BEFORE THE HEARING EXAMINER FOR THE CITY OF LAKEWOOD

In the Matter of the Appeal of Déjà Vu Tacoma, Inc. Of October 14, 2019 Notice and Order denying business license.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

Summary

Appellant appeals the denial of a business license application for an existing adult entertainment establishment, Déjà vu Showgirls Tacoma, located at 8920 South Tacoma Way, Lakewood, WA 98499. There was ample justification for the denial. However, the City Manager was not given the opportunity to consider the impacts of denial to the nonconforming use status of the business. The denial decision is remanded to the City Manager for a formal determination pursuant to LMC 18A.40.450(C) whether denial would extinguish the nonconforming use rights of Appellant's business. If the answer is in the affirmative, the City Manager shall reconsider his decision in light of this additional information. If the answer is in the negative and the Appellant's nonconforming use status is not extinguished, then the denial should be construed as upheld by this Decision.

The remand is necessary to meet the City's obligation to exercise its discretion in its decision. As acknowledged by City staff during the hearing, the issuance of a business license can be conditioned. The exercise of discretion necessarily involves the weighing of options available to address a problematical business. That balancing in turn also requires an understanding of the consequences of such options. In the City's closing brief, the City minimized the significance of the license denial on the basis that denial would only prohibit the Appellant from operating his business for the remaining two and a half months of 2019 and that the Appellant could reapply for a license in 2020. As outlined in Finding of Fact No. 15, the City's police chief testified that he understood the denial

to only be temporary and that this played a factor in his decision to recommend denial to the City Manager. It is uncontested that the Appellant's business is a nonconforming use. It is possible that denial of the business license could extinguish the nonconforming use status of the business, such that a denial of the license would result in a permanent prohibition of the business as opposed to a two-and-a-half-month closure as asserted by the City. The City Manager issued the denial decision. When questioned about the nonconforming status of the business, it was clear that he hadn't had the opportunity to consider the impacts of denial on nonconforming use status. The Notice and Order did not identify such a consequence or identify that any other options had been considered short of denial. Exercising discretion without a full consideration of all consequences of available options cannot be construed as a proper exercise of discretion.

As noted above, it's only "possible" that denial of the business license may result in loss of nonconforming use status. The City's municipal code is not entirely clear on this issue and the Examiner has no original jurisdiction to resolve it. LMC 18A.40.450(C) requires the City Manager or designee to make the initial determination as to loss of nonconforming use status. Consequently, this decision is remanded to the City Manager for that determination. Remand is further necessary because the options available to the City Manager short of license denial involve the potential significant use of city resources, which implicates budgetary and policy considerations that are beyond the jurisdiction of the examiner under separation of powers.

Under the City's business license regulations, the City had multiple grounds for denial that were well supported by the administrative record. Violating City cabaret standards was a regular course of business for the dancers and manager of the business. Undercover officers were presented with multiple offers for prostitution and on a couple occasions with illegal sales of controlled substances. Of particular significance was the fact that the dancers and managers were fully aware of the illegality of their conduct and had no intention of correcting it even after uniformed police entered the premises on November 9, 2018 and advised a manager of the requirements of cabaret ordinance performance standards. Dancers returned to their illegal conduct as soon as the uniformed officers exited the premises and continued that conduct as identified by additional undercover operations. The same illegal conduct was found to be continuing on March 26, 2019. Given this pattern of conduct, it is entirely reasonable to conclude that any enforcement action taken by the City would have to be substantial to have any deterrent effect. A business license denial resulting in a 2.5-month closure is amply justified by this conduct.

The Appellant has emphasized that there's no evidence that the business owner was aware of the illegal activity on his premises. Case law may prohibit prior restraints on expression that impose strict liability. However, it simply cannot be reasonably found that the owner was unaware of the rampant illegal activity on his business premises. At the outset, this would mean he didn't even visit his premises, since some of the violations involved lack of permanent fixtures such as the absence of railings on stages and the presence of curtains in the VIP areas. Further, police reports identified that undercover police officers repeatedly observed dancers violating cabaret standards as soon as they walked in the building, since dancers could be observed making illegal contact with patrons out in the open seating areas and could also be observed doing so without their clothes on in violation of cabaret regulations. It would also have to be believed that the Appellant's staff failed to advise the owner that his premises had been visited by uniformed officers and that the manager had been

advised of multiple acts of illegal conduct. Finally, the owner would have had to continue to cast a blind eye to such violations even after having the Washington State Court of Appeals addressed constitutional issues arising from multiple cabaret violations for a similar cabaret establishment owned by the Appellant for similar reasons just two years earlier in unincorporated Pierce County. Under the preponderance of evidence standard, it's found that more likely than not the owner knew of the illegal activity conducted on his premises. Even if the owner didn't know, the effort undertaken to purposely avoid knowledge of such clear and obvious illegal activity would likely not be protected by the First Amendment or article I, section 5 of the Washington Constitution.

Testimony

See transcript.

Exhibits

All exhibits identified in the City Exhibit List -- Second Amended, dated December 6, 2019 were admitted into the record during the hearing of December 9, 2019. In addition, the following exhibits were admitted during the December 9, 2019 hearing:

Exhibit 27: Notice of Appeal

Exhibit 28: Police Incident Reports 151620043.1, 1606900705.1, and 151670033.1

Exhibit 29: October 23, 2019 Declaration of Sean Dunn

Findings of Fact

Procedural:

1. Appellant. Déjà vu Tacoma, Inc. Eric Forbes is listed as president and officer/agent/representative in the denied business license application, Ex. 2.

2. Hearing. The hearing examiner held a hearing on the appeal on December 9, 2019 in the municipal court of the City of Lakewood. The record was left open through December 13, 2019 for submission of written closing argument.

Substantive:

3. Business. The Appellant operates an adult cabaret, Déjà vu Showgirls Tacoma, located at 8920 South Tacoma Way, Lakewood, WA 98499. The cabaret has two stages, VIP rooms, and a DJ booth that overlooks both stages. Cabaret dancers perform nude on the two stages. The business has been in operation since 1992 and is currently a legal nonconforming use (authorized when first instituted, but now prohibited by the City's zoning code for its current location). Cabaret dancers operate as independent contractors who pay $140 per evening to perform on the state and also do private dances

for patrons. The dancers also pay a portion of the money they make from private dances in the VIP rooms. P. 254[1].

4. Business License Expiration. Appellant has renewed its business license every year from the City for as long they have been required, except for the years 2018-19, with the last business license expiring on December 27, 2017. See Ex. 8, P. 180, Trans. P 108. As testified by the Appellant's bookkeeper, Vickie Lou Beekley on behalf of Consolidated Bookkeeping and Management Services, the Appellant relies in part upon yearly notices from the City to send in renewal applications. Ms. Beekley maintains that to the best of her recollection her company did not receive a renewal notice for the Appellant's 2018-2019 licenses and this is why it failed to renew its license for those years. Trans. P. 147-149. The assistant city manager for community and economic development, David Bugher, noted in his report to the City Manager that he was unable to guarantee that a renewal notice had been sent to the Appellant for 2018-19 because numerous copies of renewal notices for several businesses were missing, including those for Appellant's 2018-19 business licenses. See Ex. 8b, Trans. 120-121. However, Mr. Bugher did present spreadsheets during the appeal hearing that in his interpretation indicated that renewal notices had been mailed. Trans. P. 106-108, 119.

5. Police Investigation. A City police investigation of illegal conduct of Appellant's business was commenced in 2018 as a result of a citizen's complaint. Undercover police officers were sent to act as patrons to determine if any illegal activity was occurring at the business. The investigation identified multiple criminal and code violations. The first undercover visit was made on 8/22/18, the day City police received a tip of illegal activity at the business. See Trans. P. 14. Undercover officers went into the business on 10/3/18, 10/5/18, 10/11/18, 10/26/18, 11/9/18 and 3/26/19. Uniformed officers went into the business on 11/9/18 while undercover officers were also present. The uniformed officers gave a warning to the management about cabaret rules of conduct. A search warrant and interviews were conducted on 4/4/19. Arrests were also made on 4/4/19. See Trans. P. 14-19.

6. Arrests/Violations. As a result of the police investigation, criminal charges were filed against 30 dancers and managers for illegal drug possession, illegal drug sales and/or prostitution. The offense dates ranged from 8/22/18 through 4/4/19.

7. License Revocation. On September 18, 2019 the City issued a Notice and Order of Revocation of Business License based upon the criminal violations identified in Finding of Fact No. 6 as well as multiple violations of cabaret regulations. See Ex. 1. The revocation notice was withdrawn by letter dated September 23, 2019 after the City discovered that the Appellant did not have a business license. That same letter advised that the Appellant was required to obtain a business license. Id.

8. License Denial. Appellant filed an application for a 2018 business license on September 25, 2019. See Ex. 2. That application was denied by a Notice and Order of Denial of Business License Application dated October 14, 2019. See Ex. 8.

[1] The Bate stamp pagination imprinted by the City is reference as "P X" in this decision. Transcript pages as referenced as "Trans P. X."

9. Notice of Appeal. The Appellant filed a Notice of Appeal dated October 16, 2019. See Ex. 27. The Notice of Appeal cited sixteen grounds for error, asserting that no illegal activity occurred at Appellant's business, that past misconduct could not be considered in license denial, that general business license regulations did not apply to cabarets, that City regulations were unconstitutional and that mitigating factors and alternative remedies were not properly considered.

10. Pre-Hearing Motions. Both the City and the Appellant filed prehearing motions. The examiner's ruling on those motions addressed several of the grounds for error alleged in the Notice of Appeal, including that past misconduct could serve as the basis for denying a cabaret license and that the City Manager was required to exercise discretion in reviewing the Appellant's license application but that the First Amendment did not require the manager to impose the least restrictive alternative remedy to license denial. *See* Ex. 16 12/3/19 *Order Granting in Part Appellant's Motion Requiring Examiner to Consider Less Burdensome Alternatives* and 12/2/19 *Corrected Order Denying Motion to Preclude Evidence of Past Conduct to Deny Business License.*

11. Dancer Violations. Undercover officers reported the following interactions and observations of cabaret dancers at the Appellant's business. Since no contrary evidence was presented on the officer's observations, all observations are taken as verities:

A. On 8/22/18 "Rose" sat on an undercover officer's lap and offered to have sexual intercourse and oral sex with an undercover officer for $400. P. 0192

B. On 10/5/18, "Susie" sat on an officer's lap. P. 0198.

C. On 10/5/18, "Heather" sat on an officer's lap and rubbed his crotch with her hand. She offered to let the officer penetrate her vagina with his fingers for $20. She exposed her vagina and breasts and tried to move the officer's hand to her vagina. In response to inquiries about sexual favors, heather offered to have sex and perform oral sex for $300 an hour. P. 0198.

D. On 10/5/18, "Dita" sat on an officer's lap and danced while exposing her breasts. P. 0198.

E. On 10/5/18, "Heaven" rubbed her buttocks on an officer's lap. In response to officer inquiries Heaven said it would cost $2,000 to have sex with her. P. 200.

F. On 10/5/18, an undercover officer paid "Amira" $20 for a dance in which she rubbed her buttocks on the officer's lap. P. 200.

G. On 10/5/18, "Heather" sat on an undercover's officer's lap and in response to officer inquiries responded she would have sex with he and another officer for $600. Heather grabbed the

officer's hand and tried to have him touch her vagina. Heather danced on the officer's lap and was paid $60 by the officer. P. 200

H. On 10/11/18, "Susie" sat on an undercover officer's lap, exposed her breasts and danced by rubbing her buttocks on the officer's groin/lap area. The officer paid Susie $20 for the dance. P. 202.

I. On 10/11/18, "Kat" sat on an undercover officer's lap and danced by rubbing her buttocks on the officer's groin/lap area. Cat offered to do a hand job for $280. The officer paid Cat $20 for the dance. P. 202.

J. On 10/11/18, "Heaven" danced on an undercover officer's lap by rubbing her buttocks on his lap. In response to officer inquiries Heaven said she would do a hand job or perform oral sex for a price. Heather stated the rules in Washington against touching and rubbing were very strict and the dancers knew that conduct was illegal. P. 204.

K. On 10/11/18, "Rachel" danced on an officer's lap and was paid by the officer. P. 204.

L. On 10/11/18, an undercover officer tipped "Malani" while she was performing naked on stage. Malani responded by rubbing her bare breasts on the side of the officer's head. Malani then did a private dance with the officer while she grabbed the officer's crotch and rubbing her breasts in his face. Malani gave the officer her phone number and said they could do a lot more outside the club. After leaving the club the officer texted Malani and was told that sex would cost $800 and that in response to officer inquiries she would bring cocaine, molly or marijuana for an additional $200. P. 206-7. On 10/15/19 the officer contact Malani and was told she would set up an illegal drug deal at Appellant's business on 10/16/18 while she was working. P. 212. She listed VIP prices involving "her rules" which were double the club prices. The officer appeared at the scheduled time and Malani informed him she had forgotten to bring the drugs. The officer paid Malani $100 for a dance. Malani said she would do the drug deal later in the day, but did not follow through. On 10/26/18 Malani texted the officer and offered to make another cocaine drug deal. P. 214. In response, the officer went to Appellant's business where Malani sold him two Adderall pills for $40. Malani also did several dances for the officer in the same manner as previous dances performed for the officer. P. 214. Malani was arrested for the Adderall sale and/or cabaret violations on 4/4/19. P. 251.

M. On 10/11/18, "A.J." did a private lap dance with an officer while she grabbed the officer's crotch and rubbed her bare breasts in his face. P. 206-7. In an interview with a uniformed officer on 4/4/19, A.J. admitted to violating City cabaret standards of conduct. She stated she feels forced to violate them because the Appellant's business charges her $140 at the end of each night and if

she can't pay it the remaining balance is added to her next shift at the business. She admitted to taking payment directly from patrons. P. 250.

N. On 10/11/18, "Susie" offered to do a lap dance for $40, 60 or 100. She said that for $60 she would do two topless lap dances and that the officer could touch her wherever he wanted to. She did a lap dance for the officer and rubbed her bare breasts in his face. She grabbed the officer crotch and offered to have the officer suck her breasts. In response to officer inquiries she said that sex would be at least "my nightly minimum" of $500-600. P. 209.

O. On 10/11/18, "Roxy" offered to do a topless lap dance for $30. During the dance she rubbed her buttocks on the officer's lap as part of the dance, rubbed her bare breasts on his face and placed his hands on her buttocks. P. 209.

P. On 10/11/18, "Mary Jane' sat on an undercover officer's lap and offered to do a topless dance for $40. She gave the officer her phone number. On 11/13/18 Mary Jane contacted the officer and offered to meet him at a hot tub rental room for an hour for $200 for sex and everything else. P. 233-34.

Q. On 10/26/18, "Mami" sat on an officer's lap and grabbed his crotch. She did a lap dance for the officer where she rubbed her buttocks and crotch on his leg and exposed her breasts. She bent over and spread her buttocks for him. The officer paid her $40, which Mami said was the cost of a topless dance. P. 216.

R. On 10/26/19, "Caliente" did a lap dance for an undercover officer rubbing her crotch on his leg and exposing her breasts. She stated she wanted to have sex and when asked how much she said she would get back to him but that it would cost him. The officer paid her $40. P. 216.

S. On 10/26/19, "Violet" did a lap dance for an undercover officer and rubbed his leg with her crotch. She exposed her breasts during the dance. The officer paid her $40 for the dance. P. 216.

T. On 10/26/19, "Serenity" did a lap dance for an undercover officer where she sat partially on the officer's lap and touched his chest and stomach. The officer paid her $20. P. 219.

U. On 10/26/19, "Violet" did a lap dance for an undercover officer. Violet rubbed her buttocks on the officer's groin. The officer paid her $20. P. 219.

V. On 10/26/19, "Angel" sold an undercover officer three Adderall pills for $70. Angel also gave her phone number to the police officer and said she could sell him cocaine and oxycodone. P, 219.

W. On 10/26/19, "Roxy" did a lap dance for an undercover officer by rubbing her body on him. The officer paid her $20. P. 219.

X. On 11/9/18, "Hennessy" did a VIP lap dance for $200 with her breasts exposed as she grinded on the officer's thigh. She left the room after a few minutes (apparently when uniformed officers entered the premises) and came back to say she was warned to keep her clothes on and completed the VIP dance with her clothes on and no grinding. P. 221. Her warning had been given by a police officer. P. 230.

Y. On 11/9/18, "Suzie" did a lap dance where she grinded on the officer's crotch and at times grabbed his crotch. P. 221.

Z. On 11/9/18, "Sade" sat on an officer's lap and immediately grabbed his crotch and offered sex in the VIP room for $500. The officer said he didn't have enough money but he could get some for a hotel. Sade then offered an hour of sex in the hotel room for $600 and gave the officer her phone number. She then gave a lap dance in which she ground on the officer's lap and crotch area. P. 221.

AA. On 11/9/18, "Angel" sold cocaine to an undercover officer for $400 and then did a lap dance where at one point she grabbed the officer's hands and touched them to her bare breasts. The officer paid Angel for the dance. P. 223.

BB. On 11/9/18, "Chanel" did a lap dance for an undercover officer. During the dance uniformed police officers entered the building. The manager whispered into Chanel's ear and another dancer told Chanel to stop touching the officer. The officer ended the dance. Chanel approached the officer later for another dance and told the officer that the manager would let her know if police officers re-appeared. P. 223-24.

CC. On 11/9/18, "Love" sat on an undercover officer's lap and immediately touched his groin area. She said for $500 the officer could do anything he wanted to her and then gave the officer her phone number. P. 224.

DD. On 11/9/18, "Heather" sat on an undercover officer's lap and exposed her breasts. P. 224

EE. On 11/9/18, "Caliente" sat on an undercover officer's lap and touched his groin area while talking to him. P. 224.

FF. On 11/9/18, "Love" did a lap dance for an undercover officer by grinding on his lap and rubbing her buttocks on this thigh. The officer paid her for the dance. P.226.

GG. On 11/9/18, "Mailani" sat on an undercover officer's lap and then left when she saw uniformed police officers enter the building. After the uniformed police officers left the building, Mailani returned to the officer and did a lap dance and exposed her breasts for the duration of the dance. The officer paid Mailani for the dance. P. 226.

HH. On ll/9/18, "Roxy" sat on a chair away from an undercover officer. When asked why she was sitting so far away, Roxy responded that it was because police were in the building. She stated that the rules did not allow dancers to sit on laps and that they also had to wear certain types of clothing. P. 226.

II. On 11/9/18, "Robin" did a lap dance for an undercover officer and was paid by the officer. P. 227.

JJ. On 11/9/18, "Cheyanne" did a lap dance for an undercover officer where she grinded on the officer's lap. The officer paid Cheyanne for the dance. P. 227.

KK. On 11/9/18, a uniformed officer entered Appellant's building and observed several dancers sitting on the laps of patrons. Some were caressing the groin and thigh areas of the patrons. He also observed a dancer dancing in the lap and groin area of a patron. He saw a female in the VIP room sitting on the lap of a patron without her top on. P. 230. After meeting with the manager on the way out, the officer observed that all that females had separated from the males. P. 231.

LL. On 3/28/19, "Gemini" did a lap dance for an undercover officer. She straddled the officer's lap, exposed her breasts for the duration of the dance, caressed his inner thigh and ran her hand up his chest underneath his shirt. P. 236.

MM. On 3/28/19, "Olivia" sat on an undercover's lap, rubbed his neck and shoulders and then exposed her breasts. P. 236.

NN. On 3/28/19, "Mary Jane" sat on an undercover officer's lap and rubbed his chest. The officer

asked if he could see her after she got off work and she said she would have sex for $200 an hour. She did a lap dance for the officer and exposed her breasts. She also exposed her crotch and buttocks. P. 236.

OO. On 3/28/19, "Monique" sat on an undercover officer's lap, rubbed his chest with her hand and slid her hand under his shirt. P. 236-37.

PP. On 3/28/29, "Rachel" did a lap dance for an undercover officer. She exposed her breasts, vagina and buttocks during her dance. P. 237.

QQ. On 3/28/19, "Coral" sat down on the lap of an undercover police officer. The officer asked how much to have sex and she responded $350 for the VIP room. Coral occasionally exposed her breasts during this conversation. She did a lap dance and exposed her vagina and breasts. The officer paid her $50 for three dances. Coral returned shortly later and said she would sell the officer some cocaine. P. 244.

RR. On 3/28/19, an undercover police officer observed several topless dances sitting on the laps of patrons. P. 244

SS. On 3/28/19, "Suzy" sat on an officer's lap and in response to officer inquiries said she would have sex for $350 in the VIP room, but she would have to get to know the officer better first. Suzy then took her turn to dance on the main stage. The officer gave her a $10 tip and Suzy then rubber her bare breasts on his head. After the main stage dance Suzy did a lap dance for the officer by rubbing her buttocks on his groin and occasionally grabbing his crotch. The officer paid Suzy $40. P. 244-45.

TT. On 3/28/18, "Hennessy" offered to do a lap dance for an undercover officer. The officer said he was tired of lap dances and wanted sex. Hennesy said she would have sex in the VIP room for $350. P. 245.

UU. On 3/28/19, "Precious" approached an undercover officer wearing a once peace lingerie that exposed her nipples. She offered a dance and the officer said he only wanted sex. Precious offered a $350 VIP dance where the officer could lick her vagina but could not have sexual intercourse. P. 245.

VV. On 3/28/19, "Mary Jane" sold cocaine to an officer for $20. P. 245.

WW. On 3/28/19, an undercover officer observed patrons put money on the stage and dancers rub their bare breasts on the faces of the patrons. The officer observed Mercy, a completely naked stage dancer, walked off the stage, sat down on a patron's lap and then bounced up and own mimicking sexual intercourse. P. 244.

XX. On 4/4/19, Lauren Knight, who had been working at Appellant's business for two weeks, admitted in a uniformed[2] police interview that taking payment and tips from patrons directly, was not aware that direct payment was prohibited and stated that management knew payment was direct. She stated she was not aware that she could not have physical contact with patrons. P. 250.

YY. On 4/4/19, a uniformed officer observed a dancer dancing within inches of a patron.

ZZ. On 4/4/9, during a uniformed interview, Lilly Resto admitted to taking direct payment for dances and stated she had to pay the house $140 per shift. P. 254.

AAA. On 4/4/19, during a uniformed interview, Stephanie Carr stated she had to pay the house $140 per shift and in addition had to pay the house a portion of money received during house and private room dances.

BBB. On 4/4/19, during a uniformed interview, Destinee Ingalsbe stated that she collected payment for dances directly from patrons and that she had to pay the house $140 per shift and that the house kept track of how much money she made each night.

CCC. On 4/4/19, during a uniformed interview, Alexandra Jefferson stated she had to pay the house $140 per shift.

DDD. The police investigation resulted in a total of three referrals to the prosecuting attorney's office for drug violations. Trans. P. 35.

12. Manager Observations. Officers reported the following interactions with managers at the Appellant's business:

[2] References to "uniformed" officer includes officers that may be in plain clothes but who's identity as a police officer is not hidden from cabaret staff and dancers.

A. On 10/11/18, a dancer named "Roxy" informed a police officer that the managers looked the other way on activities in the VIP room and that anything goes in those rooms so long as is consensual. P. 209.

B. On 11/9/18, a uniformed officer spoke to Taylor Martin, who said she had served as a manager for four years. The officer went over the cabaret rules with Martin. Martin said she understood the rules. Martin was unaware of any board that identified the on-duty manager. Martin was provided a copy of the cabaret regulations. She was not given a written warning to cease or abate the violations. P. 230-31, Trans. P. 34, 144. Martin noted that the business had been subject to a compliance check in 2015 for the US Open. Trans. P. 143.

C. On 11/9/18, after uniformed police officers had entered and left the building, "Heather," a manager, sat next to an undercover officer. The officer asked what was going on and Heather responded that girls were not allowed to be dancing on guys and there was a separation requirement between dancers and customers. The officer noticed that some girls had changed into less revealing clothing and Heather commented that there were rules about the type of clothes girls had to wear. P. 226-27.

D. On 4/4/19, Jerizza Jones, a manager with Appellant's business since 2014, identified that she was aware of all applicable cabaret rules during a uniformed interview. Jones stated she couldn't recall ever sending a dancer home for a rules violation. She could only recount one incident of referring a dancer to the owner for suspension, based upon the dancer arguing with other dancers. Jones stated she hadn't been aware that direct payment from patron to dancer was prohibited. Jones stated she hadn't been given any training or guidance on how to address cabaret rules violations. P. 263.

E. Officer Larson testified that the managers walked around monitoring the lap dance areas with a clip board, but that money went straight from the patrons to the dancers. Trans. P. 66.

13. Building Violations. Police officers made the following observations of the interior of Appellant's business. No contrary evidence was presented and the observations and summaries provided below are taken as verities unless otherwise noted:

A. On 11/9/18, a uniformed police officer observed that the three VIP rooms of the building were curtained. P. 230

B. On 3/28/19, an undercover officer observed that there was no barrier between the stage and patrons. P. 244.

C. In a summary of the police investigation of Appellant's business held between August 22, 2018 and April 4, 2018, it was noted that each time officers entered the building they observed the absence of continuous three foot railing on the stages and eight foot separation between dancers on stage and patrons; the presence of curtains that block views of the VIP rooms, the main area and couch dance areas were dimly lit, which made it difficult to see the denominations on US currency, the manager was not always visible, the was only a price list for entrance fee, beverage and lap dance. No additional fees or price list were posted. There was no posting of the manager's name and license and the manager was not watching the actions of the dancers. P. 277.

Photographs provided by the Appellant are in conflict with the price list observation in the summary above. Ex. 20-24 shows a sign depicting a price list for the VIP rooms. The Appellant's Director of Facilities testified under cross-examination that the VIP sign has been there for as long as he remembers, for several years. Trans. P. 165. Since the only evidence to the contrary is the police report summary, the testimony of Appellant's Director of Facilities is taken as the more credible and it is determined that a price list for VIP services has been properly posted on the property.

In similar fashion, the Notice and Order asserts that the Appellant's business premises fail to contain a sign listing cabaret standards of conduct as required by LMC 5.16.050D5. Ex. 20-12 is a photograph that shows the required sign posted on Appellant's business and the Appellant's Director of Facilities testified under cross-examination that the sign has been there for as long as he remembers, for several years. Trans. P. 162. There was no evidence in the record to the contrary and it is determined that a sign summarizing cabaret conduct rues has been properly posted on the property.

D. Officer Barnard testified that lighting of the interior of the building as "very dark," that it was "hard to see the denominations of money." Trans. P. 20. Officer Larson testified that you could see numbers on currency but doing so was "somewhat difficult." Trans. P. 56.

E. Officer Barnard testified that on his visit on 3/28/19 there was no change in cabaret violations involving the physical features of the building. There was still dim lighting. The curtains were still on the VIP booths. There was still no barrier between the stage and the patrons. Trans. P. 21.

14. Entrapment. Some findings in Finding of Fact No. 11 identify that dancers gave various answers to undercover officer inquiries about the availability of sex for money. The officers never suggested a price and the dancers usually responded both in the affirmative and with a set price.

15. Alternatives. Police Chief Zaro did not consider any alternatives to license denial when writing his recommendation to the City Manager. Trans. P. 39-40. In his testimony he indicated that a license denial only lasted for a year since the business owner can reapply the following year. See Trans. P. 47. Based upon the limitation to one year and the history of repeated violations that included some in 2015 in addition to those found in the most recent investigation, Chief Zaro determined that denial was an appropriate recommendation. Trans. P. 44-45. Chief Zaro confirmed that if the Appellant did get back into business, the police department would have to undertake frequent compliance checks and investigations. Trans. P. 49-50. Such checks would necessitate the participation of 3-10 percent of the 100 members of the City's police department. Trans. P. 51.

City Manager Caulfield testified that he did not consider any less restrictive alternatives because Appellant had been put on notice from the 11/9/19 compliance check and his understanding was that 30 criminal citations had been issued from the police investigation including prostitution and drug violations. Trans. P. 80. As far as he knew, there were no guidelines governing license denial other than the code. Trans. P. 88. Asst. City Manager Bugher confirmed there are no such policies. Trans. P. 113. He was not aware that the business had never been subject to a license revocation/suspension or notice and order before. Trans. P. 97-99.

Asst. City Manager Bugher, who serves as the City's community development director, testified that license denial may or may not be permanent, that a license application for 2020 could be denied on the same basis as the denial for the 2019 license. Trans. P. 129. Mr. Bugher believed that as of the date of the appeal hearing the Appellant's business had not lost its nonconforming use status but whether those rights were still intact at the time of the 2020 application would have to be determined at that time. Trans. P. 131-133,

16. Mitigating Circumstances. Asst. City Manager Bugher testified that the Appellant's business has not been subject to any license suspensions or revocations since City incorporated in 1996, and he was not aware of any Notices and Orders issued against the business in that time period. Trans. P. 118-119. Police Chief Zaro did not take into consideration that Appellant's business had never been subject to any prior license suspension or revocation or any prior notice and order in his recommendation for license denial. Trans. 41-43. However, since his time as chief, Chief Zaro has not had his department conduct any big proactive effort to be inside the business monitoring violations or looking for violations. Trans. P. 52-53.

The Appellant's Director of Facilities testified that all fire code violations were remedied "immediately" upon notice from the City. Trans. P. 153. With the lack of any evidence to the contrary it is determined that all fire code violations have been remedied as testified by the Director of Facilities. The Director testified that railings in compliance with cabaret standards, three feet in height and eight feet from performance areas, were placed on both performing stages. Trans. P. 154. The curtains on the VIP rooms have been removed. Id. Photographs show the railings. P. 522, 524. A manager can sit in the DJ booth, which can accommodate three people, and see both stages, the VIP room and the main room. Trans. P. 159, P. 528 and 530 photographs. P. 534 shows a sign at the entrance to the business that identifies admission and dance price as well as minimum age for patrons. The Director noted the sign has been there through 2018 and since he was a patron of the club as a

young man. Trans. P. 162. P. 536 and 540 photographs show a sign posted in the business identifying cabaret ordinance requirements which has been posted as long as the Director can remember. Trans. P. 162. P. 560 photograph shows a sign in the business identifying VIP prices that has been posted for several years as long as the Director can remember. Trans. P. 165. The only new item depicted in the photographs is the railings. Id. Lighting can be made as bright as depicted in the photographs by turning up the lighting. Trans. P. 166.

17. Owner Notice. Appellant as owner was never given notice of the cabaret violations prior to the withdrawn license revocation. See Detective Barnard testimony, Trans. P. 37; Chief Zaro testimony, Trans. P. 44-45; Caulfield testimony, p. 102-103.

18. Fire Violations. Lance Nelson did the fire inspection of Appellant's business on October 8, 2019. He serves as the fire inspector and investigator for the West Pierce Fire and Rescue. Mr. Nelson found that a couple emergency egress lights needed to be repaired and there was a hazardous accumulation of combustible materials stacked in the storage rooms composed of tables, chairs, boxes of stuff and the like. Those items must be more than 24 inches from the ceiling. A tree was blocking egress from an emergency side door. Shrubbery and bushes had also grown next to the building. Mr. Larson hasn't seen the building or talked to anyone from Appellant's business since his investigation. Trans P. 70-71.

19. City Waives LMC 5.02.080F. During the appeal hearing the City waived LMC 5.02.080F as asserted grounds for license denial. In its closing brief, the City denied waiving this violation, stating in Footnote No. 2 that it may have given the impression it was waiving the section but that the City was only waving CAD evidence used to support it. The applicability of LMC 5.02.080F was addressed during cross-examination of the City Manager by Mr. Levy. Mr. Levy questioned the City Manager about how various licensing provisions were interpreted by him. After questioning the City Manager about LMC 5.02.080E, Mr. Lev moved on to LMC 5.02.080F, reading the provision verbatim. After Mr. Levy quoted LMC 5.02.080F, the following dialogue ensued:

> MS. McKAIN:· And that was stricken.
> MR. LEVY:· That's stricken?
> MS. McKAIN:· Yes.
> MR. LEVY:· So not relying -- okay. Then let's -- just so -- it wasn't clear to me, Mr. Olbrechts, but they're not relying on F, apparently.
> THE HEARING EXAMINER:· Actually, that wasn't apparent to me either, so understood then.· Strike that as well.· I was wondering how the city was going to pursue that. So that makes sense. So that's considered stricken as grounds for license denial.

Trans. P. 90-91.

The exchange as quoted from the transcript can only be reasonably construed as the City striking LMC 5.02.080F as grounds for license denial, not CAD data as asserted by the City later in its closing brief. In his questioning Mr. Levy didn't mention anything about CAD data. He was reading through pertinent code violations one by one and had just read LMC 5.02.080F. The only item that could

qualify as "that" in Ms. McKain's reference to "that" in the transcript excerpt above is LMC 5.02.080F. Given that waiver, the Appellant reasonably concluded that LMC 5.02.080F was not in play and on that basis didn't pursue any further questioning on that code section and didn't address it in its closing brief. For these reasons, LMC 5.02.080F must be construed as stricken in order to uphold the procedural due process rights of the Appellant.

20. Price Lists. As shown in photographs of the price lists posted in Appellant's business, Ex. 20-11 and 20-24, the posted prices for "all dances" is $20 and the price for use of the VIP room is $150 for fifteen minutes, $200 for a half hour and $400 for an hour.

Conclusions of Law

1. Authority for Appeal. LMC 5.02.190A authorizes the hearing examiner to conduct hearings and issue final decisions on appeals of denials of business licenses.

2. Authority to Impose Conditions. The City asserts that hearing examiners, as quasi-judicial bodies, have no authority to modify license denials by imposing less restrictive alternatives as a matter of separation of powers. The City claims that if a license denial does not meet City standards, the decision must be remanded back to the City Manager. This principle certainly holds true for courts granted de novo review authority over business license denials. However, it is equally true that quasi-judicial agencies such as hearing examiners are not subject to the same separation of powers limitations as courts. The courts have long recognized that administrative bodies such as hearing examiners can have mixed judicial, legislative and executive powers. It does not appear that there's any case from any state that has ever prohibited a quasi-judicial administrative body such as a hearing examiner from reversing or modifying an administrative licensing denial. The recognition that administrative bodies can have mixed government powers along with the case law stating that the authority of such agencies is defined by the legislation that creates them necessarily leads to the conclusion that hearing examiners can modify and reverse business license denials if expressly granted that authority by local ordinance. That is the case for business license denial decisions in Lakewood. LMC 5.02.090F authorizes a hearing examiner to "*affirm, modify, or overrule the denial or order of the City*." However, it is also recognized that such broad authority must be construed in the context of legislative intent and historical practices. The executive branch has historically been given the responsibility on deciding how to allocate budgeted monies in areas such as law and code enforcement and it is unlikely that the City Council intended to divert any major decision-making authority on that function to the hearing examiner. For this reason, any modification to a business license denial that could potentially result in a significant expenditure of City funds will be remanded to the City.

The City's position on separation of powers is clearly correct when applied to courts exercising de novo review authority over licensing decisions. The City bases its position upon *Household Fin. Corp. v. State*, 40 Wash. 2d 451, 244 P.2d 260 (1952). In *Household Finance,* the state's supervisor of banking denied the application of Household Finance Corporation for a license to conduct business in the cities of Vancouver and Seattle. A state statute authorized a trial de novo on the appeal. The trial court initially made a pretrial ruling that given the trial de novo standard, it had the authority to decide on its own whether or not to issue the licenses. After the presentation of evidence the trial court determined that it's pretrial ruling had been in error and that it could only

determine if the supervisor of banking's denials were arbitrary and capricious. Id. at 452-454. Presumably, the trial court determined that if it did find the license denials arbitrary and capricious, it would remand the decision back to the supervisor of banking for final decision.

On appeal, the state's supreme court agreed with the trial court's second ruling, that the trial court only had authority to determine if the licensing decision was arbitrary and capricious and not to make a licensing decision on its own. The supreme court based this decision upon constitutional grounds, holding that the trial court did not have authority to make decisions on licensing applications because this violated the separation of powers doctrine. Id. at 454-456. The court recognized that there is "*necessarily some mingling and overlapping of powers between the three separate departments of our government*" and that there must be "some sensible approximation" but that when it came to administrative licensing decisions *"we are not here concerned with a twilight-zone situation. The licensing and regulation of small loan companies ... is ... essentially a legislative and administrative function*." *Id*. at 451-52. This characterization of business licensing decisions was re-affirmed in another Washington Supreme Court case, which noted that *"[u]nquestionably, the power of regulation of public utilities, **the licensing of businesses of all kinds**, the regulation of such businesses, the general control thereof, including the power of revoking licenses or permits issued in connection therewith, is a legislative power*." (emphasis added) *Floyd v. Department of Labor and Industries*, 44 Wn.2d 560, 568 (1954), quoting, *State v. Huber*, 129 W. Va. 198 (1946).

A similar result was reach in a South Carolina supreme court decision, *Board of Control v. Thomason*, 236 S.C. 158 (1960), where a trial court was given de novo review authority over the denial of a license to conduct a small loan business. As in the *Household Finance* case, a state statute gave superior courts de novo review authority over such licensing decisions. The *Thomason* court ruled that the court's authority was limited by separation of powers as follows:

> *In order not to offend the constitutional requirement as to separation of powers, statutes undertaking to give the courts de novo review of orders of administrative bodies exercising non-judicial functions are generally construed as providing for only a limited review. State Board of Medical Registration and Examination v. Scherer, supra, 221 Ind. 92, 46 N.E.2d 602; California Company v. State Oil Gas Board, 200 Miss. 824, 27 So.2d 542, 28 So.2d 120; Jones v. Marsh, 148 Tex. 362, 224 S.W.2d 198; De Mond v. Liquor Control Commission, 129 Conn. 642, 30 A.2d 547.*
>
> *It is our view that the function vested by the Act in the State Board of Bank Control of determining whether a license should be issued to an applicant is non-judicial in nature. In line with the rule above mentioned, we think Section 8-794.163 should be construed as providing for only a limited review. The decision of the Board of Bank Control should not be given the effect of a mere initial recommendation so as to permit the court to substitute its judgment for that of the Board as to whether a license should be issued. Any other construction of Section 8-794.163 might render it unconstitutional. Household Finance Corporation v. State, supra, 40 Wn.2d 451, 244 P.2d 260. Of course, the courts can set aside any decision which is illegal, arbitrary or unsupported by any substantial evidence.*

236 S.C. at 165-66.

Under the case law outlined above, from multiple jurisdictions, it is clear that trial courts have very limited authority to review administrative licensing decisions. The cases are distinguishable, however, in that they only apply to assessing trial court authority. As shall be discussed, for purposes of separation of powers, trial court authority is considered judicial, whereas the adjudicative function of administrative agencies is still considered a component of the executive power or legislative power, a power that can be mixed with other legislative or executive authority. Indeed, if a hearing examiner exercised judicial powers as asserted by the City, that would constitute a violation of separation of powers because the separation of powers generally prohibits executive departments from exercising judicial powers. It is likely because of this distinction that there does not appear to be any case that has addressed the authority of quasi-judicial administrative bodies to modify or overturn business licensing decisions.

The question of whether the executive branch can adjudicate issues was well addressed in a couple cases addressing the question of whether a hearing officer could adjudicate industrial insurance claims instead of a trial court. See, *Nevada Industrial Comm'n v. Reese*, 93 Nev. 115 (1977); *Mulhearn v. Federal Shipbuilding Dry Dock Co*., 2 NJ 356 (1949). Both cases ruled that administrative adjudications constituted executive action that didn't usurp the judicial branch in violation of the separation of power's doctrine. Key analysis from the *Mulhearn* decision was quoted in full in the *Nevada Industrial* decision as follows:

> *The failure to comprehend that administrative adjudication is not judicial springs from the erroneous notion that all adjudication is judicial. This is not so and never has been so. . . . Once the obvious right of the Governor and the Legislature, each to adjudicate within his or its own proper sphere, is recognized and it is conceded that the courts are not the exclusive instrumentalities for adjudication, the true nature of the administrative adjudications, commonly termed `quasi-judicial', becomes apparent. This term serves to characterize not the quality of the adjudication but its origin outside the judicial branch of the government. We conclude, therefore, that the NIC Appeals Officer can exercise his administrative powers that are quasi-judicial in nature without violating the separation of powers doctrine. In doing so, we agree with the pronouncement of Mr. Justice Douglas in Sunshine Anthracite Coal Co. v. Adkins, supra, 310 U.S. 381, wherein an administrative agency was empowered by Congress to make a finding of fact whether a coal producer produced bituminous coal as defined in the Bituminous Coal Act. Justice Douglas wrote, at 400: "To hold that there was [an invalid delegation of judicial power] would be to turn back the clock on at least a half century of administrative law."*

Id. at 364-65.

Under the *Nevada Industrial* and *Mulhearn* decisions above, and the *Sunshine Anthracite* US Supreme Court case upon which they're based, it is fairly clear that a hearing examiner exercises executive adjudicative authority, not judicial authority. From this conclusion, the final remaining issue is whether an administrative agency such as a hearing examiner can concurrently exercise administrative adjudicative authority along with making licensing decisions in the form of modifying or reversing administrative licensing decisions as part of an appeal adjudication. In point of fact, it is well recognized that the doctrine of separation of powers does not preclude a certain degree of admixture of

the three powers[3] of government in administrative agencies. *Gillilan v. Illinois Racing Board*, 89 Ill. App. 3d 726 (1980)(quoting from Am Jur Administrative Laws §§ 77-78 (1962) and holding that it did not violate separation of powers to have an adjudicatory agency ask questions during a hearing).

Given the preceding, whether or not a hearing examiner can alter or reverse a city manager decision to deny a business license is not a separation of powers issue. It's a legislative intent issue, limited to interpreting the authority given to an examiner by City ordinance. A hearing examiner's authority is limited to that expressly granted by statute and ordinance and those additional powers impliedly necessary to carry out its responsibilities. *See, LeJeune v. Clallam County*, 64 Wn. App. 257 (1992). LMC 5.16.080 states that the "*general business licensing provisions*" (Chapter 5.02 LMC) shall apply to cabaret licenses "*to the extent that those provisions are not in specific conflict with the provisions*" in the cabaret chapter. The cabaret chapter doesn't have any provisions addressing appeal of denials of cabaret licenses, so Chapter 5.02 LMC governs that process. LMC 5.02.190(F) provides that the Hearing Examiner, "*may affirm, modify, or overrule the denial or order of the City, and may further impose terms and conditions to the issuance or continuance of a business license*." The City's code clearly grants the examiner the authority to overrule and condition business license decisions. The City Council can easily limit the examiner's authority in this regard at any time by amending LMC 5.02.190F to limit examiner authority to remands if it chooses to do so, but hasn't up until this point.

In its closing brief the City asserts the appellate authority of the examiner should be construed as not authorizing the conditioning of business licenses by referencing LMC1.36.265A, which applies to all appeals to hearing examiners, in contrast to the LMC 5.02.190F, which only applies to appeals of business and cabaret licenses. The City identifies that LMC 1.36.265A qualifies conditions as those that "*ensure conformance with this code, the City's comprehensive plan or any other applicable laws or regulations*." From this language the city reaches the conclusion that the authority to condition was intended to be only applied to land use decisions. That may be the case, but the City's position overlooks LMC 5.02.190F, a business license ordinance, which expressly gives authority hearing examiners to condition business and cabaret licenses. There is simply no way to infer a restriction to land use conditions in an ordinance that only applies to business and cabaret licenses. Further, statutes should be construed so that no clause, sentence, or word is made superfluous, void, or insignificant; however, in special cases the court can ignore statutory language that appears to be surplusage when necessary for a proper understanding of the provision. *State v. Evergreen Freedom Foundation*, 1 Wash.App.2d 288, 299 (2018). If LMC 1.36.265A were read to supersede the conditioning authority granted by LMC 5.02.190F it would render that LMC 5.02.190F conditioning language void.

Interestingly, although the general appellate authority granted by LMC 1.36.265A grants the authority to remand, this authority isn't granted by the more specific licensing appellate authority provision, LMC 5.02.190F. Thus, while the City takes the position that the hearing examiner only

[3] It is recognized that the reference to a "power of government" in the Illinois holding suggests that the Illinois court, and the Am Jur provision it quotes from, considers quasi-judicial function to be a judicial function under the separation of powers doctrine, contrary to the viewpoint adopted by the Nevada and New Jersey courts. This may be the case, but the common thread amongst all jurisdictions is that the exercise of administrative adjudicatory function is authorized to be "mixed" with executive and/or legislative functions in administrative agencies.

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has the authority to remand business/cabaret licensing decisions, its code appears to take the opposite by eliminating remand as an option from its business/cabaret licensing decisions while authorizing that for all other appeals. However, the City's argument that the conditioning of a business license can invoke some firmly rooted exercise of administrative authority over allocation of City resources is well taken. As noted in the preceding paragraphs, the courts consider business licensing decisions to "unquestionably" constitute an exercise of legislative/administrative power. *Floyd v. Department of Labor and Industries*, 44 Wn.2d 560, 568 (1954). It would make little sense to conclude that in circumstances where City decisions involve administrative authority in its purest form that the City Council would want to compel it quasi-judicial hearing examiner to make the final decision while for staff decisions of a more quasi-judicial form, such as land use decisions, the Examiner is given the option of remand. Consequently, the remand authority granted by LMC 1.36.265A is construed as supplementing the more specific business license appellate authority granted by LMC 5.02.190F.

Although it cannot be agreed that the Examiner has no authority to remand business license decisions, it can be agreed that in choosing between conditioning or remanding that legislative/executive type decision making should be remanded as opposed to decided upon by the examiner. In ascertaining legislative intent on this issue, it is clear that the City Council intends its hearing examiners to serve in a quasi-judicial capacity. LMC 1.36.020 provides that hearing examiners are authorized to make land use decisions and "*act in a decision-making role involving administrative matters and such* ***other quasi-judicial matters*** *as may be granted by ordinance or referred to the Hearing Examiner by the City Manager*." LMC 1.36.020 (emphasis added). Defining what constitutes quasi-judicial conduct was taken on by the *Floyd* case, supra, which held as follows:

> *When courts are confronted with the problem of determining whether an administrative agency performs legislative or judicial functions, they rely on certain tests to aid in classifying the agency's functions. One such test, mentioned in Household Finance, is whether the court could have been charged in the first instance with the responsibility of making the decisions the administrative body must make. Another test is whether the function the administrative agency performs is one that courts historically have been accustomed to perform and had performed prior to the creation of the administrative body. Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U.S. 716, 73 L.Ed. 918, 49 S.Ct. 499; State ex rel. Attorney General v. Hawkins, 44 Ohio St. 98, 5 N.E. 228, 42 Am. Jur. 368, Public Administrative Law, § 60, and cases cited therein.*

44 Wn.2d at 577.

The City's main concern in usurping administrative authority appears to be any conditions that would result in authorizing Appellants business to continue, thereby necessitating a substantial allocation of City police resources to monitor and respond to problems created by the business. Indeed, Police Chief Zaro testified that forced compliance checks of the Appellant's business would result in a three to ten percent diversion of his police force for monitoring of the business. See Trans. P. 51. Under the *Floyd* test enunciated above, courts would likely not be found to ever have historically as a matter of original jurisdiction be tasked with managing police resources in the fashion testified by Chief Zaro. Ultimately, whether or not a condition encroaches too much into the City's administrative power will have to be decided on a case by case basis, but it appears likely that remand will often be the more appropriate response to licensing decision that is found to be invalid.

3. Entrapment. During the hearing, Appellant's counsel suggested that he was employing an entrapment defense by pointing out that in some instances police officers were the ones to pose the question of whether dancers were willing to engage in prostitution. Trans. P. 26-31. As noted in the *Order Addressing Procedural Issues Raised in City's Prehearing Motion*, Ex. 16, the burden of proof in this proceeding is preponderance of evidence. Under preponderance of evidence, the Appellant has not met the elements of entrapment.

RCW 9A.16.070 sets out the elements of entrapment as follows:

> (*1) In any prosecution for a crime, it is a defense that:*
> *(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and*
> *(b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.*
> *(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.*

The statute articulates the "subjective" theory of entrapment, requiring proof of mental state; if a defendant was otherwise disposed to commit the crime, the defense is not available. *State v. Swain*, 10 Wn. App. 885 (1974). As outlined in Finding of Fact No. 14, some, but not all, offers of prostitution by the dancers were made in response to officer inquiries about the availability of such services. However, in all such cases where the answer was in the affirmative, the dancers had set prices and locations in mind. Under preponderance of evidence, the dancers were "otherwise disposed to commit the crime" and, therefore, were not entrapped into offering prostitution services.

4. Review Criteria. LMC 5.16.040A9 provides that a cabaret license shall issue unless the application failed to meet the requirements of "…*this chapter*." "*This chapter*" includes LMC 5.16.080, which states that the "*general business licensing provisions*" (Chapter 5.02 LMC) shall apply to cabaret licenses "*to the extent that those provisions are not in specific conflict with the provisions*" in the cabaret chapter. LMC 5.02.080 list grounds for denying a business license application. Those grounds listed in the Notice and Order under appeal are quoted below in italics and applied in corresponding conclusions of law. LMC 5.02.080G identifies a business owner that permits illegal activity to occur as a ground for denial. Using LMC 5.02.080G as a ground for denial, the Notice and Order under appeal asserts several violations of the cabaret regulations, Chapter 5.16 LMC and also cites to prostitution and controlled substances violations. Pertinent Chapter 5.16 LMC and criminal law violations are also quoted below in italics and applied through corresponding conclusions of law.

LMC 5.02.080 *General qualifications of licenses.*

Any of the grounds below provide a basis for license denial, revocation or suspension; provided, that no business license issued pursuant to this code shall be denied, revoked, or suspended without cause.

…

D. Any applicant, licensee or employee of applicant, licensee or employee of applicant or licensee who has failed to comply with any of the provisions of this code.

5. Operating a Business Without a License. The Appellant has operated an adult cabaret business without a cabaret license as required by LMC 5.16.020. LMC 5.16.020A requires a cabaret license for anyone conducting, managing or operating an adult cabaret. LMC 5.16.010 defines an adult cabaret as a commercial premises in which members of the public are admitted where entertainers provide live adult entertainment. LMC 5.16.010 defines adult entertainment as including any performance involving exposure of female breast below the top of the areola and any portion of the pubic region. The Appellant's business meets the definition of an adult cabaret because it involves nude dancers performing on a stage. See Finding of Fact No. 3. The Appellant's cabaret license expired on December 27, 2017 and has not been renewed since then. See Finding of Fact No. 4. As outlined in Finding of Fact No. 11, police officers observed the Appellant's business in operation on multiple dates between August 22, 2018 through April 4, 2019. The Appellant was clearly operating a business without a cabaret license after it expired on December 27, 2017.

LMC 5.02.080F: *Any applicant, licensee or employee of applicant or licensee who has caused, maintained, permitted, allowed or is likely to cause, maintain, permit, or allow a public nuisance to exist. "Public nuisance," in addition to its common meaning, includes but is not limited to a business generating a need for significant police and/or other government services.*

6. Violation Waived. The City waived this ground for denial as determined in Finding of Fact No. 19.

LMC 5.02.080G: *Any applicant, licensee, or employee of applicant or licensee or their agents have or will engage in, maintain, permit, allow or fail to prevent unlawful activity on the business premises.*

7. Appellant Permits and/or Prevents Unlawful Activity. As outlined in more detail in the conclusions of law below, the Appellant's business was the site at which numerous prostitution, drug[4] and cabaret regulation violations occurred over a period of several months. From these illegal activities it is concluded that the Appellant permitted, allowed or failed to prevent unlawful activity on its business premises.

Throughout the appeal hearing, the Appellant emphasized that there was no direct notice given to Appellant of on-going cabaret license violations and that there was no evidence to suggest that Appellant was ever aware of such violations. As determined in Finding of Fact No. 17, the City did not give the Appellant any direct notice of a violation. In emphasizing this point, the Appellant appears to be arguing the point that the owner cannot be held strictly liable for code and criminal

[4] Drug violations were relatively minor compared to the number of other violations and are not further discussed in this decision. As noted in Finding of Fact No. 11DDD, three illegal drug sales were referred to the prosecuting attorney. Illegal drug sales identified in the admitted police reports are composed of the sale of two Adderall pills for $40 (Finding of Fact No. 11L); a sale of cocaine for $400 (Finding of Fact No. 11AA), a sale of cocaine for $20 (Finding of Fact No. 11VV) and the sale of three Adderall pill for $70 (Finding of Fact No. 11V). No contrary evidence was presented as to whether the drugs were controlled substances and under the preponderance of evidence standard it's determined that the four incidents constitute illegal drug sales under Chapter 69.50 RCW.

violations on its property. A recent case involving another[5] of Appellant's adult entertainment businesses in unincorporated Pierce County addressed the strict liability issue. *See Forbes v. Pierce Cnty*., 427 P.3d 675 (2018). Appellant in that case argued that imposing strict liability upon an operator or manager of an adult entertainment establishment for cabaret violations serving as a basis for license suspension served as an unconstitutional prior restraint. The *Forbes* court agreed that the state constitution provides greater protection for erotic dancing than the federal constitution does under the First Amendment, but then avoided addressing the prior restraint strict liability issue by construing Pierce County regulations as requiring a threshold of fault for owner or manager responsibility. In this regard, the court determined that cabaret standards requiring managers "ensuring" that dancers comply with cabaret regulations was not strict liability, reasoning that "*[a] failure to ensure compliance necessarily involves some fault by the manager*." 427 P.3d at 687. The court also found that provisions that prohibited an operator or manager from "permitting" a violation also did not involve strict liability, because "permitting" was construed as to "*consent to expressly or formally*," "*to make possible*," or to "*give opportunity*." Applying the permit definitions, the court found that "*an operator or manager can permit – consent to – an activity when he or she knows that the activity is occurring and fails to take steps to stop that activity*." The court also found that "permit" can be defined as "*to make possible*" or to "*give an opportunity*" and that under these definitions "*an operator or manager can permit – make possible – an activity by not taking steps before the activity occurs to prevent the activity*."

Under the latter "permit" standard formulated by the Forbes court, it's unclear whether fault would necessitate actual knowledge of violations as opposed to including constructive knowledge, i.e. that the operator should know of violations and thereby take measure to prevent them. Given the rampant and pervasive nature of cabaret and criminal violations on the Appellant's premises, the only way the Appellant could avoid knowing of the violation is by taking extreme measures to assure that it didn't know of the violations. Appellant representatives could never actually visit the site or they could not avoid seeing the physical features of the property in violation of cabaret regulations, i.e. the absence of railing on the stages, the curtained VIP rooms and the absence of required signage. Further, Appellant representatives would also have to miss seeing violations that were occurring every time police offices visited the premises during their visits to the business, i.e. no separation between patrons and dancers both on stage and off and lack of dancer clothing off stage. Appellant's manager would have had to not report to Appellant about the November 9, 2018 warning given to her by uniformed officers regarding cabaret ordinance requirements. Finally, the Appellant would have had to ignore the notice of the *Forbes* decision itself, which was issued only a year ago and put the Appellant on notice that one of his businesses was operating in violation of the law and should have put him on notice that his other businesses could be doing the same.

The forced ignorance that the Appellant would have had to assume to have no knowledge of the violations on its business is not found to absolve the Appellant of culpability for two reasons. First, under the preponderance of evidence standard, it is determined that more likely than not the Appellant had actual knowledge of the violations occurring on his property. It is simply too improbable that

[5] As noted in Finding of Fact No. 1, the Appellant of this appeal is Deja Tacoma, Inc. with Eric Forbes identified as the president and officer/agent/representative in the business license application. In the Forbes case, the affected business owner is Eric Forbes doing business as Dreamgirls of Tacoma LLC. See 427 P3d at 679. The two companies are technically separate entities, but they both appear to be run by Mr. Forbes.

given the numerous and recurring violations along with the 11/9/18 notice to the manager that the Appellant could not know about the violations. Second, the extreme measures the Appellant would have to take to avoid knowledge is likely not the type of behavior protected by the First Amendment or article I, section 5 of the Washington State Constitution. There is simply no value in protecting free speech by condoning and encouraging extreme efforts to maintain a blind eye towards violations of criminal and cabaret standards. For these reasons, the Appellant is found to have permitted and failed to prevent the unlawful activity depicted below in violation of LMC 5.02.080G,

LMC 5.16.050A1: *No employee or entertainer shall be unclothed or in such less than opaque and complete attire, costume or clothing so as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, except upon a stage at least 18 inches above the immediate floor level and removed at least eight feet from the nearest member of the public.*

8. Violated. Between August 22, 2018 and April 4, 2019, Appellant's dancers violated LMC 5.16.050A1 at Appellant's business. Dancers on at least 23 occasions exposed their breasts and/or pubic area in violation of LMC 5.16.050A1 as identified in Finding of Fact 11C, D, H, L, N, O, Q, R, S, X, AA, DD, GG, KK, LL, MM, NN, PP, QQ, RR, SS, UU, WW.

LMC 5.16.050A2: *No employee or entertainer mingling with members of the public shall be unclothed or in less than opaque and complete attire, costume or clothing as described in subsection (A)(1) of this section, nor shall any male employee or entertainer at any time appear with his genitals in a discernibly turgid state, even if completely and opaquely covered, or wear or use any device or covering which simulates the same.*

9. Violated. Between August 22, 2018 and April 4, 2019, Appellant's dancers violated LMC 5.16.050A2 at Appellant's business. Dancers on at least 23 occasions exposed their breast and/or pubic area while mingling with the public in violation of LMC 5.16.050A1 as identified in Finding of Fact 11C, D, H, L, N, O, Q, R, S, X, AA, DD, GG, KK, LL, MM, NN, PP, QQ, RR, SS, UU, WW.

LMC 5.16.050A4: *No employee or entertainer shall caress, fondle or erotically touch any member of the public. No employee or entertainer shall encourage or permit any member of the public to caress, fondle or erotically touch any employee or entertainer.*

10. Violated. Between August 22, 2018 and April 4, 2019, Appellant's dancers violated LMC 5.16.050A4 at Appellant's business. Dancers on at least 30 occasions exposed their breast and/or pubic area while mingling with the public in violation of LMC 5.16.050A4 as identified in Finding of Fact No 11C, E, F, H, I, J, L, M, N, O, Q, R, S, T, U, W, X, Y, Z, AA, CC, EE, FF, JJ, KK, LL, NN, OO, SS, WW. From these findings, erotic touching was construed to include any rubbing of buttocks or pubic areas and any touching of breasts or male or female genitalia.

LMC 5.16.050A5: *No employee or entertainer shall perform actual or simulated acts of sexual conduct as defined in this chapter, or any act which constitutes a violation of Chapter 7.48A RCW, the Washington Moral Nuisances Statute.*

> *Moral nuisances—Declaration of.*
> *The following are declared to be moral nuisances:*
> *(6) Every place which, as a regular course of business, is used for the purpose of lewdness, assignation, or prostitution, and every such place in or upon which acts of lewdness, assignation, or prostitution are conducted, permitted, carried on, continued, or exist;*
>
> *RCW 7.48.050 – Definitions*
>
> *(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:*
> *(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and*
> *(b) Which depicts or describes patently offensive representations or descriptions of:*
> *(i) Ultimate sexual acts, normal or perverted, actual or simulated; or*
> *(ii) Masturbation, excretory functions, or lewd exhibition of the genitals or genital area.*
> *Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, or scientific value.*
> *(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.*

11. Violated. As outlined in conclusions of law below, numerous offers for prostitution were made by the dancers during the police investigation, several offered for the VIP rooms. The high number of such offers over such a short period of time establishes that Appellant's place of business was used for the purpose of prostitution as a regular course of business. The multiple acts of grinding on laps that is a regular part of a lap dance as identified in Finding of Fact No. 11 might also be construed as "*patently offense representation ...of... ultimate sexual acts*." under the RCW "lewd matter" definition above and also qualify as simulated sex under LMC5.16.050A5 . In any event, on the offers of prostitution alone, it is concluded that the Appellant's business qualifies as a moral nuisance and thus the Appellant's business is in violation of LMC 5.16.050A5.

LMC 5.16.050A6: *No employee or entertainer mingling with members of the public shall conduct any dance, performance or exhibition in or about the nonstage area of the adult cabaret unless that dance, performance or exhibition is performed at a distance of no less than four feet from any member of the public.*

12. Violated. Between August 22, 2018 and April 4, 2019, Appellant's dancers violated LMC 5.16.050A6 at Appellant's business. Dancers on at least 46 occasions performed closer than 4 feet to patrons and undercover officers, most of the time sitting on the laps of patrons and officers, in violation of LMC 5.16.050A6 as identified in Finding of Fact No 11A, B, C, D, E, F, G, H, I, J, K, L,

M, N, O, P, Q, R, S, T, U, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS, WW, YY.

LMC 5.16.050A7: *No payment, tip or gratuity may be paid directly to any adult entertainer or other employee of an adult cabaret as compensation for any adult entertainment, regardless of where the adult entertainer or other employee of an adult cabaret is located. Payments made to cashiers, wait-persons or other employees of an adult cabaret for admission fees or for food, beverage or other product sales do not constitute compensation for any adult entertainment. Any payments, tips or gratuities that any patron or other person intends or desires to pay to any adult entertainer or other employee of an adult cabaret as compensation for any adult entertainment shall be deposited in a box or receptacle clearly identified as the box or receptacle into which payments, tips or gratuities shall be received by or deposited for the intended adult entertainer or other employee of an adult cabaret. The location of such box(es) or receptacle(s) shall be in the vicinity of the cash register or counter where payments are made for services provided in the establishment, and shall be clearly visible to the manager of the adult cabaret and to the public. No payment, tip or gratuity may be offered to, or accepted by an adult entertainer in advance of or prior to any performance, exhibition, dance or conduct provided by the entertainer. No entertainer performing upon any stage area shall be permitted to accept any form of payment, tip or gratuity offered directly to the entertainer by any member of the public.*

12. Violated. Between August 22, 2018 and April 4, 2019, Appellant's dancers violated LMC 5.16.050A7 at Appellant's business. Dancers on at least 13 occasions dancers accepted direct payment for private dances in violation of LMC 5.16.050A6 as identified in Finding of Fact No 11F, G, H, I, L, Q, R, S, T, U, W, QQ, and SS.

LMC 5.16.050C1: *A licensed manager shall be on duty at an adult cabaret at all times adult entertainment is being provided or members of the public are present on the premises. The name and license of the manager shall be prominently posted during business hours. The manager shall be responsible for verifying that any person who provides adult entertainment within the premises possesses a current and valid entertainer's license.*

13. Violated. Between August 22, 2018 and April 4, 2019, Appellant's business premises didn't have a sign posting the manager's name and license in violation of LMC 5.16.050C1. In uncontested evidence, FOF 13C identifies that police officers found no sign during their investigation that identified the manager on duty or the managers license. Appellant's photographs, Ex. 20, which appear to include pictures of all the pertinent signs in Appellant's establishment, confirm the absence of any sign identifying the manager on duty or the manager's license.

LMC 5.16.050C3*:* *The manager or an assistant manager licensed under this chapter shall maintain visual observation of each member of the public at all times any entertainer is present in the public or performance areas of the adult cabaret. Where there is more than one performance area, or the performance area is of such size or configuration that one manager or assistant manager is unable to visually observe, at all times, each adult entertainer, each employee, and each member of the public, a*

manager or assistant manager licensed under this chapter shall be provided for each public or performance area or portion of a public or performance area visually separated from other portions of the adult cabaret.

14. Violated**.** Between August 22, 2018 and April 4, 2019, Appellant's managers were observed by police officers as not maintaining visual observation of dancers as required by LMC 5.16.050C3. In uncontested evidence, FOF 13C identifies that police officers observed that the managers were not always visible.

LMC 5.16.050C4: *The manager shall be responsible for and shall assure that the actions of members of the public, the adult entertainers and all other employees shall comply with all requirements of this chapter.*

15. Violated. Managers likely did nothing to stop the multiple and often times obvious code violations identified in this decision in violation of LMC 5.16.050C4. The only time police reports identified any effort by the managers to stop violations was when uniformed police officers were present. See FOF No. 11BB. A dancer acknowledged during a uniformed police interview that the managers looked the other way on activities in the VIP room so long as the activities were consensual. See FF 12A. Another manager who has worked as manager for Appellant since 2014 told uniformed offers that she had never sent a dancer home for a rules violation or referred a dancer to the owner for license suspension. See FOF No. 12D.

LMC 5.16.050D1: *Performance Area. The performance area of the adult cabaret where adult entertainment as described in subsection (A)(1) of this section is provided shall be a stage or platform at least 18 inches in elevation above the level of the patron seating areas, and shall be separated by a distance of at least eight feet from all areas of the premises to which members of the public have access. A continuous railing at least three feet in height and located at least eight feet from all points of the performance area shall separate the performance area and the patron seating areas. The stage and the entire interior portion of cubicles, rooms or stalls wherein adult entertainment is provided must be visible from the common areas of the premises and at least one manager's station. Visibility shall not be blocked or obstructed by doors, curtains, drapes or any other obstruction whatsoever.*

16. Violated. Three-foot railings and eight-foot separation are missing from the dance stages in violation of LMC 5.16.050D1 as identified in Finding of Fact No. 13B and C.

LMC 5.16.050D2: Lighting. *Sufficient lighting shall be provided and equally distributed throughout the public areas of the premises so that all objects are plainly visible at all times. A minimum lighting level is established requiring that lighting be sufficient so that eight-point size print on white background would be readable at a distance of 20 inches from the eyes of the person so reading, and that level of lighting shall be provided for all areas of the adult cabaret where members of the public are admitted.*

17. No Violation. The City failed to meet its burden of proof on lighting. Officers testified that the establishment was very dark. One officer testified it would be hard to see the denominations on money and another testified it would be somewhat difficult to see the denominations. Finding of Fact

No. 5D. From this testimony it is not possible to ascertain whether it was too dark to read eight-point print from 20 inches away as required by LMC 5.16.050D2.

LMC 5.16.050D3: *Visibility to Manager. All activity or entertainment occurring on the premises shall be visible at all times by and from the manager on duty at the time.*

18, Violation. Between August 22, 2018 and April 4, 2019, Appellant's managers were observed by police officers as not maintaining visual observation of dancers as required by LMC 5.16.050D3. In uncontested evidence, FOF 13C identifies that police officers observed that the managers were not always visible.

LMC 5.16.050D5*: Signs. A sign at least two feet by two feet, with letters at least one-inch high shall be conspicuously displayed in the public area(s) of the premises stating the following:*

THIS ADULT CABARET IS REGULATED BY THE CITY OF LAKEWOOD. ENTERTAINERS ARE: (A) NOT PERMITTED TO ENGAGE IN ANY TYPE OF SEXUAL CONDUCT; (B) NOT PERMITTED TO APPEAR SEMI-NUDE OR NUDE, EXCEPT ON STAGE; (C) NOT PERMITTED TO ACCEPT PAYMENTS, TIPS OR GRATUITIES IN ADVANCE OF THEIR PERFORMANCE; (D) NOT PERMITTED TO ACCEPT PAYMENTS, TIPS OR GRATUITIES DIRECTLY FROM PATRONS

18. No Violation. As determined in Finding of Fact No. 13C, the sign required by LMC 5.16.050D5 has been posted on the premises for several years.

LMC 5.16.050D7: *Price List. There shall be posted and conspicuously displayed in all areas of the adult cabaret where members of the public are admitted a list of any and all types of entertainment, performances, dances or conduct or other services provided on the premises for which a fee or charge is or may be paid. Such list shall further indicate the specific fee or charge in dollar amounts for each entertainment listed. It shall be unlawful for any entertainer, manager or other person to charge, request or demand any fee or charge in excess of the amount so posted. All payments for such entertainment, performances, dances or conduct or other services shall be paid in accordance with this section.*

19. Violation. Dancers charged for more than posted prices in violation of LMC 5.16.050D7. As identified in Finding of Fact No. 20, price lists posted at Appellant's business list "all dances" as costing $20 and that use of the VIP room is $150 for fifteen minutes, $200 for a half hour and $400 for an hour. Dancers requested more than $20 per private dances as determined in Finding of Fact No. 11 N, O, P, and Q. One dancer requested more than the posted VIP rates as determined in Finding of Fact No. 11L. Several dancers offered sex in the VIP room for amounts around $500, but since there was no time set for this activity it's unclear if these amounts exceeded the VIP hourly rates.

RCW 9A.88.030 Prostitution.

(1) A person is guilty of prostitution if such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

(2) For purposes of this section, "sexual conduct" means "sexual intercourse" or "sexual contact," both as defined in chapter 9A.44 RCW.

RCW 9A.44.010
As used in this chapter:
(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and
(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.
(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

20. Violated. Between August 22, 2018 and April 4, 2019, Appellant's dancers violated RCW 9A.88.030 at Appellant's business by offering to engage in sexual intercourse or sexual contact as defined by RCW 9A.44.010 on at least 14 occasions as identified in Finding of Fact No 11A, C, E, G, J, L, N, P, Z, CC, NN, QQ, TT and UU.

21. Consideration of Alternatives. As concluded in the December 3, 2019 *Order Granting in Part Appellant's Motion Requiring Examiner to Consider Less Burdensome Alternative*s, a proper exercise of discretion in denying a business license involves a consideration of less burdensome alternatives. It is concluded that the City did not properly exercise discretion in this case because the City did not consider whether denial of the business license would result in permanent closure of Appellant's business. The decision to deny is remanded for consideration of that factor.

Whether or not denial of the Appellant's business license would result in permanent closure of its business is an open question because the business is a nonconforming use. As argued by Appellant's counsel during the hearing, denial of the business license could result in loss of nonconforming use status under LMC 18A.40.450. The City's community development director acknowledged that nonconforming use status would have to be assessed in a formal determination before any conclusions could be reached as to the impacts of denial. Trans. P. 132. Indeed, LMC 18A.40.450C requires nonconforming use status of adult cabarets to be determined by the City Manager or designee, so that issue cannot be determined in this Decision.

A proper exercise of discretion in assessing whether denial is appropriate for Appellant's license application necessarily involves knowing the impacts of that denial to the Appellant's nonconforming use status. In its closing brief the City maintains that the Applicant can reapply for a 2020 cabaret license. City regulations would not preclude such a re-application. If a 2020 license application were approved, denial of the subject 2019 application filed in October would only result in a 2.5-month closure of the business. However, if nonconforming use status is lost, the Applicant would be permanently barred from operating at its current location, assuming the zoning code isn't amended to authorize the use. The merits of alternative decisions cannot be properly assessed without knowing the ramifications of denial to nonconforming use status. For example, the merits of considering an approval conditioned on the Appellant paying for a full-time uniformed officer to monitor the club may well be considered a reasonable and feasible requirement in comparison to

denial of the application if that denial results in a permanent closure of the business. In the same vein, given that the timing of the appeals process has rendered re-opening the business moot for 2019, the City may decide to approve the license solely for the purpose of preserving the Appellant's nonconforming use status for evaluation of a 2020 license application if license denial extinguishes nonconforming use status.

Under normal circumstances, remand could be potentially avoided by this decision concluding that "*even if*" nonconforming use status were extinguished, denial was justified. However, due to separation of powers considerations, that scenario cannot be entertained by this decision. As outlined in Finding of Fact No. 15, in making his recommendation to the City Manager to deny the license, the police chief understood that denial did not preclude the Appellant from re-applying 2.5 months later. Consequently, it is unknown whether the chief would have made the same recommendation had he understood denial to permanently close the business. Such an assessment would necessitate an evaluation of impacts upon police department resources, i.e. would avoiding the impacts to the business owner of permanent denial justify the drain on police resources of having to monitor the business if it were allowed to re-open? As outlined in Conclusion of Law No. 2, business license decisions involving considerations of significant impacts to City resources are outside the jurisdiction of the examiner.

22. Denial Justified if Nonconforming Status Not Extinguished. For the reasons outlined in the Summary section of this decision, denial of the 2019 business license application is amply justified if such denial doesn't extinguish nonconforming use status. Dancers and managers were well aware that regular business activity was in violation of City ordinances and only made an effort to stop such activity when uniformed police were present. As outlined in the findings of fact, violations continued immediately after management was warned of the violations on November 9, 2018 and were found to be continuing on March 26, 2019, the first time undercover officers revisited the premises after the November 9, 2018 warning. As detailed in Finding of Fact No. 11, dancers sitting on laps and dancers touching patrons from the stages was a regular course of applicant's business in violation of cabaret separation requirements. Dancers exposing their breasts and genitalia was also a regular course of business off the stages in violation of cabaret dress codes. As further detailed in Finding of Fact No. 11, several of the dancers routinely offered sex for money in violation of prostitution laws. The unauthorized touching, disrobing and prostitution by themselves serve as ample justification for denial of the business license if that doesn't extinguish nonconforming use status. As outlined in Finding of Fact No. 16, it doesn't appear that the Appellant has been subject to any prior Notice and Orders or any adverse business license application decision. Even without that prior history, a license denial is still appropriate given that the conduct of the Appellant's dancers was an on-going and pervasive activity that was clearly and unquestionably in violation of the law.

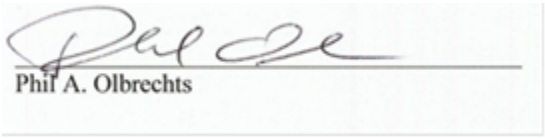
23. Grounds for Appeal. The Appellant's Notice of Appeal identifies 16 grounds for appeal and the scope of this appeal is limited to those identified grounds. Grounds 1 and 2 assert that no illegal conduct was conducted on Appellant's business. The bulk of this decision determines that multiple counts of illegal criminal and cabaret activity occurred on Appellant's business. Grounds 3 and 4 contests findings pertaining to calls for service in the Notice and Order. The City has waived its allegations associated with calls for service. Ground 5 asserts that LMC 5.02.080 is inapplicable to cabaret businesses and Ground 6 asserts that past conduct cannot be considered in Appellant's license application. LMC 5.02.080 was found applicable to Appellant's business and past conduct to be a

proper consideration in the December 2, 2019 *Corrected Order Denying Motion to Preclude Evidence of Past Conduct to Deny Business License*. Ground 7 and 8 asserts that license denial is based upon strict liability and Conclusion of Law No. 7 of this decision concludes that City regulations do not impose a strict liability standard. Ground 9 asserts that LMC 5.16.050 A and C only applies to dancers and managers, not Appellant as owner. However, the owner is only made responsible for those violations via LMC 5.02.080G, which prohibits an owner from permitting, allowing or failing to prevent such activity from occurring. As determined by this Decision, the owner permitted and failed to prevent LMC 5.16.050A and C violations from occurring. In Ground 10, the Appellant asserts that the City failed to impose the least restrictive alternative to denial. As determined in Ex. 16 12/3/19 *Order Granting in Part Appellant's Motion Requiring Examiner to Consider Less Burdensome Alternatives*, the City is not required to impose the least restrictive alternative but is required to consider alternatives. This Decision has required remand to ensure that alternatives are otherwise properly considered. Grounds 11-14 raise constitutional issues beyond the jurisdiction of the examiner. Ground 15 asserts that the City never provided notice of the Appellant's lapsed business license or warned the owner of license violations before denying the application. The Appellant asserts these factors should be considered as mitigating factors by the examiner. These factors have been considered by the Examiner, but the factors do not compel a less severe remedy than business license denial (assuming nonconforming use rights are not extinguished) given the knowing and pervasive criminal and cabaret ordinance violations conducted at Appellant's business. Ground 16 asserts that denial of the business license will result in permanent closure of Appellant's business. That issue has been remanded to the City Manager for evaluation.

Decision

The denial decision is remanded to the City Manager for a formal determination pursuant to LMC 18A.40.450(C) whether denial would extinguish the nonconforming use rights of Appellant's business. If the answer is in the affirmative, the City Manager shall reconsider his decision in light of this additional information. If the answer is in the negative and the Appellant's nonconforming use status is not extinguished, then the Ex. 8, October 14, 2019, Notice and Order should be construed as upheld by this Decision.

DATED this 31st day of December, 2019.



Hearing Examiner for Lakewood

Appeal

This Decision is a final decision of the City of Lakewood, subject to the remand ordered by this Decision. No further administrative appeal of this decision to the City Council or any other administrative appellate authority is authorized by the Lakewood Municipal Code. Any remand decision authorized by this Decision shall be considered final unless timely appealed to the hearing examiner.