adequate legislative record to support its ordinance. First, as discussed above, the state constitutional issue is the same as the federal constitutional issue, and it was necessarily adjudicated by the Tenth Circuit in reaching its holding. Secondly, Z.J. Gifts was a party to the federal case. Thirdly, the federal court entered a final judgment against Z.J. Gifts on August 31, 1998. Finally, in the five years the federal case was pending Z.J. Gifts had more than a full and fair opportunity to litigate this issue.

Z.J. Gifts admits that this issue was determined adversely to it in the federal case. Nevertheless, it asserts that it should be allowed to relitigate this issue as part of its claims under the state constitution. The problem with Z.J. Gifts' analysis is that nowhere does it explain how the issue would be any different if it were analyzed under the state constitution as opposed to the federal constitution. It does not cite a single case or other authority to support its assertion, other than to note that in some cases the Colorado courts allow greater protection under the state constitution. Yes, in some cases they do. But not in this case. As discussed in detail above, the Colorado courts have consistently limited their analysis of sexually oriented

business regulations to the federal constitutional principles. Therefore, Z.J. Gifts' assertion that it should be able to relitigate the legislative record issue is wholly without merit.

VIII. The Injunction Complies With C.R.C.P. 65(d).

Next Z.J. Gifts complains that the injunction entered by the trial court is technically deficient and does not comply with C.R.C.P. 65(d). On the contrary, however, the trial court's order is in full compliance with the letter and spirit of the rule.

First, plaintiff's claim is remarkable in light of the fact that the permanent injunction issued by the trial court is practically identical to the preliminary injunction this Court has already affirmed. On August 10, 1999 the trial court preliminary enjoined Z.J. Gifts from operating a sexually oriented business at its present location. Vol. II, pgs. 365-74. This Court affirmed the trial court in its opinion dated April 26, 2001. Vol. III, pgs. 500-13.

Nevertheless, plaintiff alleges that the injunction is invalid for several technical reasons. The first technical defect it asserts is that the injunction did not set forth the reasons for its issuance. This is untrue. On November 18, 2002 the trial court issued its Findings of Fact, Conclusions of Law and Order and its Final Judgment. Vol. IV, 907-16. These documents, taken together as they were obviously meant to be, describe in nine pages of detail the exact reasons the injunction is entered against Z.J. Gifts.

Secondly, Z.J. Gifts asserts that the injunction is not specific in its terms. Again, this is not the case. The injunction states:

> Plaintiff is hereby permanently enjoined from operating a sexually oriented business at 15451 East Mississippi Avenue, Aurora, Colorado in Arapahoe County. Plaintiff is further permanently enjoined from operating a sexually oriented business without a sexually oriented business license.

Vol. IV, pg. 916.

Thus, a specific person (plaintiff Z.J. Gifts) is enjoined from performing a specific act (operating a sexually oriented business) at a specific location (15451 East Mississippi Avenue, Aurora, Colorado). Z.J. Gifts is also enjoined from operating any sexually oriented business without the required license. Z.J. Gifts' assertion that this injunction is not specific is specious at best.

Finally, Z.J. Gifts drags out the "I don't know what it means" argument, and claims the injunction is invalid because it does not describe in reasonable detail the act enjoined. In making this argument, plaintiff notes that the order enjoins its operation of a sexually oriented business, which, as discussed above, means a "commercial establishment which devotes a significant or substantial portion of its stock-in-trade or interior floor space to the sale, rental or viewing, for any form of consideration, of [sexually explicit material]." Plaintiff then argues that it is not on notice of the acts enjoined by the trial court because it cannot understand the terms "significant" or "substantial."

Z.J. Gifts no longer asserts that the terms are unconstitutionally vague. It now asserts only that the terms are too imprecise to give it notice of the acts enjoined. The issue, however, is the same – i.e., whether persons of reasonable intelligence can understand the required conduct. *People v. Longoria*, 862 P.2d 266, 272 (Colo. 1993). Z.J. Gifts' assertion that it cannot understand the meaning of the words "significant" or "substantial" must be rejected because numerous courts have held these exact terms give sufficient guidance.

For example, in *City of Colorado Springs v. Board of County Com'rs of the County of Eagle*, 895 P.2d 1105 (Colo.App. 1994), this Court rejected a vagueness challenge to the word "significant." The Court stated:

> 'Significant' means 'deserving to be considered; important; notable,' and 'significantly,' thus means 'to a significant degree.' *See Webster's Third*

> *New International Dictionary* 2116. The antonyms of 'significant' include meaningless, trivial, trifling, paltry, and picayune. *See Roget's Thesaurus* 639 (Bantam Rev.Ed. 1990).[4]
>
> 'Significant' is a term used extensively throughout statutory language in Colorado to describe the extent of a specific status or condition. *See* § 13-21-401(1), C.R.S. (1987 Repl.Vol. 6A) ('[Manufacturer] also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer.'); § 16-4-101(1)(b), C.R.S. (1994 Cum.Supp.) (no bail required in cases of certain crimes of violence if the court finds the proof is evident that the crime occurred and that 'the public would be placed in significant peril if the accused were released'); § 22-20-103(1.5), C.R.S. (1994 Cum.Supp.) (children with disabilities includes children with 'significant limited intellectual capacity' or 'significant identifiable emotional disorder[s]'). **Indeed, our research has revealed over 200 statutory sections which have used the term without any reported interpretative difficulty.**

Id., 895 P.2d at 1114 (emphasis added).

Similarly, in *15192 Thirteen Mile Road v. City of Warren*, 626 F. Supp. 803, 820 (E.D. Mich. 1985), the court noted that the word "substantial" had been construed as having an ascertainable meaning in numerous statutory schemes, *Id.*, and in upholding the use of the term the court went on to note that the word "substantial" appears in the United States Code some 1,157 times. *Id.*

Turning to the precise definition at issue here, courts have almost uniformly rejected vagueness challenges to the terms "significant or substantial." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (*See* 427 U.S. at 53, n. 4, where the definitions upheld are reproduced in full); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1419 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 578 (1994) ("significant or substantial" upheld); *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1224 (8th Cir. 1997) ("significant or substantial" upheld); *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 984-5 (Pa.

[4] In construing this term the court went through a process almost identical to that which the city did. Katherine Svoboda testified that she went to the dictionary definition of the terms for guidance as to their meaning. Vol, V,

Commw. Ct. 1997) ("significant or substantial" upheld); *15192 Thirteen Mile Road v. City of Warren*, 626 F. Supp. 803, 820 (E.D. Mich. 1985) ("significant or substantial" upheld); *S&G News, Inc. v. Southgate*, 638 F. Supp. 1060, 1066 (E.D. Mich. 1986), *aff'd* 819 F.2d 1142 ("significant or substantial" upheld); *Mom N Pops, Inc. v. City of Charlotte*, 162 F.3d 1155 (4th Cir. 1998), 1998 WL 537928 ("significant or substantial" upheld). *See also, Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 833 (4th Cir. 1979) *cert. denied* 447 U.S. 929 (1979) ("preponderance" of merchandise upheld); *SDJ, Inc. v. City Houston*, 636 F. Supp. 1359, 1367-1368 (S.D. Tex 1986) ("major" portion of business upheld); and *Stansberry v. Holmes*, 613 F.2d 1285, 1290, *rehearing in banc denied*, 616 F.2d 568 (5th Cir. 1980), *cert. denied*, 449 U.S. 886 (1980) ("major" portion of business upheld).

In summary, if Z.J. Gifts is correct and the terms "significant" and "substantial" do not provide meaningful guidance to persons of normal intelligence, literally hundreds of Colorado and federal statutes and regulations will need to be rewritten. Obviously, however, this will not be necessary, because the Aurora ordinance's definition of "sexually oriented business" clearly falls within those cases where the law provides an "imprecise but comprehensible normative standard," *Board of Education of Jefferson County School District R-1 v. Wilder*, 960 P.2d 695, 703 (Colo. 1998), and is therefore not impermissibly vague, and an injunction prohibiting the operation of a "sexually oriented business" as defined in the ordinance provides adequate notice to Z.J. Gifts of the prohibited conduct.

Z.J. Gifts insists that the City must provide exact percentage guidelines in order for it to comply with the injunction. Again, however, the authority to the contrary is overwhelming. In *Parrish v. Lamm*, 758 P.2d 1256 (Colo. 1988), the Supreme Court

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121:9-18.

specifically rejected the hyper-parsimonious approach to the vagueness doctrine suggested by plaintiff, stating:

> The vagueness test 'is not an exercise in semantics to emasculate legislation; rather, it is a pragmatic test to ensure fairness.' *People v. Sequin*, 199 Colo. 381, 388, 609 P.2d 622, 627 (1980). *Accord*, *e.g*., *People v. Revello*, 735 P.2d 487, 490 (Colo.1987). **Statutory terms need not be defined with mathematical precision in order to pass constitutional muster.** *Exotic Coins Inc*., 699 P.2d at 943. Instead, the statutory language must strike a balance between two potentially conflicting concerns: it must be specific enough to give fair warning of the prohibited conduct, yet must be sufficiently general to address the problem under varied circumstances and during changing times. *E.g., Kibler v. State*, 718 P.2d 531, 534 (Colo.1986); *Colorado Auto & Truck Wreckers Ass'n v. Dep't of Revenue*, 618 P.2d 646, 651 (Colo.1980).

Id., 758 P.2d at 1368 (emphasis added); *See also, Watso v. Colorado Dept. of Soc. Servs.*, 841 P.2d 299, 309 (Colo.1992) ("Generality is not the equivalent of vagueness. Neither scientific nor mathematical certainty is required.")

In *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974 (Pa. Commw. Ct. 1997) the court rejected a specific percentage test in construing the terms "significant" and "substantial" in a sexually oriented business regulation. The court noted that the terms have well recognized meanings, and "[l]imiting the definition of 'adult bookstore' to establishments that meet specific sales percentages would frustrate the Act's purpose by drawing arbitrary classifications." *Id.*, 689 A.2d at 985. *See also, State v. Holmberg*, 545 N.W.2d 65, 72 (Minn. Ct. App. 1996) (Significant and substantial test for sexually oriented business does not require specific percentage.).

What we see at work here is plaintiff's desire to subvert the statute by establishing a "bright-line" percentage measure which it can then easily manipulate, circumvent and evade. For example, if the measure were a percentage of inventory, plaintiff could carry as many sexually explicit items as it desired and then numerically offset its "real" inventory with numerous old "B movies" stacked in the corner. This is exactly what happened in a case cited

by plaintiff, *City of New York v. Les Hommes*, 94 N.Y.2d 267, 702 N.Y.S.2d 576 (N.Y. 1999). In *Les Hommes* both lower courts ruled against the business because its compliance with the 40% regulation established by the city was "facial," "formalistic," and a "sham." *Id.*, 702 N.Y.S.2d at 579. The high court reversed, however, holding that the city was stuck with the 40% threshold it had established in its regulations, and the business's lack of good faith in meeting that arbitrary threshold was irrelevant. *Id.*, 702 N.Y.S.2d at 580. Thus *Les Hommes* does not support plaintiff's argument that Aurora should be forced to make the same mistake that New York made by establishing an arbitrary percentage threshold. Instead, the case is an excellent example of why Aurora has avoided New York's approach because it is unworkable in practice. As Katherine Svoboda testified, a percentage definition "would be fairly easy to manipulate." Vol. V, 122:1-2.

Plaintiff cites dicta from *Z.J. Gifts, D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), *cert. pending*, ___ U.S. ___ (2003), to the effect that a percentage test could be incorporated in a "narrowing construction." This is an excellent example of why dicta is not binding precedent. In making this dicta statement the Tenth Circuit obviously did not consider the practical difficulties and opportunity for mischief implicated by a percentage definition as recognized by the court in *Golden Triangle News, Inc. v. Corbett*. Indeed, some courts have even **banned** percentage definitions as arbitrary. *See, e.g., World Wide Video, Inc. v. City of Tukwila*, 117 Wash.2d 382, 816 P.2d 18 (1991) (striking down percentage definition).

In conclusion, therefore, numerous courts have upheld the use of the terms "significant" and "substantial" as giving persons of ordinary intelligence notice of proscribed conduct. Therefore, the trial court's injunction – which prohibits Z.J. Gifts from operating a

business at its present location that has a significant or substantial portion of its stock in trade or interior floor space devoted to sexually explicit material – gives Z.J. Gifts adequate notice of the prohibited conduct and thus fully complies with the requirements of C.R.C.P. 65(d).

IX. Z.J. Gifts "Judicial Review" Claim is Moot.

Z.J. Gifts next asserts that the licensing provisions of the ordinance are unconstitutional because they do not provide for a prompt judicial determination of challenges to adverse licensing decisions as require in *Z.J. Gifts, D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), *cert. pending*, ___ U.S. ___ (2003). Again, as discussed in detail above, the Tenth Circuit's decision upholding the constitutionality of the ordinance against Z.J. Gifts' constitutional challenge is *res judicata* even if that case is later determined to have been wrongly decided. Even if this were not the case, however, Z.J. Gifts claims in this regard are moot.

Z.J. Gifts asserts the ordinance is unconstitutional because it fails to provide a specific time period during which a judicial determination of a challenge to an adverse licensing decision must be made. While this was formerly the case, as of January 27, 2003 it is no longer. On that date in response to the Tenth Circuit's decision in *City of Littleton*, the Aurora City Council enacted Section 86-55[5] of the Aurora Municipal Code. A copy of this new statute is attached to this brief as Exhibit A. The new ordinance requires a judicial determination of an adverse administrative licensing decision within 75 days of the date a complaint if filed. By any measure this is a prompt judicial determination, and therefore Z.J. Gifts' claim to the contrary is moot.

[5] Z.J. Gifts' brief is somewhat confusing because in referencing the ordinance it uses a prior codification of the Aurora Municipal Code.

X Senate Bill 251 Does Not Apply to This Case.

Finally, Z.J. Gifts argues that the recently enacted Senate Bill 251 prevents the City from enforcing the zoning provisions of the ordinance. This claim too is meritless.

Senate Bill 251 (copy attached to plaintiff's brief) was signed by the governor on June 6, 2003. The bill contained a "safety clause" and thus became effective on that date. The Aurora ordinance became effective on December 23, 1993, Vol. IV, pg. 882, nearly ten years prior to the enactment of Senate Bill 251. Z.J. Gifts was open for business at the time the ordinance came into effect. Vol. IV, pg. 882. Section 86-558 of the Aurora ordinance states that any business that was lawfully operating in a location as of the effective date of the ordinance shall be permitted to continue to operate at that location for an amortization period of six months. Accordingly, the amortization period for Z.J. Gifts ran out on June 23, 1994. The trial court entered its injunction on November 18, 2002. Hence, Z.J. Gifts became an illegal operation nearly nine years before the effective date of Senate Bill 251, and the injunction prohibiting that illegal operation was entered seven months before the bill became effective. This is important, because the legality of that injunction is the issue under review in this appeal. The fact that the trial court might not have entered the injunction at a later time after S.B. 251 was enacted is not relevant to whether it was proper before S.B. 251 was even introduced, much less enacted. If the rule were otherwise, all of the hundreds of businesses that have already been amortized by local governments in the last 75 years would be able to re-open in their prior locations, a result surely not intended by the General Assembly. Accordingly, Senate Bill 251 is not applicable to Z.J. Gifts because such an application would be an improper retroactive application of the statute.

The Supreme Court recently elucidated the considerations governing the retroactive application of statutes in *In the Matter of the Estate of DeWitt*, 54 P.2d 849 (Colo. 2002). In that case the court stated:

> Absent legislative intent to the contrary, a statute is presumed to operate prospectively, meaning it operates on transactions occurring after its effective date. *See Coffman v. State Farm Mut. Auto. Ins. Co*., 884 P.2d 275, 279 (Colo.1994); *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 11 (Colo.1993); *Curtis v. McCall*, 79 Colo. 122, 123, 244 P. 70, 71 (1926). A statute is retroactive if it operates on transactions that have already occurred or on rights and obligations that existed before its effective date. *Ficarra*, 849 P.2d at 11. Retroactive application of statutes is generally disfavored by both common law and statute. *Id*.; see also § 2-4-202, 1 C.R.S. (2001). . . . In order to overcome the presumption of prospectivity, the statute must reveal a clear legislative intent of retroactivity. *Ficarra*, 849 P.2d at 14.

Id., 54 P.3d at 854.

In this case application of Senate Bill 251 to Z.J. Gifts would clearly operate on an obligation that existed before its effective date, namely Z.J. Gifts' obligation to cease operating a sexually oriented business at its present location that accrued nine years ago on June 23, 1994, as well as its obligation to comply with the injunction entered on November 18, 2002. There is absolutely nothing in the statute that indicates that the General Assembly intended the statute to apply to businesses that were already unlawful at the time the statute became effective. Therefore, the presumption of prospective application has not been overcome and the law does not apply to Z.J. Gifts.

XI. <u>If Senate Bill 251 Does Apply, it is Unconstitutional</u>.

Even if Senate Bill 251 were retroactive in application, it would still not be applicable to Z.J. Gifts, because the Aurora ordinance preempts the state statute under Aurora's home rule powers. The Supreme Court recently addressed this issue as well in *City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003), where the court stated:

> Article XX, Section 6 of the Colorado Constitution, adopted by Colorado voters in 1912, granted "home-rule" to municipalities opting to adopt home-rule charters. Colo. Const. art. XX, § 6. The effect of this constitutional provision is that certain cities, which have satisfied size requirements and adopted a city charter, may legislate on matters of local concern that preempt any conflicting state legislation. *Id*. We have recognized that regulated matters fall into one of three broad categories: (1) matters of local concern; (2) matters of statewide concern; and (3) matters of mixed state and local concern. *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo.2002). The decision as to whether state or local legislation controls in a given situation often turns on whether a matter is a local, state or mixed concern. . . . Whether a matter is of local, state or mixed concern determines who may legislate in that area. First, in matters of local concern, both home-rule cities and the state may legislate. *See*, e.g., *id*. However, when a home-rule ordinance or charter provision and a state statute conflict with respect to a local matter, the home-rule provision supercedes the conflicting state statute. *Id*. . . . We have not developed a specific test that dictates th[e] process of analyzing whether a matter is of local, state, or mixed concern. *Commerce City*, 40 P.3d at 1280. Instead, we have made this determination on an *ad hoc* basis, considering the totality of the circumstances. *Id*. at 1279-80. We have identified several general factors to be considered when determining whether a matter is of state, local, or mixed concern, including the need for statewide uniformity, whether the municipal legislation has an extraterritorial impact, whether the subject matter is traditionally one governed by state or local government, and whether the Colorado Constitution specifically identifies that the issue should be regulated by state or local legislation. *Id*. at 1280; *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 37 (Colo.2000); Denver, 788 P.2d at 768.

Id., at 155-6.

The Colorado Supreme Court on several occasions has categorized zoning as a matter of local concern for purposes of Article XX, Section 6 of the state constitution. *City of Colorado Springs v. Securecare Self Storage, Inc.*, 10 P.3d 1244, 1247 (Colo. 2000); *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1064 (Colo. 1992) (exercise of zoning authority matter of local concern); *City of Greeley v. Ells*, 186 Colo. 352, 358, 527 P.2d 538, 541 (1974) (same); *Roosevelt v. City of Englewood*, 176 Colo. 576, 586, 492 P.2d 65, 70 (1971) (same).

Applying the factors identified in *City of Northglenn v. Ibarra*, it is clear that the particular form of zoning regulation known as "amortization " – like zoning generally – is a matter of local concern and thus preempts the state statute.

(a) Need for Statewide Uniformity: Zoning is perhaps the quintessential case in which there is no need for statewide uniformity. Colorado is a state of rich geographic diversity. From agricultural eastern plains towns like Fort Morgan, to industrial/urban Denver, to suburbs like Lakewood and Aurora, to mountain communities such as Aspen and Vail, local governments face radically different challenges in balancing the legitimate concerns of the community against the interests of individual landowners in their land use regulations. A "one size fits all" approach to land use issues mandated from a statewide central authority undermines the very concept of home rule embodied in Article XX, Section 6 of the Colorado Constitution. This analysis applies equally to the particular aspect of zoning known as "amortization." Whether a Weld County community should amortize a hog feeding lot to make way for residential development incorporates a completely different set of considerations from whether Denver should amortize an industrial use as part of its goal of rehabilitating the Platte Valley. Therefore, far from needing statewide uniformity, Colorado requires local flexibility in these type of amortization decisions.

(b) Whether the Regulation Has Extraterritorial Impact. The Supreme Court has defined "extraterritorial impact" as a ripple effect that impacts state residents outside the municipality. *City of Northglenn*, 62 P.3d at 161. To find a ripple effect the impact must have serious consequences to residents outside the municipality. *Id*. It is difficult to imagine a regulatory scheme with less extraterritorial impact than amortization. By definition, amortization affects only specific nonconforming uses in specific municipalities.

Municipalities do not have the power to require land use changes anywhere other than within their own jurisdiction. Accordingly, there can be no ripple effect from municipal amortization decisions. This is especially true in the context of sexually oriented business regulations, because cities may not constitutionally force these uses into other cities. Any sexually oriented business regulation must leave open reasonable alternative places in which these businesses may locate. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)

(c) History and Tradition. There can be no doubt that land use has traditionally been regulated in Colorado at the local level. *Lundvall Brothers, Inc. v. Voss*, 812 P.2d 693, 695 (Colo.App. 1991), *judgment aff'd*, 830 P.2d 1061 (Colo. 1992); *City of Colorado Springs v. Smartt*, 620 P.2d 1060, 1062 (Colo. 1981) (home rule city's zoning policies governed by its own charter).[6]

Amortization is a fair and time-honored tool in Colorado cities' land use "tool bag." *See, Robinson Brick Co. v. Luthi*, 115 Colo. 106, 169 P.2d 171 (1946) (1946 case discussing amortization issues). Indeed, amortization is the only effective way for cities to respond to changing circumstances. For example, it is common knowledge that residential construction is rapidly expanding into many formerly rural communities that were once far from urban centers. Consider a pre-existing junkyard on land surrounded by open prairie. Circumstances change over time and perhaps surrounding landowners wish to develop their property for residential uses. If a municipality is unable to establish a fair amortization schedule for the junkyard, as a practical matter the owner of the junkyard has forevermore prevented development of surrounding land. He will have effectively condemned the surrounding

[6] In *City of Northglenn* the Supreme Court cautioned against a categorical approach to this issue when a particular municipal regulation is under review. However, a categorical approach is not only proper but inevitable when the law under review is a state statute that purports to take an entire category of land use regulation away from Colorado municipalities.

properties. Such a state of affairs is very unfair to the surrounding landowners and greatly reduces the value of their property. Thus, far from being an onerous governmental burden or "taking," amortization is a fair way for municipalities to meditate between competing property uses and actually enhance overall property values.

Conversely, loss of amortization authority under Senate Bill 251 seriously restricts municipalities' ability equitably to address health, safety and welfare issues in their community. Amortization allows a middle ground between requiring that an illegal land use cease immediately and grandfathering the use forever. It mitigates the hardship on property owners of complying with changed land use regulations by allowing property owners a reasonable time to comply with zoning requirements. Without amortization, to implement its land use plan a municipality must either accept an incompatible land use forever, force it to cease immediately, or condemn the property.

Not surprisingly, therefore, the Colorado Supreme Court has squarely held that termination of nonconforming uses is a matter of local concern, as to which the general assembly has no power. "Comprehensive zoning contemplates the existence of nonconforming uses and, to ultimately and effectively accomplish the end sought to be accomplished, it is inherent that reasonable means must be afforded to terminate non-conforming uses." *Service Oil Co. v. Rhodus*, 179 Colo. 335, 340, 500 P.2d 807, 809 (Colo. 1972). "The power to zone cannot be effective without the power to ultimately, under reasonable conditions, terminate that which does not conform. . . . zoning is a matter of local and municipal concern." *Id*., 500 P.2d at 811. "The General Assembly has power to legislate zoning regulations applicable to Statutory cities. Where, however, . . . Home rule city exercises the power delegated to it by Article XX, Section 6, as to matters of purely local

concern, the legislature has no power." *Id*., 500 P.2d at 812 (overruled on other grounds, *Hartley v. City of Colorado Springs,* 764 P.2d 1216, 1221 (Colo.1988). Zoning, including enforcement to limit expansion or enlargement of nonconforming uses, is a matter of local concern, within powers of a home rule city. *City of Greeley v. Ells*, 186 Colo. 352, 358, 527 P.2d 538, 541 (Colo. 1974).

In summary, therefore, amortization of nonconforming land uses is a matter of local concern, and under Article XX, Section 6 any attempt by the state to completely ban the use of amortization by home rule cities like Aurora is preempted.

CONCLUSION

The trial court properly enjoined Z.J. Gifts from operating a sexually oriented business at its present location. All of Z.J. Gifts' challenges to the ordinance are barred by *res judicata* or collateral estoppel or are otherwise moot, and Senate Bill 251 does not prevent application of the ordinance to Z.J. Gifts' operation. Accordingly, the City respectfully requests the Court to affirm the trial court's ruling.

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Barry K. Arrington

CERTIFICATE OF MAILING

The undersigned certifies that on October 27, 2003, a true and correct copy of the foregoing **APPELLEES ANSWER BRIEF** was placed in the United States mail, first-class postage prepaid, and addressed as follows:

Arthur M. Schwartz
Michael W. Gross
Schwartz & Goldberg, P.C.
1630 Welton Street, Suite 420
Denver, Colorado 80202

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