

COURT OF APPEALS
STATE OF COLORADO
2 E. 14th Avenue
Denver, CO 80203

District Court, Arapahoe County, Colorado, Ctrm 3/402
Honorable Thomas C. Levi
Case No. 98CV3682

Plaintiff-Appellant:

Z.J. GIFTS D-2, L.L.C., an Oklahoma limited partnership,
d/b/a CHRISTAL'S.

Defendants-Appellees:

CITY OF AURORA, an incorporated home rule municipal
corporation, PAUL TAUER, Mayor of the City of Aurora,
in his official capacity, and the CITY COUNCIL of the
CITY OF AURORA, COLORADO, and the members
thereof, NADINE CALDWELL, KATHY GREEN,
INGRID LINDEMANN, JOHN PAROSKE, DAVE
WILLIAMS, ED TAUER, EDNA MOSLEY, BOB
LEGARE and JOHN MCCRACKEN, in their official
capacities only.

COURT USE ONLY

Case Number: 03 CA 425

OPENING BRIEF OF APPELLANT

Arthur M. Schwartz, No. 557
Michael W. Gross, No 14113
SCHWARTZ & GOLDBERG, P.C.
1225 17th Street, Suite 1600
Denver, Colorado 80202
(303) 893-2500

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
Course of Proceedings Below	2
Statement of the Facts	4
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
I. THE CHALLENGED AURORA ORDINANCE IMPOSING LOCATIONAL REGULATIONS ON ADULT BUSINESSES MUST BE ANALYZED AS A TIME, PLACE AND MANNER RESTRICTION ON MATERIALS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	8
A. Adult Zoning Ordinances as Time, Place and Manner Restrictions on First Amendment Rights	9
1. Justice O’Connors Plurality Opinion	12
2. Justice Kennedy’s Opinion Concurring in the Judgment	14
3. Justice Souter’s Dissenting Opinion	15
B. Evidence Relied Upon By the City	16
II. THE DISTRICT COURT’S ORDER ENJOINING DEFENDANT SEXUALLY ORIENTED BUSINESS FROM “OPERATING A SEXUALLY ORIENTED BUSINESS” WAS VIOLATIVE OF COLORADO RULES OF CIVIL PROCEDURE 65(d)	19

<p>III. BY FAILING TO PROVIDE FOR A SPECIFIC TIME PERIOD FOR AN APPLICANT'S LICENSING DECISION OR FOR PROMPT JUDICIAL REVIEW, AURORA MUNICIPAL CODE SECTIONS 26-441, <i>ET SEQ.</i> VIOLATE PLAINTIFF'S FIRST AMENDMENT RIGHTS OF FREE SPEECH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, AND ARE IN DIRECT CONFLICT WITH FW/PBS, INC. V. CITY OF DALLAS, 493 U.S. 215 (1990) AND Z.J. GIFTS, D-4, L.L.C. v. CITY OF LITTLETON, 311 F.3D 1220(10TH CIR. 2002)</p>	<p>27</p>
<p>IV. PURSUANT TO SENATE BILL 251, AMENDING C.R.S. 38-1-101(3)(a), THE CITY OF AURORA MAY NOT ENFORCE THE ZONING RESTRICTIONS AGAINST PLAINTIFF HEREIN THAT WAS LAWFULLY OPERATING ITS BUSINESS PRIOR TO THE ENACTMENT OF THE AURORA ADULT ZONING ORDINANCE</p>	<p>30</p>
<p>CONCLUSION</p>	<p>30</p>
<p>CERTIFICATE OF MAILING</p>	<p>31</p>

TABLE OF AUTHORITIES

Cases

Baby Tam & Co. v. City of Las Vegas, 199 F.3d 1111 (9 th Cir. 2000).....	21
<i>Ben’s Bar, Inc. v. Village of Somerset</i> ,316 F.3d 702, 722 (7 th Cir. 2003).....	12
Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991).....	23
<i>City of Aurora v. Board of County Commissioners of County of Adams</i> , 919 P.2d 198, 200 (Colo. 1996).	25
<i>City of Colorado Springs v. 2354 Corp.</i> , 896 P.2d 272 (Colo. 1995)	28
<i>City of Los Angeles v. Alameda Books, Inc</i> , 535 U.S. 425 (2002) ...	2, 5, 7,12,13, 14,15, 16 , 18
City of New York v. Les Hommes, 94 N.Y. 2d 267 (N.Y. Ct. App., 1999)	21
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986).....	11,12, 14, 16
<i>Colorado Common Cause v. Meyer</i> , 758 P.2d 153 (Colo. 1988)	25
Colorado Springs Board of Realtors, Inc. v. State of Colorado, 780 P.2d 494 (Colo. 1989) 8, 19, 20	
<i>Deters v. Smuggler Durrant Mineral Corp.</i> , 930 P.2d 575 (Colo. 1997).....	26
<i>DiMa Corporation v. High Forest Township</i> , 2003 WL 21909571 (D. Minn. 8/7/03)...	18
<i>El Paso County Board of Equalization v. Craddock</i> , 850 P.2d 702 (Colo. 1993).....	25
<i>Encore Videos, Inc. v. City of San Antonio</i> , 310 F.3d 812 (5th Cir. 10/28/03), <i>withdrawn and modified</i> , 330 F.3d 288 (5th Cir. 4/28/03), <i>cert pending</i> , __.U.S.__, Case No. 03-163 4, 17	
<i>Flanigan’s Enterprises, Inc. v. Fulton County</i> , 242 F.3d 946 (11 th Cir. 2001).....	17
<i>Furlong v. Gardner</i> , 956 P.2d 545 (Colo. 1998).....	20
<i>FW/PBS, Inc. v. City of Dallas</i> , 493 U.S. 215 (1990).....	2, 6, 28
<i>Hartley v. City Colorado Springs</i> , 764 P.2d 1216, 1224 (Colo. 1988).....	26

<i>High Gear & Toke Shop v. Beacom</i> , 689 P.2d 624, 631 n.7 (Colo. 1984).....	24
<i>J & B Entertainment, Inc. v. City of Jackson</i> , 152 F.3d 362, 370 (5 th Cir. 1998).....	12
Madsen v. Women's Health Center, Inc., 512 U.S. 753, 129 L.Ed. 2d. 593, 114 S. Ct. 2516 (1994)	22
<i>McMillan v. State</i> , 405 P.2d 672, 674 (Colo. 1965).....	26
Miller v. Lunnon, 703 P.2d 640 (Colo. App. 1985).....	5, 8
<i>PDM Molding, Inc. v. Stanberg</i> , 898 P.2d 542, 545 (Colo. 1995).....	25
<i>Peek-a-boo Lounge v. Manatee County, Florida</i> , 337 F.3d 1251, 2003 WL 21649675, (11th Cir. 7/15/03).....	12,16
Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999).....	22, 25
<i>People v. District Court</i> , 834 P.2d 236, 240 (Colo. 1992).....	25
People v. Ford, 773 P.2d 1059 (Colo. 1989).....	23
<i>People v. Lowe</i> , 660 P.2d 1261, 1268 (Colo. 1983).....	25
People v. Seven Thirty Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985).....	23
<i>Pigford v. People</i> , 593 P.2d 354, 356 (Colo. 1979).....	25
<i>Ranch House v. Anderson</i> , 238 F.3d 1273-1283 (11th Cir. 2001).....	17
<i>Schad v. Borough of Mount Ephraim</i> , 452 U.S. 61, 68 (1981).....	9,10,12
Schenk v. Pro Choice Network, 519 U.S. 357, 136 L.Ed., 18 (1997).....	22
<i>Schmidt v. Lessard</i> , 414 U.S. 473 (1974)(<i>per curiam</i>).....	19
<i>Three Bells Ranch Associates v. Cache La Poudre Water Users Association</i> , 758 P.2d 164 (Colo. 1988).....	25
<i>United States v. Louisiana Pacific Company</i> , 682 F. Supp. 1141 (D. Colo. 1988)...	19
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	10

<i>Village of Hoffman Estates v. Flipside, Inc.</i> , 455 U.S. 489 (1982).....	24
<i>Young v. American Mini Theatres</i> , 427 U.S. 50, 75 1980).....	9,10,11, 24.
Z.J. Gifts, D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10 th Cir. 1998).....	5, 18
<i>Z.J. Gifts, D-4, L.L.C. v. City of Littleton</i> , 311 F.3d 1220 (10 th Cir. 2002),	4,6,8, 17, 22, 27, 28
Other Authorities	
Aurora Municipal Code Section 26-441	4, 5, 20 21, 27
Aurora Municipal Code Section 26-426-494.....	27, 284, 11
Senate Bill 251, amending C.R.S. §38-1-101	2,7, 29,30
Rules	
C.R.C.P. 65(d).....	7,19, 20
Fed. R. Civ. P. Rule 65	20
Constitutional Provisions	
Article II Section 10 of the Colorado Constitution.....	4, 7, 14
First Amendment of United States Constitution.....	passim

COURT OF APPEALS
STATE OF COLORADO
2 E. 14th Avenue
Denver, CO 80203

District Court, Arapahoe County, Colorado, Ctrm 3/402
Honorable Thomas C. Levi
Case No. 98CV3682

Plaintiff-Appellant:

Z.J. GIFTS D-2, L.L.C., an Oklahoma limited partnership,
d/b/a CHRISTAL'S.

Defendants-Appellees:

CITY OF AURORA, an incorporated home rule municipal corporation, PAUL TAUER, Mayor of the City of Aurora, in his official capacity, and the CITY COUNCIL of the CITY OF AURORA, COLORADO, and the members thereof, NADINE CALDWELL, KATHY GREEN, INGRID LINDEMANN, JOHN PAROSKE, DAVE WILLIAMS, ED TAUER, EDNA MOSLEY, BOB LEGARE and JOHN MCCRACKEN, in their official capacities only.

Attorneys for Plaintiff/Appellant:

Arthur M. Schwartz, No. 557
Michael W. Gross, No. 14113
SCHWARTZ & GOLDBERG, P.C.
1225 17th Street, Suite 1600, Denver, CO 80202
303-893-2500 Telephone
303-893-3349 Facsimile
aschwartz@sgattorneys.com

COURT USE ONLY

Case Number: 03 CA425

OPENING BRIEF OF APPELLANT

COMES NOW the Plaintiff/Appellant, above-named, by and through undersigned counsel, and respectfully submits the Opening Brief of Appellant pursuant to C.A. R. 28, 31 and 32.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in failing to make any findings regarding Plaintiff's arguments concerning *City of Los Angeles v. Alameda Books, Inc*, 535 U.S. 425 (2002), where the City did not advance any evidence to support the constitutionality of the challenged ordinance specifically relating to the assertion that the ordinance did not advance the government's goal of minimizing the adverse secondary effects of sexually oriented businesses.

2. Whether the District Court's Order permanently enjoining Plaintiff "from operating a sexually oriented business" is overbroad in violation of C.R.C.P. 65(d) by failing to describe in reasonable detail the acts enjoined and by referring to a definition in an outside document, the Aurora Municipal Code, to describe the acts enjoined.

3. Whether the District Court erred in enjoining Plaintiff from operating a sexually oriented business without a license where the Tenth Circuit subsequently held in *Z.J. Gifts, D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), that C.R.C.P. 106(a)(4) failed to provide prompt judicial review as required by the First Amendment to the United States Constitution in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

4. Whether the District Court's permanent injunction order is superseded by newly enacted Senate Bill 251, amending C.R.S. §38-1-101, that prohibits the use of amortization provisions to terminate uses that were lawful at the time of their inception.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Plaintiff filed the instant case challenging the Aurora sexually oriented business licensing

ordinance in the Arapahoe County District Court on October 14, 1998. (R., Vol. I, p. 35) The City of Aurora brought a counterclaim seeking to have Plaintiff's business declared a public nuisance. (R., Vol. 1, p. 83) On December 1, 1998, the City of Aurora filed a Motion for Preliminary Injunction seeking to enjoin Plaintiff from operating an alleged adult video store in the City of Aurora. (R., Vol. I, p. 114) The case was consolidated with a related case, *Universal Video-Aurora, L.L.C. v. City of Aurora*, Case No. 98CV3984. Although pleadings involving the consolidated case may be included in the record, that case is not involved in this appeal. On August 10, 1999, following three separate days of hearings, Arapahoe County District Court Judge John Leopold issued a preliminary injunction against Plaintiff enjoining it from operating adult businesses at its current location. (R., Vol. II, p. 365-374) Plaintiff timely filed a notice of appeal from this order. (R., Vol. III, p. 407-411) Pursuant to C.A.R. 8(a), Plaintiff filed a Motion for Stay Pending Appeal in the Colorado Court of Appeals on December 28, 1999, which motion was granted on January 18, 2000. (R., Vol. III, p. 472) On April 26, 2001, the Court of Appeals affirmed the decision of the District Court. (R., Vol. III, p. 500-513) A Petition for Certiorari was timely filed in the Colorado Supreme Court and was denied on November 27, 2001. (R., Vol. III, p. 514) On March 6, 2002, the District Court issued a contempt citation at the request of the City of Littleton. (R., Vol. III, p. 577-580) A hearing was conducted on the contempt citation on April 5, 2002. After hearing the testimony of three witnesses, the District Court determined that the City had failed to prove that Plaintiff willfully violated the Court's preliminary injunction order. (R., Vol. I, p. 18) A trial to the court on Plaintiff's claims and Defendant's counterclaims was held on October 15-16, 2002. After hearing testimony from two witnesses, the District Court entered judgment in favor of Defendant against Plaintiff on all

claims. On November 18, 2002, the court entered its order and judgment to that effect. (R., Vol. IV, pp. 907-916)

Plaintiff filed a motion for reconsideration on December 4, 2002 on the basis of the recent decisions in *Encore Videos, Inc. v. City of San Antonio*, 310 F.3d 812 (5th Cir. 10/28/03), *withdrawn and modified*, 330 F.3d 288 (5th Cir. 4/28/03), *cert pending*, __U.S.__, Case No. 03-163; and *Z.J. Gifts, D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 11/18/03), *cert. pending* __U.S.__, Case No. 02-1609. R., Vol. IV, pp.917-948. This motion was denied on January 13, 2003. (R., Vol. IV, p. 961) Plaintiff timely filed a Notice of Appeal on February 26, 2003. (R., Vol. IV, p. 980-995)

II. STATEMENT OF THE FACTS

Plaintiff Z.J. Gifts, D-2, L.L.C. has operated a retail gift and novelty store at 15451 East Mississippi Avenue in Aurora since November 1993. Plaintiff's business sells lingerie, novelty items, greeting cards, cosmetics, oils and lotions, videocassette tapes, and magazines. (R., Vol. II, p. 86) A portion of Plaintiff's stock-in-trade is sexually explicit in nature, which material is presumptively protected by the First and Fourteenth Amendments to the United States Constitution, and Article II, Section 10 of the Colorado Constitution. *Id.* Chapter 26 of the Aurora Municipal Code regulates "adult entertainment establishments" in the City of Aurora, Colorado. (R., Vol. III, pp. 619-632) The issue presented in the instant case is whether the District Court erred in determining Plaintiff's business should be enjoined from operating adult bookstores or video stores, as defined in Aurora Municipal Code Section 26-441 which defines an "adult bookstore, adult novelty store, or adult video store" as a:

commercial establishment which devotes a significant or substantial portion of

its stock in trade or interior floor space to the sale, rental, viewing, for any form of consideration, of 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. (R., Vol. III. P. 619)

The terms "significant or substantial" and "characterized" are not defined in the Ordinance.

In December 1993, the City of Aurora enacted a sexually oriented business licensing ordinance that placed zoning and licensing restrictions on sexually oriented businesses. Plaintiff Z.J. Gifts challenged the Aurora sexually oriented licensing ordinance in United States District Court which, per Judge Richard P. Matsch, was declared to be unconstitutional in *Z.J. Gifts v. City of Aurora*, 932 F.Supp. 1256 (D.Colo. 1996). This decision was subsequently reversed by the United States Court of Appeals for the Tenth Circuit in *Z.J. Gifts v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), *cert. denied* 525 U.S. 868 (1998).

The City thereafter sought to enforce the Ordinance against Plaintiff in the Aurora Municipal Court, however, those cases were dismissed on October 6, 1999 for lack of jurisdiction. Plaintiff then filed constitutional challenges to the Aurora Ordinance in the Arapahoe County District Court in the instant case on October 14, 1999. (R., Vol. I, p. 35). The City of Aurora brought a counterclaim seeking to have Plaintiff's business declared a public nuisance. (R., Vol. 1, p. 83) In addition, the City of Aurora filed a motion for preliminary injunction against the Plaintiff seeking to close its business. (R., Vol. I, p. 114). Hearings on the City's motion for preliminary injunction were held on February 4 and March 4 and 29, 1999.

Prior to trial, Plaintiff submitted a Supplemental Memorandum of Law that raised several legal arguments including the recent decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728 (2002). (R., Vol. III, p. 890-898) At the hearing, Plaintiff's

counsel presented extensive arguments concerning the applicability of this case. (R., Vol. V, pp. 6-21) However, the District Court expressed skepticism about reliance on a United States Supreme decision that was decided by a 4-1-4 margin and apparently did not rely upon this case in the oral ruling or the written order. (R. Vol. V, pp 15-21).

After ruling on certain issues in the consolidated case, Plaintiff called Terry Hughes, operations manager of the Christal's store. Mr. Hughes testified how the plaintiff had reduced its inventory of adult items to less than 16 1/2 % of its total inventory. (R, Vol.V., pp. 78-80).

The City called Katherine Svoboda, Aurora deputy city manager. She testified that she had visited Plaintiff's store the day before and based upon her reading of Aurora ordinances determined that Plaintiff operated an adult bookstore, adult novelty store and adult video store as defined in Aurora ordinances. (R. Vol. V, pp.113-114,). She indicated that she had looked up the terms "significant or substantial" in the dictionary to determine their meaning, which she understood to be "important, having significance", "important, weighty, significant". (R, Vol. V, p. 121, 164). She was not able to place any percentage to define these terms. *Id.* at 121, 161.

Since this case was filed, several new developments have altered the complexion of this case. On November 18, 2002, the United States Court of Appeals for the Tenth Circuit in **Z.J. Gifts, D-4, L.L.C. v. City of Littleton**, 311 F.3d 1220 (10th Cir. 2002), *cert. pending*, __U.S.__, Case No. 02-1609, held that C.R.C.P. 106(a)(4) failed to provide timely judicial review as required by the United States Supreme Court in **FW/PBS, Inc. v. City of Dallas**, 493 U.S. 215(1990). As a result, the Aurora Ordinance challenged in this case is constitutionally inadequate because it relies upon C.R.C.P. 106 to provide a mechanism for judicial review. See A.M.C. Section 26-494(e), 26-496. (R., V. III, pp. 631-632).

In addition, the Colorado Legislature enacted Senate Bill 251, amending C.R.S. 38-1-101(3)(a), that prohibits municipalities from “adopting or enforcing” amortization provisions to terminate nonconforming uses. A copy of this bill is attached hereto as Exhibit A. Since this action involves enforcement of a n amortization provision in the Aurora ordinances against Plaintiff’s business that was lawfully zoned at its inception, this bill applies to the Plaintiff in this case. As such, Plaintiff’s constitutional challenges to the Aurora zoning provisions may be mooted out by virtue of the fact that Plaintiff’s valid nonconforming use may not be terminated under the Aurora Ordinance.

SUMMARY OF THE ARGUMENT

The United States Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728(2002) imposed a evidentiary burden on municipalities to justify time, place, manner regulations of adult businesses. Here , the City failed to advance any evidence to justify the challenged ordinance which regulates Plaintiff’s business that does not offer any on premises viewing of entertainment..

The District Court ordered that “the Plaintiff is hereby permanently enjoined from operating a sexually oriented business at 15141 East Mississippi Avenue.” (R., Vol. IV, p. 916) Colorado Rules of Civil Procedure 65(d) provides, in part:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in its terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained... .

The injunction in this case did not set forth the reasons for its issuance, was not specific in its terms, did not describe in detail the acts enjoined, and referred to terms in Aurora ordinances for

guidance as to the acts enjoined. *See, Colorado Springs Board of Realtors, Inc. v. State of Colorado*, 780 P.2d 494 (Colo. 1989). The failure of the order for injunctive relief to set forth in detail the acts to be enjoined is aggravated by the reference to the term “sexually oriented business” which is specifically defined in the Aurora City Code. The City alleges in this case that Plaintiff operates an adult video store as defined in the Aurora Municipal Code as devoting a “substantial or significant” amount of its inventory or floor space as specifically defined adult material. The vague standard is not adequate to support an order for injunctive relief, particularly where the order restricts the sale of protected speech materials.

The Aurora sexually oriented business licensing ordinance provides for judicial review under C.R.C.P. 106. However, the Tenth Circuit in *Z.J. Gifts, D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir, 11/18/02) *cert. pending*, __U.S.__, Case No. 02-1609 determined C.R.C.P. 106 failed to provide prompt judicial review as required by the First Amendment. As such, the Aurora licensing requirement is unconstitutional and the District Court’s order enjoining Plaintiff from operating its business without a license should be reversed.

Plaintiff was a lawful use at the time of its inception. Pursuant to the clear and mandatory terms of Senate Bill 251, amending C.R.S. § 38-1-101, the City may not enforce an ordinance that would terminate a lawful use by amortization. Thus, Plaintiff’s business remains a lawful use and may not be terminated by enforcement of the amortization provision contained in the challenged ordinance.

ARGUMENT

I. THE CHALLENGED AURORA ORDINANCE IMPOSING LOCATIONAL REGULATIONS ON ADULT BUSINESSES MUST BE ANALYZED AS A TIME, PLACE AND MANNER

RESTRICTION ON MATERIALS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Adult Zoning Ordinances as Time, Place and Manner Restrictions on First Amendment Rights

"The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.'" *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Where protected First Amendment rights are at stake, zoning regulations do not have a "talismanic immunity from constitutional challenge." *Young v. American Mini Theatres*, 427 U.S. 50, 75 (1980)(Powell, J. concurring).

American Mini Theatres was the first case in which the United States Supreme Court considered a zoning scheme aimed (in part) at adult businesses as a separate classification. There, the Court upheld a Detroit zoning ordinance requiring adult movie theaters to disperse by not locating within 1000 feet of another such theater. A 500-foot distance requirement from residential areas was not considered by the Court. Four justices found the zoning scheme permissible in the face of both the First Amendment and Equal Protection challenges. Justice Powell, in a concurring opinion, declined to join Part III of the plurality opinion which found that non-obscene materials may be treated differently under First Amendment principles from other forms of protected expression. *Young v. American Mini Theatres*, 427 U.S. at 73, n.1.

Justice Stevens, writing for the plurality, based his opinion on the fact that the ordinance did not restrict, in a significant way, the number of locations within the city where adult

businesses could locate:

The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that the Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the city of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight. *Id.*, n.35.

Thus, given the fact that there was no serious restriction of access to adult materials as a result of the ordinances, the Court upheld the 1000 foot dispersion provision. In his concurrence, Justice Powell wrote that a zoning scheme such as Detroit's, in order to survive constitutional scrutiny, must satisfy the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968): (1) whether the enactment is within the constitutional power of the government; (2) whether it furthers a substantial governmental interest; (3) whether that interest is unrelated to the suppression of free expression; and (4) whether the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. Convinced that the Detroit plan met all parts of the test, Justice Powell joined the plurality in upholding the plan. However, he cautioned:

Although courts must be alert to the possibility of direct rather than incidental effects of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case.

Id., at 84.

In the wake of *American Mini Theatres*, local governments around the country experimented with zoning as a way to regulate (and in many cases, eliminate or ban) adult businesses. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, the Supreme Court struck

down a zoning scheme that prohibited all live entertainment within a town. The ordinance did not prohibit preexisting live entertainment that qualified as non-conforming uses. *Id.*, at 64, n. 3. The Court noted that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.* Under this analysis, the Court held the ordinance was neither justified by any substantial government interest, nor narrowly drawn to address any problems that might be created by live entertainment.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court upheld an ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, church, park or school.

Renton has not used 'the power to zone as a pretext for suppressing expression,' *American Mini Theatres* (at 84) (Powell, J., concurring), but rather has sought to make some areas available for adult theatres and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theatres from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres*, (the city) has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment.

City of Renton v. Playtime Theatres, Inc., *supra*, 475 U.S. at 54-55.

In the analysis of Renton's ordinance, then-Justice Rehnquist initially noted that the ordinance was content-neutral:

[A]s the District court concluded, the Renton ordinance is not aimed at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community. [Emphasis in original].

Id., at 47.

Applying the time, place and manner regulation approach discussed in *American Mini Theaters*, the Court determined the inquiry was "whether the Renton ordinance is designed to serve a substantial government interest and allows for reasonable alternative avenues for

communication." *Id.*, at 50. Under the first prong of this analysis, the Court noted that "the Renton Ordinance is '*narrowly tailored*' to affect only the category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal in *Schad v. Borough of Mount Ephraim*, [*supra*]" (Emphasis added). *Id.*, at 52. With regard to the second portion of the test, referring to reasonable alternative avenues of communication, Justice Rehnquist stated, "the First Amendment requires only that Renton refrain from effectively denying respondents a *reasonable opportunity to open and operate an adult theater* within the city." *Id.*, at 54.

Recently, the United States Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728(2002), dealt with the issue of the quantum and quality of evidence necessary to justify a so-called content neutral regulation of protected speech. In *Alameda Books*, the Supreme Court reversed the decision of the Ninth Circuit striking down a prohibition on multiple types of adult businesses locating under the same roof. The case was remanded for further proceedings apparently to allow the parties to develop additional evidence relating to the justification for the regulation.

Because the decision in *Alameda Books* involved a narrowly divided 4-1-4 plurality opinion, it will be necessary to examine each of the opinions in some detail to attempt to discern the guiding principles of this case that set forth the relevant standard under the First Amendment. See e.g., *Peek-a-boo Lounge v. Manatee County, Florida*, 337 F.3d 1251, 2003 WL 21649675, pp. 10-12 (11th Cir. 7/15/03); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 722 (7th Cir. 20032); *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998).

1. Justice O'Connor's Plurality Opinion.

The plurality opinion of Justice O'Connor, commanding the opinion of four justices, reaffirmed the analysis set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, with some clarification regarding the procedure for the evaluation of evidence advanced by both sides on the justification by the government to support the regulation of protected speech.

While the plurality relied upon *Renton* for the principle that a municipality may rely upon relevant evidence to demonstrate a connection between speech and a substantial independent government interest, it indicated that the government need prove more than just some rational relationship between the regulation and the government interest. The plurality opinion stated:

This is not to say a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *Erie v. P.A.P's A.M.*, 529 U.S. 277, 298 (2000) (plurality opinion). *Id.*, at 1736.

Justice O'Connor went on to apply this reasoning to the case at hand.

This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily correct. Therefore, we conclude that the city, at this stage of the litigation, has complied with the evidentiary requirement in *Renton*. *Id.*

Unlike *Alameda Books*, the City in the instant case has not fulfilled its initial evidentiary threshold, since it has not produced any evidence to support its Ordinance. Based on the arguments previously presented by the Plaintiff on the issue, it is clear that Plaintiff is prepared

to make this case.

2. Justice Kennedy's Opinion Concurring in the Judgment.

In an opinion concurring in the judgment, Justice Kennedy provided two reasons why he believed he needed to make a separate statement. He stated that he agreed with the dissenting opinion that the description of this regulation as “content neutral” is “imprecise.” *Id.*, at 444-445. In addition, Justice Kennedy wrote, “in my view, the plurality’s application of *Renton* might constitute a subtle expansion, with which I do not concur.” *Id.*

The main premise of Justice Kennedy’s opinion was that “a city may not regulate the secondary effects of speech by suppressing the speech itself.... Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.” *Id.*, at 445.

Justice Kennedy explicitly identified the fiction of designating adult business regulations as content neutral. “These ordinances are content based and we should call them that.” *Id.*, at 448. Nevertheless, Justice Kennedy found the central holding of *Renton* to be sound where a zoning restriction was designed to decrease the external adverse secondary effects of a business singled out because of the content of the speech it presents.

In addressing the specific issue before the Court, Justice Kennedy indicated that a municipality must advance some evidence that the quantity and access to speech is not significantly limited by regulations to reduce adverse, external secondary effects:

[A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the

speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with JUSTICE SOUTER. See post, at 5. The rationale of the ordinance must be that it will suppress secondary effects-and not by suppressing speech. *Id.*, at 449-450.

In this regard, Justice Kennedy appears to depart from Justice O'Connor's concern in the plurality opinion that Justice Souter's analysis in the dissenting opinion would "unwise[ly]" "move the evidentiary analysis into the inquiry on content neutrality and raise the evidentiary bar that a municipality must pass." *Id.*, at 449.

In a case where a majority of the Supreme Court is unable to agree on single rationale, the holding of the Court may be viewed as that position taken by those justices who concurred in the judgments on the narrowest grounds. In this case, Justice Kennedy's opinion should be regarded as the holding in *Alameda Books*. As such, the areas in which he agrees with Justice Souter's dissenting opinion give that opinion additional authority. In conclusion, Justice Kennedy found that the Los Angeles ordinance did, in fact, withstand the summary judgment motion from the plaintiffs, but might not withstand intermediate level scrutiny if the City's assumptions are proven unsound at trial.

3. Justice Souter's Dissenting Opinion.

Although Justice Kennedy's separate concurring opinion agreed with the result reached by Justice O'Connor's plurality, his opinion seemed to agree with the reasoning of Justice Souter's dissent in many respects.

The dissenting opinion of Justice Souter, joined by three other justices (Justice Breyer with regard to Part II), focused on the need for empirical evidence to show a causal relationship between adult business, the harm sought to remedied, and the regulation addressing this harm:

If combating secondary effects of property devaluation and crime is truly a reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary effects zoning as akin to time, place, or manner restrictions.

In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the demonstration available.[citations omitted] The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation. *Id.*, at 457-458.

After an examination of the evidence and the Los Angeles regulation, the dissent concluded that the regulation "lack[ed] any demonstrable connection to the interest of crime control" and appeared "like a policy of content-based regulation" to drive out expressive adult businesses. *Id.*, at 466.

B. Evidence Relied Upon By the City

The foregoing cases make clear that the government must advance evidence that an ordinance is designed to serve the government's interest in combating the negative secondary effects associated with adult entertainment. This evidence must be "reasonably believed to be relevant" to the problem of adverse secondary effects. *Renton*, 475 U.S., at 51-52. Further, the City's evidence "must fairly support [its] rationale" and plaintiffs challenging the ordinance must be given opportunity to "cast direct doubt on this rationale" with evidence of their own. *Alameda Books*, 122 S.Ct., at 1738. This evidence has been held to require pre-enactment evidence to justify the regulation. *Peek-a-boo Lounge v. Manatee County, Florida*, 337 F. 3d

1251, 2003 WL 21649675, pp. 10-12 (11th Cir. 7/15/03); *Ranch House v. Anderson*, 238 F.3d 1273-1283 (11th Cir. 2001); *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 946 (11th Cir. 2001).

Thus, the City has the burden of providing a legislative record to justify the challenged restrictions. In the absence of such a record, the ordinances cannot withstand constitutional challenge.

The City has previously asserted that the decision in *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998) is dispositive on the issues in this case. However, this case did not resolve the state constitutional issues. Mover, the Tenth Circuit decision occurred without the benefit of the *Alameda Books* opinion that dealt with the exact issue of the quantum of evidence required to justify a regulation of adult businesses. In light of the Justice O'Connor's plurality opinion and Justice Kennedy's concurring opinion in *Alameda Books*, the Tenth Circuit is clearly subject to reexamination.

Since *Alameda Books*, two courts have directly dealt with the on premises/off premises distinction and reached different results. In *Encore Videos, Inc. v. City of San Antonio*, 310 F.3d 812 (5th Cir. 10/28/03), *withdrawn and modified*, 330 F.3d 288 (5th Cir. 4/28/03), *cert. pending*, __.U.S.__, Case No. 03-163, t Fifth Circuit struck down an ordinance that defined adult uses at 20% of floor space or inventory as applied to a video store that did not provide on premises viewing. The initial opinion adopted the Kennedy/Souter analysis in *Alameda Books* and found the City did not meet its burden of justifying the regulation. *Encore Videos, Inc.*, 310 F.3d at 818-820. Upon denial of rehearing *en banc*, the original opinion was withdrawn and the Fifth Circuit issued a new opinion that struck down the San Antonio ordinance as applied a video

store with nonpremises viewing under a *Renton* analysis. *Encore Videos, Inc.*, 330 F. 3d at 294-295. Neither of these opinions found the reasoning in *Z.J. Gifts, D-2 ,L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998) to be persuasive.

Last month, in *DiMa Corporation v. High Forest Township*, 2003 WL 21909571 (D. Minn. 8/7/03), a district court determined that *Alameda Books* clarified the procedure of evaluating justification for adult use regulations and placed a greater on the government than required by the Eighth Circuit decision in *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994). Based upon the new *Alameda Books* analysis, the District Court found that the City ‘s justification for the ordinance as applied to a video store without on premises viewing had been placed in doubt and that summary judgment was not appropriate.

Likewise, the Tenth Circuit decision does not foreclose further examination of the First Amendment issues in light of the United States Supreme decision in *Alameda Books*. Certainly it the obligation of the district court to follow the binding authority of the United States Supreme Court in dealing with issues of free speech. Moreover, the district court must independently evaluate these issues under the State Constitution.

In the instant case, Plaintiff raised the *Alameda Books* decision in written and oral arguments to the Court. However, the Court dismissed these arguments in its oral ruling and did not address them in any form in the written order. The City wholly failed to meet its burden of justifying the challenged ordinances. As such, the District Court’s order upholding the constitutionality of the challenged Aurora ordinances should be reversed and ordinance declared unconstitutional. In the alternative, the matter should be remanded to give the District Court an opportunity to rule on these constitutional issues.

II. THE DISTRICT COURT'S ORDER ENJOINING DEFENDANT SEXUALLY ORIENTED BUSINESS FROM "OPERATING A SEXUALLY ORIENTED BUSINESS" WAS VIOLATIVE OF COLORADO RULES OF CIVIL PROCEDURE 65(d)

The District Court ordered that "the Plaintiff is hereby permanently enjoined from operating a sexually oriented business at 15141 East Mississippi Avenue." (R., Vol. IV, p. 916) Rule 65(d) of the Colorado Rules of Civil Procedure provides, in part:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in its terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained...

An injunction prohibiting conduct must be sufficiently precise to enable the subject to it to conform its conduct to the requirements thereof. *Colorado Springs Board of Realtors, Inc. v. State of Colorado*, 780 P.2d 494, 499 (Colo. 1989).

When interpreting a state procedural rule, similar federal and related case law can provide guidance. *Furlong v. Gardner*, 956 P.2d 545 (Colo. 1998). One purpose of Federal Rules of Civil Procedure 65 is to ensure that those against whom an injunction is issued receive fair and precisely drawn notice of what the injunction actually prohibits. In addition F.R.C.P. 65 is intended to avoid contempt citations based upon an order that is too broad or vague. *United States v. Louisiana Pacific Company*, 682 F. Supp. 1141 (D. Colo. 1988). See also *Schmidt v. Lessard*, 414 U.S. 473 (1974)(*per curiam*). An order requiring a party to obey the law in the future is too broad under F.R.C.P. 65, as is an order enjoining a party from future violations of a particular law, because such orders fails to meet the specificity requirements of the rule. *Id.*

The injunction order in the instant case fails to meet these requirements. The injunction did not set forth the reasons for its issuance, was not specific in its terms, did not describe in

detail the acts enjoined, and referred to a term defined in Aurora ordinances for the sole guidance as to the acts enjoined.

In *Colorado Springs Board of Realtors, Inc. v. State of Colorado*, 780 P.2d 494, 499 (Colo. 1989), the Colorado Supreme Court reversed an order for injunctive relief on the basis that it failed to give adequate notice on how to avoid future violations of the order:

This decree in effect simply prohibits the Board from violating Colorado's antitrust laws and requires the Board to submit general plans and reports to the court indicating that its revenues will not be spent for activities that violate the antitrust laws. The sweeping language of the decree does not sufficiently inform the Board of the steps it must take to avoid violations thereof.

Likewise, the order in the instant case fails to inform Plaintiff of the conduct that led to the violation of the Aurora ordinances, nor does the order provide any guidance as to how to avoid violations of Aurora ordinances. Even the reference to an outside document, namely the entire Aurora Municipal Code, fails to provide any meaningful guidance on how to avoid violations of the law. The issue presented in the instant case is whether the District Court erred in determining Plaintiff's business should be enjoined from operating adult bookstores or video stores, as defined in Aurora Municipal Code Section 26-441, which defines an "adult bookstore, adult novelty store, or adult video store" as a:

commercial establishment which devotes a significant or substantial portion of its stock in trade or interior floor space to the sale, rental, viewing, for any form of consideration, of 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.

The terms "significant or substantial," and "characterized" are not defined in the Ordinance.

Other jurisdictions use a numeric figure to define this term. For example, the El Paso County, Colorado zoning department defines "substantial and significant" to be over 50% of the total stock-in-trade of the establishment. (R., Vol. IV, pp. 817-818) *Compare, Baby Tam, Inc. v. City of Las Vegas*, 199 F.3d 1111, (9th Cir. 2000) [substantial or significant defined as less than 50%]; *City of New York v. Les Hommes*, 94 N.Y. 2d 267 (N.Y. Ct. App. 2000) [substantial and significant defined as 40%]. See also *Z.J. Gifts, D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, at 1229 (10th Cir, 2002) *cert. pending*, __U.S.__, Case No. 02-1609 [“A common method of narrowing construction has been to develop a percentage that will act as a guide as to what constitutes significant or substantial.”]

Plaintiff strenuously denies that it is operating an “adult novelty store or adult video store” as defined in *A.M.C., Section 26-441*. This view is supported by the District Court’s determination that the City failed to hold Plaintiff in contempt of the Court’s order on April 5, 2002. (R., Vol. I, p. 18). The Court further observed that the vagueness of the definition made it difficult for the Plaintiff to comply with the court’s order. (R. Vol. V. p. 235, l. 1-9). As observed by the District Court, “[T]here is certainly some vagueness to [the definition], When you have the words substantial and significant, how much is that? And since it is not defined any better than that, there are some serious issues as to whether the plaintiff’s have willfully violated the orders of the court.” *Id.*

Plaintiff desires to comply with the Ordinance and does not intend to operate an “adult business” at its present location. Notably, City officials have refused to assist in providing meaningful guidelines, despite Plaintiff’s repeated efforts to come to a clear understanding of the meaning of the term “significant or substantial” so Plaintiff may ensure compliance with

Aurora's regulations.

In the absence of any guidance by the City concerning the definition of "substantial or significant," the order for injunctive relief should advise Plaintiff as to how to avoid future violations of the Ordinance. To date, no city representatives have been able to attach any numerical figure to the terms "substantial or significant." Katherine Svoboda, deputy city manager, testified that Christal's was an adult bookstore under the Aurora Ordinance. She testified the term "substantial or significant," within the definition of adult bookstore, means "important, weighty, significant" to the business (R., Vol. V, p. 164) She went on to testify that she could not place any percentage figure on the terms "substantial or significant." (R. Vol. V, p. 121, 161). Thus, the City was unable to provide any coherent, objective definition of what constituted "substantial or significant" for the purposes of defining an adult bookstore under Aurora Ordinance.

In the instant case, the only guidance providing any ascertainable standard as to what constitutes "significant or substantial" is not found in the dictionary definition, but rather in the actual application of the Ordinance to other establishments and the interpretations by other jurisdictions. The City of Aurora has wholly defaulted on its "responsibility to promulgate clear and unambiguous standards." *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999).

Moreover, the City obtained injunctive relief against the continuing sale or rental of constitutionally protected publications and videotapes. As such, it must be noted that " the proper test for evaluating content-neutral injunctions under the First Amendment [is] 'whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.'" *Schenk v. Pro Choice Network*, 519 U.S. 357, 372, 136

L.Ed.2d 18 (1997), quoting *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765, 129 L.Ed. 2d. 593, 114 S. Ct. 2516 (1994). Because any injunction issued against the continuing operation of Plaintiff's business is necessarily based upon the language of the Ordinance defining sexually oriented business, the foregoing principle is relevant to construction of the Ordinance in the context of evaluating a permanent injunction.

Finally, "[f]or more than a century, [the Colorado Supreme] Court has held that Article II, Section 10 [of the Colorado Constitution] provides greater protection of free speech than does the First Amendment." *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991). See also, *People v. Ford*, 773 P.2d 1059, 1065 (Colo. 1989)(citations omitted); and *People v. Seven Thirty Five East Colfax, Inc.*, 697 P.2d 348, 356 (Colo. 1985).

All of these principles indicate that the permanent injunction issued against Plaintiff herein is vague and overbroad. Plaintiff is not provided adequate standards by the City to comply with the Ordinance, nor is it given any standards by which to comply with the preliminary injunction. The District Court's order enjoining Plaintiff from violating the Aurora City Code wholly fails to meet the minimum standards for notice imposed by C.R.C.P. 65(d) . As such, the District Court's order enjoining Plaintiff should be reversed.

Plaintiff strenuously denies that it is operating an "adult bookstore, adult novelty store, or adult video store." Plaintiff Z.J. Gifts has been operating at its current location since November 1993. Plaintiff intends to comply with the challenged Ordinance and does not intend to operate a "sexually oriented business" at its present location. Notably, city officials have refused to assist in providing meaningful defined guidelines, despite the Plaintiff's repeated efforts to come to a clear definition of the term "significant or substantial" so that Plaintiff may

ensure compliance with Aurora's zoning regulations. *See, R.*, Vol. III, pp. 671-673.

Both the United States Supreme Court and this Court have made clear that a lesser degree of vagueness in legislative enactments will be tolerated where a law threatens the exercise of constitutionally protected rights. “[P]erhaps the most important factor affecting the clarity that the Constitution demands of law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.” *Village of Hoffman Estates v. Flipside, Inc.*, 455 U.S. 489 (1982), *quoted in High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 631 n.7 (Colo. 1984). As repeatedly observed in *Young v. American Min-Theatres*, 427 U.S. 50, 60-61, the definitions contained in adult use zoning ordinances are readily susceptible of a narrowing construction by the state courts. Although the Court in *Young* refused to strike down the words “characterized by an emphasis” on sexual activity in response to a vagueness challenge, the Court, no less than three times in its opinion, stated the definitions would be subject to a narrowing construction by state courts faced with the actual application of the law.

After protracted litigation, the instant case is finally, in the position whereby a state court can actually construe the language of the Ordinance as applied to the establishments in this case. Unfortunately, nowhere in the opinions below is there any attempt to provide any construction of the vague language of the Ordinance, nor does the City offer any meaningful definition of the terms of the Ordinance. Thus, Plaintiff is left to guess at the meaning of the term "substantial or significant." In construing the language of a legislative enactment, the starting point is the language of the enactment itself.

If a court can give effect to the ordinary meaning of the words adopted by the legislature,

the enactment should be construed as written, since “it may be presumed that the General Assembly meant what it clearly said.” *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 545 (Colo. 1995). In the instant case, the express language of the Ordinance is anything but clear. The term “substantial or significant” does not provide any type of definite standard upon which an individual can rely to comply with the law. Nor does the City or the Court's orders offer any assistance in this regard. Indeed, all that is left is for the City, the Court, or Plaintiff to hazard a guess as to the meaning of the terms. Several tenets of statutory construction are applicable in the instant case.

It is fundamental that where ambiguities exist in a legislative enactment, courts may rely on tools of statutory construction such as legislative history or administrative interpretation. *See, City of Aurora v. Board of County Commissioners of County of Adams*, 919 P.2d 198, 200 (Colo. 1996). When construing legislation, courts afford appropriate deference to the consistent and contemporaneous interpretation given the enactment by the officer or agency charged with its interpretation. *El Paso County Board of Equalization v. Craddock*, 850 P.2d 702 (Colo. 1993). However, the construction of an administrative agency is not binding on the court, particularly where the agency misapplies or misconstrues the law. *Id.* However, when the construction of legislation by those charged with its enforcement has not been uniform, deference to administrative interpretations is not applicable. *Colorado Common Cause v. Meyer*, 758 P.2d 153 (Colo. 1988); and *Three Bells Ranch Associates v. Cache La Poudre Water Users Association*, 758 P.2d 164 (Colo. 1988).

Finally, violations of the Aurora sexually oriented business licensing ordinances are enforceable as criminal violations carrying penalties of up to one year in the city jail. *See,*

Aurora Municipal Code Section 26-88, 1-13(c). The rule of lenity requires that penal statutes be narrowly construed. ***People v. Lowe***, 660 P.2d 1261, 1268 (Colo. 1983). Indeed, because citizens need to know what conduct could lead to the imposition of criminal penalties, the statute should be narrowly, not broadly, construed. The rule of lenity “requires penal statutes to be construed against the government.” *Id.* at 1267. Where ambiguity exists in a penal statute, such ambiguity is always resolved in favor of the person whose liberty interests are affected. ***People v. District Court***, 834 P.2d 236, 240 (Colo. 1992).

Moreover, “legislative acts in derogation of the common law, like statutes interfering with property rights, must be strictly construed. ***Hartley v. City Colorado Springs***, 764 P.2d 1216, 1224 (Colo. 1988), citing ***Pigford v. People***, 593 P.2d 354, 356 (Colo. 1979) and ***McMillan v. State***, 405 P.2d 672, 674 (Colo. 1965). See also ***Deters v. Smuggler Durrant Mineral Corp.***, 930 P.2d 575 (Colo. 1997). The ordinance applied in this case restricts the right to exercise free speech, limits the use to which private property may be put, and imposes criminal penalties. The sum of the foregoing factors weigh heavily in favor of the strictest construction of the ambiguous terms of the Aurora Ordinance.

Against this backdrop of tenets of statutory construction, the City has steadfastly refused to provide any guidance to Plaintiff’s businesses as to what is meant by the term “significant or substantial.” In the instant case, the only guidance providing any ascertainable standard as to what constitutes “significant or substantial” is not found in the dictionary definition, but rather in the actual application of the Ordinance to other establishments and the interpretations by other jurisdictions. The City of Aurora wholly defaulted on its “responsibility to promulgate clear and unambiguous standards.” See also, ***Pearson v. Shalala***, 164 F.3d 650, 661 (D.C. Cir. 1999),

[invalidating the FDA's interpretation of a regulation that created the “significant scientific agreement” standard]

Based upon this evidence, together with the inherent ambiguity of the terms “substantial” and “significant,” the Court’s order fails to comply with the requirements of C.R.C.P. 65(d). The City and the District Court failed to provide fair notice to Plaintiff either legislatively or through administrative interpretation as to what that term “adult video store” means so that Plaintiff can comply with it. The City has wholly defaulted on its responsibility to give any type of fair notice of what constitutes a violation. As such, any ambiguity must be resolved in Plaintiff's favor and the order for permanent injunction should be reversed.

III. BY FAILING TO PROVIDE FOR A SPECIFIC TIME PERIOD FOR AN APPLICANT'S LICENSING DECISION OR FOR PROMPT JUDICIAL REVIEW, AURORA MUNICIPAL CODE SECTIONS 26-441, ET SEQ. VIOLATE PLAINTIFF'S FIRST AMENDMENT RIGHTS OF FREE SPEECH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, AND ARE IN DIRECT CONFLICT WITH FW/PBS, INC. V. CITY OF DALLAS, 493 U.S. 215 (1990) AND Z.J. GIFTS, D-4, L.L.C. v. CITY OF LITTLETON, 311 F.3D 1220(10TH CIR. 2002)

In the “final judgment”, dated November 18, 2002, the District Court stated “Plaintiff is further permanently enjoined from operating a sexually oriented business without a sexually oriented business license.” (R, Vol. IV, p. 916). Pursuant to the Tenth Circuit decision in **Z.J. Gifts, D-4, L.L.C. v. City of Littleton**, 311 F.3d 1220 (10th Cir, 2002) *cert. pending*, __U.S. __, Case No. 02-1609, issued the very same day, the Aurora sexually oriented business licensing requirement is clearly unconstitutional and , thus, the District Court’s order should be reversed. The challenged Aurora Ordinance, Sections 26-441, *et. seq.*, sets forth the procedures for approval of sexually oriented business licenses by the City Clerk. Section 26-494 provides the

procedures for the suspension or revocation of a license. (R. Vol. III, p. 630-631). Section 26-494(e) provides that in the event the finance director suspends or revokes a sexually oriented business license, this shall be a final decision and may be appealed to the district court pursuant to Colorado Rules of Civil Procedure (C.R.C.P.) 106(A)(4) which establishes the procedure for judicial review in state district court of administrative decisions. *Id.* Section 26-496 provides that denial of a license or denial of a renewal of a license are final orders subject to judicial review.(R., Vol. III, p. 632).

It has always been Plaintiff's position that the foregoing provisions and procedures are deficient in light of those required by the United States Supreme Court in its decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, striking down a similar Dallas sexually oriented business licensing ordinance for failure to provide "prompt judicial review". The Colorado Supreme Court upheld this procedure under C.R.C.P. 106 in *City of Colorado Springs v. 2354 Corp.*, 896 P.2d 272 (Colo. 1995). However, as previously noted, the United States Court of Appeals for the Tenth Circuit recently struck down a nearly identical sexually oriented business license requirement in *Z.J. Gifts, D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir, 2002) *cert. pending*, __U.S.__, Case No. 02-1609, on the basis that C.R.C.P. 106 failed to provide prompt judicial review as required by the First and Fourteenth Amendments to the United States Constitution in *FW/PBS*.

Section 26-494(e) provides for judicial review under C.R.C.P. 106(a)(4) in the event of a license suspension or revocation of a sexually oriented business license. Section 26-496 merely states that judicial review is available in the event of denial of a license. However, there is no mechanism for "prompt judicial review " as required by the Tenth Circuit in *Z.J. Gifts, D-4*,

L.L.C. v. City of Littleton. As such, the Aurora licensing requirement is unconstitutional and the District Court's order enjoining Plaintiff from operating a sexually oriented business without a license should be reversed.

IV. **PURSUANT TO SENATE BILL 251, AMENDING C.R.S. 38-1-101(3)(a), THE CITY OF AURORA MAY NOT ENFORCE THE ZONING RESTRICTIONS AGAINST PLAINTIFF HEREIN THAT WAS LAWFULLY OPERATING ITS BUSINESS PURSUANT TO SENATE BILL 251, AMENDING C.R.S. 38-1-101(3)(a), THE CITY OF AURORA MAY NOT ENFORCE THE ZONING RESTRICTIONS AGAINST PLAINTIFF HEREIN THAT WAS LAWFULLY OPERATING ITS BUSINESS PRIOR TO**

Plaintiff has operated its business at its current location of 15451 East Mississippi Avenue, Suite B, Aurora, Colorado since November 19, 1993. (R., Vol. IV, p. 908) On that date, the City of Aurora issued Plaintiff a business license. On December 13, 1993, the City of Aurora enacted Ordinance 93-117, which added to the Aurora Municipal Code, Chapter 32.5 providing for the licensing and regulation of adult businesses. The effective date of this ordinance was January 21, 1994. (R, Vol. IV, p. 908) The ordinance has since been recodified to Section 26-441 *et seq.* Thus, at the inception of its business, Plaintiff was lawfully zoned. *Id.* Section 26-455(a) of the Ordinance provides that “any sexually oriented business lawfully operating of the effective date of the ordinance “as a nonconforming use was permitted to continue to operate for six months. A.M.C., Section 26- 455(a). (R., Vol. III, p. 624) On June 6, 2003, The Governor signed into law Senate Bill 251, amending C.R.S. 38-1-101, which states as follows:

38-1-101(3)(a) Notwithstanding any other provision of law to the contrary, a local government shall not enact or enforce an ordinance, resolution or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization.

b) For purposes of this subsection (3), “local government” means a county, city and county, town, or home rule or statutory city.

A copy of the Senate Bill 251 is attached hereto as *Exhibit A* and incorporated by this reference.

As set forth unequivocally in the Court’s Order of November 18, 2002, Plaintiff was a lawful use at the time of its inception. Pursuant to the clear and mandatory terms of Senate Bill 251, the City may not enforce an ordinance that would terminate a lawful use by amortization. Thus, Plaintiff’s business remains a lawful use and may not be terminated by enforcement of the amortization provision contained in the challenged ordinance. Based upon the clear and unambiguous language of Senate Bill 251, the City is foreclosed from enforced the challenged zoning restrictions against Plaintiff and a permanent injunction should not enter against the operation of Plaintiff’s business.

CONCLUSION

Based upon the foregoing arguments and authorities, Plaintiff-Appellant respectfully requests this Honorable Court to reverse the Arapahoe County District Court’s order dated November 18, 2002 and remand the case for further proceedings, and for such other and further relief this Court deems appropriate under the circumstances.

Respectfully submitted,

Arthur M. Schwartz, No. 557
Michael W. Gross, No 14113
SCHWARTZ & GOLDBERG, P.C.
1225 17th Street, Suite 1600
Denver, Colorado 80202
(303) 893-2500

CERTIFICATE OF MAILING

I do hereby certify that I have mailed a true copy of the above and foregoing **OPENING BRIEF OF APPELLANT**, by depositing same in the United States Mail, postage prepaid, addressed to:

Barry K. Arrington, Esq.
Arrington & Associates, P.C.
2801 Youngfield Street, Suite 300
Golden, CO 80401

Charles H. Richardson
Teresa Kinney
Office of the City Attorney
15151 East Alameda Parkway
Aurora, CO 80012-1553

on this _____ day of September, 2003.