

**STATE OF WISCONSIN  
SUPREME COURT**

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Case No. 97-1504

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CITY NEWS AND NOVELTY, INC.,

Plaintiff-Appellant-Petitioner,

v.

CITY OF WAUKESHA,

Defendant-Respondent-Respondent.

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**PETITION FOR REVIEW**

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Seeking Review of the Decision of the Court of Appeals,  
District II, Dated October 20, 1999

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Who bears the burden of persuasion when a litigant wishing to engage in expressive activity protected by the First Amendment challenges the constitutionality of a municipal ordinance that regulates such activity? In analyzing the challenge lodged by the petitioner, City News and Novelty, Inc., to Waukesha's adult bookstore licensing ordinance, the Court of Appeals placed the burden on. to establish beyond a reasonable doubt that the ordinance was unconstitutional. City News asserts that because its activity, i.e., sale of expressive materials, is protected by the First Amendment, requiring it to bear the burden in a challenge to an ordinance which restricts its protected activity conflicts with other Wisconsin appellate cases and with federal law.

2. Does the Waukesha licensing ordinance that regulates adult bookstores adequately eliminate the ability of the municipality to deny license renewal based on subjective factors, as has been required by the United States Supreme Court? The Court of Appeals ruled that it does.

3. Does the Waukesha licensing ordinance that regulates adult bookstores contain all the procedural safeguards designed to protect the First Amendment rights of applicants that have been required by the United States Supreme Court? The Court of Appeals ruled that it does.

4. Does a municipal procedure for nonrenewal of a license violate a licensee's due process rights if it permits the mayor first to pass judgment

on a city council decision to nonrenew by deciding whether to endorse or to veto that decision and then permits the mayor to participate as a voting review board member in the subsequent administrative review of that decision? The Court of Appeals ruled that it does not.

5. Does a bookstore licensing ordinance violate due process where it permits nonrenewal of a license without requiring any element of scienter in connection with the violation or violations which form the basis of the nonrenewal? The Court of Appeals ruled that it does not.

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## STATEMENT OF CRITERIA RELIED UPON TO SUPPORT PETITION

When the respondent City of Waukesha refused to renew the license that allowed the petitioner City News and Novelty, Inc., to lawfully operate its adult bookstore, City News challenged that municipal decision in a certiorari action. The petitioner's challenge was based in large part upon its assertion that Waukesha's licensing ordinance is facially unconstitutional and consequently, unenforceable.

In *FW/PBS v. City of Dallas*, 393 U.S. 215 (1990), the United States Supreme Court revisited the limits placed by the First Amendment on government regulation of bookstores which deal in sexually explicit materials and restated certain safeguards which must attend such regulation. Since that decision was issued, there has been a flood of litigation on this issue in the federal courts. See, e.g., *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc), cert. denied 511 U.S. 1085; *11126 Baltimore Blvd., Inc. v. Prince Georges County, Maryland*, 58 F.3d 988 (4th Cir. 1995) (en banc), cert. denied 516 U.S. 1010; *Eastbrook Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), cert denied 516 U.S. 909; *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), cert. denied 514 U.S. 1066; *TK's Video v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11<sup>th</sup> Cir. 1999).

While one Wisconsin Court of Appeals decision, *Town of Wayne v. Bishop*, 210 Wis.2d 219, 565 N.W.2d 201 (Ct. App. 1997), review denied 568 N.W.2d 297, has discussed the application of *FW/PBS* standards in the context of zoning regulations, to date there has been no decision from the Wisconsin Supreme Court which interprets or analyzes the *FW/PBS* requirements in the context of licensing regulations.<sup>1</sup> This case presents the Supreme Court with an opportunity to “oversee and implement the statewide development of the law” in an area of substantial public interest and growing statewide concern. *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246, 256 (1997).

The history of this case in the Court of Appeals shows the pronounced need for guidance from the Supreme Court in this area. First, the Court of Appeals sought to certify this case to this Court. When this court refused the certification, the Court of Appeals determined to hold this case in abeyance pending this Court’s decision in *Kenosha County v. C & S Management*, 223 Wis. 2d 373, 588 N.W.2d 236 (1999). Finally, after the Court of Appeals issued its first decision in this case and City News filed a petition for review, the Court of Appeals withdrew its decision on its own motion, and issued a new one.

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<sup>1</sup> Two cases decided by the Court of Appeals have explored other aspects of adult bookstore regulation. In *City News and Novelty, Inc. v. City of Waukesha*, 170 Wis. 2d 14, 487 N.W.2d 316 (Ct. App. 1992), the appellate court determined that customers of an adult establishment do not have a right to private and anonymous viewing of sexually explicit videos. In *Tee & Bee, Inc. v. City of West Allis*, 214 Wis. 2d 194, 571 N.W.2d 438 (Ct. App. 1997), the Court of Appeals held that a municipality which wishes to opt out of the review procedures delineated in Ch. 68, Wis. Stats., must do so explicitly, and the substituted procedure may not conflict with the procedures required in Ch. 68. However, although each decision examined an aspect of licensing of an adult bookstore, neither examined the constitutional requirements reiterated in *FW/PBS*.

An equally important reason to grant review is that the Court of Appeals, in considering petitioner's challenge to the constitutionality of Waukesha's adult bookstore licensing ordinance, placed the burden of proof on the petitioner, the party challenging the licensing ordinance. A-8-10, ¶11. This allocation of the burden conflicts with established precedent in the State of Wisconsin. *Kenosha v. C & S Management*, 223 Wis. 2d 373, 588 N.W.2d 236 (1999), *Lounge Management, Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 580 N.W.2d 156 (1998), *State v. Thiel*, 183 Wis. 2d 505, 515 N.W.2d 847 (1994), and *Town of Wayne v. Bishop*, 210 Wis. 2d 219, 565 N.W.2d 201 (Ct. App. 1997), review denied 568 N.W.2d 297, all hold that while one who challenges an ordinance ordinarily bears the burden of establishing beyond a reasonable doubt that the ordinance is unconstitutional, when the challenged ordinance restricts expression protected by the First Amendment, the government carries the burden of proving that the regulation does not impermissibly infringe on First Amendment rights.

The conflict created by the decision below extends beyond Wisconsin's courts. Decisions of the United States Supreme Court that interpret federal law are binding on state courts. *State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662, 666 (1993). The United States Supreme Court has consistently required that, when a regulation infringes upon protected freedom of expression, the burden must be on the proponent of such legislation to justify the infringement.

license grantors and whether the ordinance contains the procedural safeguards mandated by the United States Supreme Court.

The Wisconsin Supreme Court has, within the past year, analyzed the constitutional law of sexually explicit expression in the areas of public nudity, *Lounge Management v. Town of Trenton*, 219 Wis. 2d 13, 580 N.W.2d 156 (1998), and obscenity, *Kenosha v. C & S Management*, 223 Wis.2d 373, 588 N.W.2d 236 (1999). The Court of Appeals has explored the parameters of zoning regulations which restrict First Amendment expression in *Town of Wayne v. Bishop*, 210 Wis.2d 219, 565 N.W.2d 847 (Ct.App. 1997), review denied, 568 N.W.2d 297. However, when municipalities choose to regulate sexually explicit expression by means of a licensing ordinance, they encounter a dearth of guidance.

#### STATEMENT OF THE CASE

The petitioner, City News and Novelty, Inc., (hereinafter "City News") is a corporation which operates an adult-oriented establishment located at 245 West Main Street in the City of Waukesha. In years past, City News has annually renewed its license to operate under the provisions of § 8.195 of the Municipal Code of the City of Waukesha (hereinafter "the ordinance" or "the licensing ordinance"). Its most recent license was due to expire January 25, 1996. On November 15, 1995, City News applied for renewal of its license. On December 19, 1995, the Common Council of the City of Waukesha passed a

Resolution, which found several violations of the ordinance, and denied renewal of the license.

City News requested administrative review of this decision. On January 22, 1996, the Common Council reviewed and affirmed its December 19, 1995, Initial Determination. City News appealed the Initial Determination to the Waukesha Administrative Review Appeals Board (hereinafter "Board"). A timely administrative hearing was held before the Board, commencing April 2, 1996, with continuations on April 9, May 7, and May 8, 1996. (Transcripts in Record). The Board issued findings of fact, conclusions of law, and a written decision affirming the Initial Determination to deny renewal. City News sought judicial review via certiorari action in circuit court. In a decision filed April 2, 1997, the circuit court affirmed the decision of the Board. City News appealed.

After both parties had submitted briefs, the Court of Appeals certified the appeal to the Supreme Court. By order of April 21, 1998, the Supreme Court refused certification. On April 27, 1998, the Court of Appeals ordered the appeal held in abeyance pending a Supreme Court decision in *Kenosha v. C & S Management*, 223 Wis. 2d 373, 588 N.W.2d 236 (1999). On January 26, 1999, following the decision in *C & S Management*, the city filed a motion seeking oral argument, asserting that oral argument would be appropriate because the determination of the issues raised in the appeal would have a "significant impact on a municipality's ability to regulate adult oriented establishments" and

because the lack of precedent establishing state law on the issues raised gave the case significant importance. This motion was granted.

The Court of Appeals originally issued its decision August 18, 1999. It found that one section of Waukesha's licensing ordinance, § 8.195(3)(d), which governs an applicant's municipal right to a public hearing following denial of license, was unconstitutional, but it found that provision severable. It upheld the remainder of the ordinance. In significant part, it affirmed the decision of the trial court and of the Board. After City News filed its Petition for Review, the Court of Appeals withdrew its decision and revised some of its language to explain having placed the burden of proof on City News. The revised decision, from which City News now seeks review, was issued October 20, 1999.

#### ARGUMENT

- I. IN ORDER TO HARMONIZE THE DECISION IN THIS CASE WITH EXISTING STATE AND FEDERAL CASE LAW CONCERNING REGULATIONS WHICH RESTRICT FIRST AMENDMENT RIGHTS, THE BURDEN OF PROOF MUST BE PLACED ON THE PROPONENT OF THE LEGISLATION WHICH INFRINGES UPON FREEDOM OF SPEECH.

The non-obscene, sexually explicit books, magazines, and videos that are sold by an adult bookstore, such as the one operated by City News, are expressive materials entitled to the protection of the First Amendment. *Special Souvenirs v. Town of Wayne*, 56 F.Supp.2d 1062, 1085 (E.D. WI. 1999). Because Waukesha's municipal licensing ordinance requires anyone who seeks to sell such

materials to receive governmental permission before doing so, it must be classified as a prior restraint. The United States Supreme Court has instructed that the “defining feature” of a prior restraint is that it gives a public official “the power to deny the use of a forum in advance of actual expression.” *Ward v. Rock Against Racism*, 491 U.S. 781, 795, n.5 (1989), quoting *Southeastern Promotions*, 420 U.S. at 553. In other words, any regulation which requires a citizen to “obtain permission” from the government before disseminating speech is characterized as a prior restraint. *T.J.’s South, Inc. v. Town of Lowell*, 895 F.Supp. 1124, 1133 (N.D. Ind. 1995).

While prior restraints are not unconstitutional, per se, “any system of prior restraint [bears] a heavy presumption against its constitutional validity.” *FW/PBS*, 493 U.S. at 225; *Southeastern Promotions*, 420 U.S. at 558. Since Waukesha’s licensing ordinance acts as a prior restraint, it must bear that heavy presumption of unconstitutionality.

In its decision in this case, the Court of Appeals allocated the burden to City News, requiring that it prove the ordinance unconstitutional beyond a reasonable doubt. A-8-10, ¶11. In support, the Court of Appeals cited language from one of the opinions in *FW/PBS*, which said that in a licensing situation, unlike other First Amendment contexts, the city need not bear the burden of proof. A-9-10, ¶11. However, the court so held without properly analyzing the limited

value of a plurality opinion of the Supreme Court in setting precedent.<sup>2</sup> The position that a licensing ordinance does not contain the same threat of censorship and therefore does not require all three *Freedman* safeguards was advanced by Justice O'Connor in Section II of *FW/PBS*. Only Justices Stevens and Kennedy joined that section of the opinion.

Three justices, Brennan, Marshall and Blackmun, concurred in the judgment that the Dallas ordinance was unconstitutional but disagreed that any of the *Freedman* requirements can be eliminated in the context of licensing an adult bookstore. They argued that the "transcendent value of speech" always requires that the burden of persuasion be placed on the government when protected expression is regulated. *FW/PBS*, 493 U.S. at 238, citing *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). Chief Justice Rehnquist and Justice White, concurring and dissenting, would not have applied any *Freedman* safeguards to a licensing situation, and Justice Scalia, dissenting, would have applied a different analysis entirely.

When a "fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgement on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193

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<sup>2</sup> Also, it is one thing to place the burden of proof on a license applicant when it comes to the factual grounds for its eligibility. It is quite another to relieve a municipality of the burden of persuasion as to the facial constitutionality of its licensing ordinance, merely because the issue is raised in connection with a nonrenewal review proceeding rather than in a full frontal assault under 42 U. S. C. Sec. 1983.

(1977). Therefore, *FW/PBS* should not properly be read as holding that the requirements set forth by the Supreme Court in *Freedman* have been modified, since that rationale neither enjoyed the assent of a majority nor was the narrowest ground for the decision. The narrowest ground upon which *FW/PBS* was decided was that the Dallas ordinance was unconstitutional because it was a prior restraint requiring procedural safeguards and two of those safeguards were lacking. *11126 Baltimore*, 58 F.3d at 999, n. 15. In short, the requirements established by the United States Supreme Court in *Freedman* have not been curtailed and are therefore still binding on the states.

It also does not alter the burden of proof analysis to say that the ordinance is content-neutral. It well may be, but it is still a prior restraint, and as such, carries the presumption of unconstitutionality:

Otherwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decision-maker and provide for the *Freedman* procedural safeguards. Indeed the Court has repeatedly stated that “[a]ny system of prior restraint” bears “a heavy presumption against its constitutional validity.”

*11126 Baltimore*, 58 F.3d at 995, n.11, internal citations omitted.

Other than in the instant decision of the Court of Appeals, Wisconsin courts have been uniform in requiring that where a regulation restricts freedoms protected by the First Amendment, such regulation is presumed unconstitutional, and the burden to establish its constitutionality is on the proponent of such

legislation. See, *C & S Management*, 223 Wis. 2d 373, 588 N.W.2d at 242; *Lounge Management*, 219 Wis. 2d at 20, 580 N.W.2d 156; *Thiel*, 183 Wis. 2d 505, 515 N.W.2d at 854; *Wayne v. Bishop*, 210 Wis. 2d 219, 565 N.W.2d at 206.

There is a real danger that Wisconsin courts, in an effort to give effect both to the foregoing authority and the decision below, will read it as carving out an ill-defined exception of some sort to the rule that prior restraints are presumptively unconstitutional. In order to avoid this perception, this Court should grant review to reverse the Court of Appeals as to the allocation of the burden of proof.

II. THE LICENSING ORDINANCE DOES NOT CONTAIN SUFFICIENTLY OBJECTIVE STANDARDS GOVERNING RENEWAL DECISIONS TO PREVENT THE EXERCISE OF UNLAWFUL DISCRETION.

The United States Supreme Court has identified as one of the “two evils that will not be tolerated” in prior restraint provisions any scheme that places “unbridled discretion in the hands of a government official or agency.” *FW/PBS*, 493 U.S. at 225; *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 780, 757 (1988). The Supreme Court has consistently held that any prior restraint through licensing, “without narrow, objective and definite standards to guide the licensing authority” is unconstitutional. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

A. Application of Statutory Construction Does Not Support a Finding that There Are Any Standards to Govern Applications for Renewal.

Although at first blush it might seem inconsequential for this Court to review the statutory construction of one city's ordinance, the fact is that cities and towns tend to look to the efforts of other municipalities in the area of regulation of sexually explicit material for guidance. This mechanism has been explicitly endorsed by the United States Supreme Court, which has encouraged cities that are considering the adoption of such regulations to rely upon the experiences of other cities. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986). The Court of Appeals tacitly recognized the existence of this phenomenon when it noted that the City of Delafield has an identical ordinance. A-7, n. 4. The Waukesha ordinance is the first Wisconsin adult-use licensing ordinance to win, in part, the stamp of approval of a reported decision. Thus, as a practical matter, this Court would be reviewing not just the language of one city's ordinance, but, in effect, a model, likely to be used by many cities throughout Wisconsin.

City News argued below that Waukesha ordinance § 8.195(7), entitled "Renewal," contains no standards that explicitly govern the determination as to whether or not to renew the license of an adult bookstore. The Court of Appeals rejected this reading of the ordinance and held that the standards for issuance of new licenses were meant to apply to renewals as well. A-11, ¶14. When the applicant is a corporation, there are only two eligibility standards for a new license. Both are found at § 8.195(4)(b), which requires that all officers,

directors, and stockholders who own more than 5% of the stock be at least 18 years of age and that none of these officers, directors, or stockholders shall have been found to have violated the licensing ordinance within five years immediately preceding the date of application. A-3, n.2. In addition, the Court of Appeals found applicable the provisions of §8.195(10)(f), which require that the operator insure compliance of the establishment and its patrons with the provisions of the ordinance, as well as those of §(10)(b) which provide that any act or omission of an employee constituting a violation of the licensing ordinance shall be deemed an act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or nonrenewed. A-11, ¶14. To the Court of Appeals' way of thinking, then, the standards for renewal encompass both meeting the new-license standards at § 8.195(4) and avoiding violation by anyone, including employees and customers, of the regulatory portions of the ordinance, mostly at § 8.195(10).

This conclusion can only be reached by torturing the explicit language of the ordinance. According to the terms of the ordinance and the Court of Appeals, the "operator" is the corporation that seeks the license. A-3. The standards for the issuance of a new license require only that the individual officers, directors and stockholders of the corporation be of age and not have violated the ordinance within the last five years. If § 8.195(4) is also deemed to contain standards for renewal, then presumably a corporation's license may not be

renewed for five years after any officer, director or stockholder has violated the licensing ordinance.

This makes no sense if it is read in conjunction with §8.195(8). This section requires the Common Council to revoke a license if any operator or employee violates a provision of the licensing ordinance, except that, in the case of a first offense where the conduct was solely that of an employee, the penalty may not exceed a suspension of 30 days if the Council finds that the operator had neither actual nor constructive knowledge of the violation and could not by the exercise of due diligence have had such knowledge. Clearly, (8) contemplates a situation where a violation does occur and is dealt with by either a suspension or a revocation. A suspension lasts for 30 days. A revocation lasts for one year. Section 8.195(8)(d). A-49.

But, if the terms of § 8.195(4) govern renewals as well as initial applications for a license, and, as the court below held, a violation by “any employee” will disqualify an applicant for renewal, then clearly an operator who has received either a 30-day suspension or a one-year revocation as a result of a previous violation also will be ineligible for renewal until five years have passed from the date of that violation. This would render the language that provides for the more moderate and calibrated sanctions of revocation and suspension laughable, since all revocations and suspensions would inevitably be followed by five-year nonrenewals, an absurd result.

A literal reading of the language of §8.195(10)(b) compels an opposite, and equally absurd, result. This paragraph provides that at renewal time, violations committed by any employee are considered violations “of the operator.” If the standards for a new license at § 8.195(4) also apply to renewals, this language is irrelevant to a corporate applicant because violations by “the operator,” the corporation, cannot disqualify an applicant from receiving a new license. Only violations by officers, directors and shareholders are listed as disqualifiers. Clearly, § 8.195(10)(b) signals that Waukesha did not intend employee violations to be irrelevant at renewal time, but if the new license standards at §8.195(4) govern renewals, as the court below held, they will be, since § 8.195(10)(b) does not ascribe employee violations to any entity on the list of those whose violations can disqualify an applicant.

The truth here, which is that standards for renewal simply seem to have been omitted in the drafting process, is demonstrated by these opposite and equally extreme scenarios, neither of which has any plausible claim to being the intent of the legislative body that enacted the ordinance.

In construing a statute, the Court is required to avoid a result that renders a portion of an ordinance superfluous or absurd. *Swatek v. County of Dane*, 192 Wis.2d 47, 531 N.W.2d 45 (1995). Therefore, it cannot be correct to say that the standards for issuance are presumptively the standards that govern renewal. The ordinance simply contains no renewal standards.

which lasts for five years. The ordinance lists no criteria by which the city is governed or guided in making this choice. That the ordinance does permit such discretion is beyond dispute. The city so argued when the petitioner asserted on appeal that the ability of the city to invoke the most severe sanction available to it, non-renewal, instead of the lesser penalty, revocation, violated due process. The city responded that such a decision is solely a matter of discretion for the licensing body. The Court of Appeals concurred, finding that “while revocation and nonrenewal both rely upon a violation of the ordinance, we believe the city properly exercised its discretion in deciding to impose a nonrenewal sanction.” A-32, ¶62.

Without standards to prevent subjective criteria from being used as a basis for deciding which penalty to invoke, the ordinance does not protect a bookstore from being subject to the danger of censorship. Nothing in the language of the ordinance prevents the city from using distaste for the materials as a basis for choosing the most severe penalty. Because such a decision would be not only unconstitutional but also virtually undetectable, it is necessary that the ordinance contain explicit provisions, which would make such an occurrence impossible. The Supreme Court has noted that the need to reapply annually for a license enables a licensing authority to subject the forum of expressive activities to discipline (i.e., censorship) for unpopular speech that has already been uttered. *Lakewood*, 486 U.S. at 759-60. The *Lakewood* Court cautioned that demonstrating

the link between the expressive content and a subsequent denial of license renewal might well prove impossible. *Id.*, at 759.

The Seventh Circuit has also voiced this concern, noting that licensing systems which require annual renewals may facilitate "content discrimination" in licensing of expressive fora. *Graff*, 9 F.3d at 1329, Judge Flaum's concurrence. Thus, the dangers inherent in the Waukesha ordinance, which contains no explicit standards for renewal, and which permits subjective discretion to be exercised in determining which penalty to apply after a violation has occurred, are exacerbated in circumstances where, as here, a store selling politically unpopular expressive material must seek renewal on an annual basis.

### III. THE LICENSING ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT DOES NOT CONTAIN THE REQUISITE PROCEDURAL SAFEGUARDS.

#### A. There Is No Assurance That A Decision Will Be Made Within A Brief And Definite Period Of Time.

In *FW/PBS v. City of Dallas*, 393 U.S. 215 (1990), the Supreme Court found the licensing portion of the ordinance to be unconstitutional because, although the ordinance required the chief of police to approve the issuance of a license within 30 days following receipt of the application, the ordinance also contained a provision which allowed the license not to be issued until the premises were approved by the health and fire departments. The Court read this to mean that the license might not in fact be issued within 30 days, as there was no certain time limit set on the inspections by the health and fire departments. The Court found that the city's

licensing ordinance law allowed "indefinite postponement of the issuance of a license." *FW/PBS*, 393 U.S. at 217. This potential for delay violated one of the safeguards necessary for any prior restraint to be valid, that such restraint prior to judicial review be imposed only for a brief specified period during which time the status quo must be maintained. *Id.*, at 227, citing *Freedman v. State of Maryland*, 380 U.S. 51, 58-60 (1965).

The Waukesha ordinance, at §8.195(3)(c) requires the city to notify an applicant within 21 days of receipt of the application whether the license has been granted or denied. A-3, n. 2. However, it also requires, at §8.195(7)(c), the police department, if aware of any information bearing on the operator's qualifications to file such information with the city clerk. A-47. The ordinance does not mandate any time limit within which the police report shall be filed. Section 8.195(7)(d) requires the city building inspector to inspect the premises prior to renewal of a license. A-48. No time limit is set for this inspection either.

Clearly, all of these factors are capable of combining, just as the factors in *FW/PBS* were so capable, to delay the 21-day time period and render it illusory. In fact, in this case, the application for renewal was filed on November 15, and the notification of denial did not come until 35 days later. In its decision, the Court of Appeals found this delay irrelevant, since City News is making a facial, not an as-applied, attack. A-14, n.5. However, the fact that the ostensible time limits were exceeded in this case is illustrative that the problem suggested is not fanciful,

but very real. *See, Special Souvenirs*, 56 F.Supp.2d at 1089, where the court found that the facts of the case demonstrated that the permit scheme which plaintiff had facially attacked had the potential for excessive delay. If the city can exceed the 21 day limit by 14 days, as it did, then what is to prevent a delay of, say, 14 weeks? As in *FW/PBS*, no language in the ordinance prevents an indefinite postponement of a decision. Moreover, without language by which a delay results in an automatic renewal, any time limit is meaningless because it is unenforceable by an applicant.

In explaining the importance of time limits in regard to constitutionally protected expression and licensing schemes, the Supreme Court said:

The core policy underlying *Freedman* is that the license for a First Amendment protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.

*FW/PBS*, 393 U.S. at 224. In determining whether time limits are satisfactory, federal courts have held that the licensing ordinance must be explicit and must **guarantee** an absolute right to operate in a short period of time, regardless of other considerations.

The issue . . . is whether the ordinance, on its face, meets the requirements of *FW/PBS* . . . We cannot depend on the individuals responsible for enforcing the ordinance to do so in a manner that cures it of constitutional infirmities. [The ordinance] says that applicants may be permitted to begin operation; it does not say 'shall'. We do not read this language to create an absolute right to operate at the expiration of the 45 days. On its face, therefore, [the ordinance] risks the suppression of protected expression for an indefinite time period prior to any action on the part of the decision-maker or any judicial determination.

*Redner v. Dean*, 29 F.3d at 1501.

The Fourth Circuit has echoed these concerns, finding an ordinance requiring licensing of adult businesses unconstitutional because of potential indefinite delay as a result of inspecting agencies having no time limits set, with the attendant possible delay to the entire licensing process. *Chesapeake B & M, Inc. v. Harford County, Maryland*, 58 F.3d 1005, 1009 (4<sup>th</sup> Cir. 1995), *en banc*, cert. denied, 516 U.S. 1010.

B. There is no Guarantee of Prompt Judicial Review.

The Waukesha licensing ordinance comes up short of constitutionally mandated procedural safeguards in another way. Another element which the Supreme Court found essential in an ordinance which restricts freedom of expression by licensing it is "prompt judicial review in the event that the license is erroneously denied." *FW/PBS*, 493 U.S. at 228. As the Court of Appeals noted in its decision, there is currently a split among the federal appellate circuit courts as to whether "prompt judicial review" means merely speedy access to, or initiation of, judicial review, or alternatively, whether it means a prompt judicial decision. A-18-19, ¶ 31-32. The Court of Appeals held that "prompt judicial review" means prompt access to court. A-19, ¶ 33.

The petitioner's argument that the ordinance fails to provide prompt judicial review was based on a showing that the administrative review process which

precedes judicial review is open-ended and may therefore result in the commencement of judicial review being indefinitely delayed.

This was the holding of *Redner v. Dean*, 29 F.3d 1495 (11<sup>th</sup> Cir. 1994). There, the Eleventh Circuit Court of Appeals considered an ordinance which provided that in the event of a license denial, the applicant might appeal within 15 days to a board, which was to schedule a hearing as soon as the board's calendar would allow. No specific time limit was set for the board to either commence or conclude its proceedings. While the *Redner* Court acknowledged that the Supreme Court "has not clarified exactly what type of judicial review is sufficient," it found the ordinance under review to be constitutionally inadequate under any interpretation of "prompt judicial review" because, since the ordinance provides no specific time frame in which the board must hand down an administrative decision, judicial review is potentially unavailable for an extended period of time while the administrative action is still pending. *Redner*, 29 F.3d at 1502. The Eleventh Circuit has recently reiterated that, even where an ordinance requires a timely administrative hearing, the failure to also explicitly require a timely decision renders the ordinance unconstitutional. *Lady J. Lingerie*, 176 F.3d at 1363.

Similarly, the procedures set out in Waukesha's licensing ordinance fail to guarantee prompt judicial review of an adverse decision. Thus, the ordinance is unconstitutional.

To some degree, the Court of Appeals agreed with this rationale, as it found Waukesha's procedure for a public hearing unconstitutional on this basis.

A-22, ¶ 39-40. The Court of Appeals invalidated §8.195(3)(d), the provision which requires a public hearing to be held within 10 days of a license denial, yet does not set forth any time period after the hearing within which a decision must be rendered. This does not solve the problem. Chapter 68, Wis. Stats., which governs administrative hearings, and will control with § 8.195(3)(d) severed and excised, is also insufficient for the purpose of providing "prompt judicial review," and for the same reason.

While §68.09 provides that an initial determination shall be reviewed within fifteen days of receipt of a request for a review, there is no requirement that the review decision be made within any certain period of time. The Court of Appeals did not appreciate this problem, characterizing the provisions of Ch. 68 as providing a "fixed timetable". A-20, ¶35. However, the court did not address the petitioner's contention that while §68.09(3) says that the municipal authority shall review the decision within 15 days of receipt of a request for review, it does not require the municipal authority to issue a decision within any certain time period, nor does it grant any automatic relief to the applicant for renewal if the decision is not forthcoming in a short and specified period of time. The same situation exists within the provisions of §68.12, which does require a written decision to be rendered within 20 days after the completion of a hearing and the filing of briefs, but does not prevent

the hearing, once it has been initiated within the prescribed time limits, from being continued indefinitely, thereby defeating the applicant's right to pursue a judicial review in a prompt fashion.

In Wyoming, the state Administrative Procedure Act was found to be constitutionally defective for these very reasons. In *Franken Equities, L.L.C. v. City of Evanston*, 967 F.Supp. 1233 (D.Wyo. 1997), the federal court found that the time limits contained in the ordinance did not preclude the possibility of delay after the requisite hearing was commenced:

Although the Administrative Procedures [Act] . . . govern[s] applications for conditional use permits..., it does not require that the licensor rule...within 45 days. Instead, the licensor must hold a public hearing within 45 days....[Failure] of the licensor to act within 45 days following the closing of the record of a public hearing shall be deemed a denial of such submission. [A] closer examination ...reveals that the licensor may suppress protected expression indefinitely. Neither the ordinance nor the procedural rules indicate how or when the record closes.

*Id.* at 1238 (emphasis in the original, internal citations omitted)

Although a municipality is not at liberty to change the provisions of Ch. 68, it is free to "opt out" of the provisions of Ch. 68. §68.16, Stats.; *Tee & Bee, Inc., v. City of West Allis.*, 214 Wis.2d 194, 571 N.W.2d 438 (Ct.App. 1997). By so doing, can create a more streamlined and definitive timetable for those administrative appeals which involve review of prior restraints. Waukesha's failure to have done so, coupled with the fact that the ordinance has no provision for retaining the status quo for applicants seeking renewal, imposes the possibility of "significant hardship" on an adult bookstore and runs the risk of suppression of free speech for too long a

period of time. *11126 Baltimore Blvd.*, 58 F.3d at 998. It is easy to observe that a city ordinance cannot compel a state court to hew to any particular timetable. An ordinance can, however, obviate the injury from administrative or judicial delay, at least in renewal cases, by guaranteeing an existing business the right to operate until review is completed.

In the instant case, the City of Waukesha has ad hoc permitted City News to continue operating without interruption throughout the pendency of all judicial review. However, every bookstore is entitled to explicit protection in this regard.. Even the Fifth Circuit Court of Appeals, one of the circuits which has taken a narrow approach to the issue of prompt judicial review, agrees on the need to preserve the status quo by explicit language:

The contention is that the County cannot constitutionally shut down an existing business while its application for a license is pending, and that TK's was operating when Denton County adopted its regulations. The County points out that it has not attempted to close TK's. . . .

Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process. It is no answer that the County has not elected to do so. The absence of constraint internal to the regulation is no more than open-ended licensing. Businesses engaged in activity protected by the First Amendment are entitled to more than the grace of the state. . . .

Because TK's was in business when the Order was adopted, its free speech activity cannot be suppressed pending review of its license application by the County.

TK's Video, 24 F.3d at 708.

The court in *Wolff v. Monticello* also held that even if the city has not attempted to force an applicant out of business during the pendency of proceedings, the retention of the status quo must be explicit in the ordinance itself. *Wolff*, 803 F.Supp. at 1574-75. The Fourth Circuit, too, has held that not only must the status quo be explicitly preserved throughout the administrative stage, but that it is preferable to extend it through the judicial review stage. *Chesapeake*, 58 F.3d at 1009; *Baltimore Blvd.*, 58 F.3d at 1001. And the Eleventh Circuit reminds us that the requirement that the status quo be maintained through at least the administrative process is one of the basic guarantees which stems from *Freedman*. *Lady J.*, 176 F.3d at 1363.

The Waukesha ordinance does not explicitly provide for the retention of the status quo. In fact, on its face, it says the opposite. §8.195(a)(2) states, "no adult establishment shall be operated . . . without first obtaining a license to operate." When the lack of preservation of the status quo is coupled with the lack of definitive time limits and the attendant possible delay in judicial review, the Waukesha ordinance has the potential for long-term suppression of expression prior to any type of judicial review. As a result, it is constitutionally defective on its face.

#### IV. THE PROCEDURES CONTAINED IN THE LICENSING ORDINANCE VIOLATE AN APPLICANT'S DUE PROCESS RIGHTS.

The Court of Appeals recognized that the legitimate expectation of renewal of a business license rises as a matter of law to the level of a property

interest, and therefore, one cannot be deprived of that property interest without being afforded procedural due process. *A 27; Manos v. City of Green Bay*, 372 F.Supp. 40, 49 (E.D. Wis. 1974). The due process rights of City News were violated in at least two essential respects.

A. Permitting the Mayor to First Determine Whether to Sign or to Veto a Resolution Denying Renewal of a License and then to Review that Same Resolution Deprives the Applicant of an Impartial Decisionmaker.

The Supreme Court has mandated that impartiality is an essential element of due process, stating, "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 346 U.S. 133, 75 S.Ct. 623 (1954). The Wisconsin Supreme Court has concurred that both impartiality and the appearance of impartiality weigh heavily in due process considerations. The criteria for review of issues involving questions of impartiality are set out in *Guthrie v. Wisconsin Employment Relations Commission*, 111 Wis. 2d 447, 331 N.W.2d 331 (1983), where the Court found there can be a denial of due process when the risk of bias on the part of the decision-maker is impermissibly high, even if there is no bias or unfairness in fact. The principle elucidated by *Guthrie* can be summed up as "no man can be a judge in his own case." *Id.* at 336. Wisconsin's Administrative Procedure Act recognizes the inherent unfairness, or at least the appearance thereof, in allowing one to review his or her own earlier decisions by providing that at a hearing on administrative appeal, "the municipality shall provide an impartial

decision maker, . . . who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal." § 68.11(2).

In this case, Mayor Opel first endorsed the Resolution denying renewal of the license. She then also presided over the Common Council when it conducted its §68.09 review. Finally, she also was one of three members, and was in fact the chairperson, of the Administrative Review Board that conducted the due process review of the initial determination.

By statute, Mayor Opel is the Chief Executive Officer of the City of Waukesha. §62.09(8)(a), Wis. Stats. Among the powers entrusted to a mayor of a municipality, also by statute, is the power to veto any and all acts of the common council. §62.09(8)(c), Wis. Stats. Mayor Opel's action in signing, and thereby signifying her approval of, the Council's Resolution denying renewal of the license was not an insignificant or purely formal action. When the Resolution came to her for signature, she had a choice: she could approve the Resolution, or she could veto it. She chose to approve the Resolution. This decision-making process on the part of the mayor can only be seen as participation in making the initial determination. Consequently, the mayor was disqualified, both by the terms of §68.11, Wis. Stats., and by constitutional considerations of impartiality, from participating in the subsequent administrative review.

In *State v. Kiernan*, \_\_\_ Wis. 2d \_\_\_, 596 N.W.2d 760 (1999), this Court held that OWI jurors who had listened to a particular lawyer present a

particular defense to incriminating breath alcohol evidence, and passed judgment on that defense, rejecting it, in one trial, could not be regarded as impartial in a second trial involving a different defendant, at which the same lawyer planned to present the same defense. Here, the Mayor listened to the same lawyers present the same theories of defense in the same case, after having passed judgment on them all earlier, in connection with her veto decision. There is no speculation involved in determining that she had, quite literally, prejudged the issues before the review board; it had been her duty as mayor to do so.

B. Because the Ordinance Permits Nonrenewal Without Requiring an Element of Scienter for The Violation which is the Basis of the Nonrenewal, it Violates both the Due Process Rights and the First Amendment Rights of the Bookstore Seeking Renewal of its License.

The ordinance permits the city to suspend, revoke or refuse to renew an operator's license if an employee of the operator commits a violation of the ordinance. §§ 8.195(8)(a)2, (10)(a). This means that despite every effort of the owner of the bookstore, an employee may violate a rule, or may, perhaps unwittingly, permit a customer to violate a rule, with the result being that the operator's license to disseminate sexually explicit, constitutionally protected material is either revoked for one year or denied renewal. Scienter on the part of the owner of the bookstore is not required in order to justify the city's invoking the

most severe sanctions possible – complete suppression of the protected expression for a period of five years.

While strict liability offenses are acceptable in some contexts, there are limits to the ability of a legislative body to declare one presumptively guilty of an offense. *Patterson v. New York*, 432 U.S. 197 (1977). Furthermore, both the United States Supreme Court and the Wisconsin Supreme Court have cautioned that there are likely to be problems associated with strict liability offenses where freedom of expression is involved. In *Smith v. People of California*, 361 US. 147, 150 (1959), the Supreme Court warned of the danger of strict liability in the context of an obscenity case. Earlier this year, the Wisconsin Supreme Court, citing *Smith* and *Patterson*, found that where distribution of sexually explicit photographs of a minor is alleged, due process requires that knowledge as to the age of the subject be an essential element. *State v. Zarnke*, 224 Wis.2d 116, 589 N.W.2d 370, 376 (1999). The statute examined in *Zarnke* made lack of knowledge of the age of the subject of the photo an affirmative defense; the Supreme Court said that was inadequate, given the expressive context of the offense. Waukesha's ordinance, while not a criminal statute, has the power to restrict expressive activity, yet does not even allow an affirmative defense based on lack of knowledge.

One federal court has specifically held that imposing strict liability on the owner of an adult business for the illicit act of an employee offends due process.

*Bright Lights, Inc. v. City of Newport*, 830 F.Supp. 378, 387 (E.D.Ky. 1993). The Waukesha ordinance, by permitting license deprivation as a result of a violation by an employee or a patron, violates the due process rights of the bookstore owner.

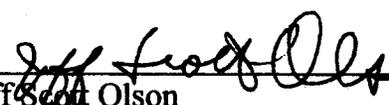
Dated this 19th day of November, 1999.

Respectfully submitted,

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