



**CORRECTED FINAL DECISION of the
SNOHOMISH COUNTY HEARING EXAMINER**

Millie Judge
Hearing Examiner

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DECISION DATE: December 16, 2011

APPELLANT(S): HADES GROUP, LLC
23803 127TH Ave, NE, Arlington, WA 98223

RESPONDENT: Snohomish County Auditor – Licensing Division

FILE NO.: 11-985858

DECISION APPEALED: DENIAL OF ADULT ENTERTAINMENT
DANCE STUDIO LICENSE

BUSINESS LOCATION: 10809 Mukilteo Speedway, Mukilteo, Washington.

DECISION (SUMMARY): **APPEAL DENIED**

This matter having come before the Hearing Examiner on December 7, 2011, and the testimony of witnesses having been heard and all exhibits having been admitted into evidence and considered, the Hearing Examiner enters the following Findings of Fact, Conclusions of Law and Decision based on a preponderance of the evidence:

FINDINGS OF FACT

1. **The Record.** The official record for this proceeding consists of the Exhibits entered into evidence (Exhibits 1 through 8), as well as the testimony of the single witness received at the open record hearing. The entire record was admitted into evidence and considered by the Examiner in reaching the decision herein.

NOTE: For a complete record, an electronic recording of the public hearing in this case is available in the Office of the Hearing Examiner.

2. **Parties of Record.** The Parties of Record is set forth in the Parties of Record Register.
3. **Public Hearing.** The Hearing Examiner held an open record appeal hearing on December 7, 2011. The witness was sworn, testimony was presented, and pre-filed exhibits were entered into the record. Notice of the application and public hearing were made according to the provisions of Chapter 2.02.140. (Exhibits 4 and 4.A) Gordon Sivley, Deputy Prosecuting Attorney, appeared on behalf of the Auditor's Office. Gilbert Levy and his associate, Jennifer Kaplan, Law Offices of Gilbert Levy, appeared on behalf of the

Appellant. No members of the attended the public hearing. Ms. Kaplan was the only witness to testify at the public hearing.

4. Application Request. Hades Group, LLC is a tenant of certain real property located at 10809 Mukilteo Speedway, Mukilteo, WA (hereinafter, the “subject property”). The subject property is zoned Light Industrial and is located within unincorporated Snohomish County. There is an existing structure on the subject property that was formerly a nightclub and casino. (Exhibit 7)

On behalf of Hades Group, LLC, Phil McKibben of El Paso, Texas, filed an application for a license to operate an “adult entertainment dance studio” on the subject property. (Exhibit 5, Attachment 1)

5. Adjacent to the subject property and across the street, there is a strip mall located at 10924 Mukilteo Speedway, Mukilteo WA 98275. (Exhibit 5, Attachment 2) There are two restaurants located at the strip mall, including the Lotus Chinese Restaurant and the Sakuma Japanese Restaurant. Id. Both restaurants are licensed to serve beer and wine by the Washington Alcoholic Beverage Commission. Id. The strip mall within which these restaurants are located is within the jurisdictional boundary of the City of Mukilteo.
6. Governing Regulations: The application is governed by the following provisions of the Snohomish County Code:¹

- Chapter 6.01 SCC (General Licensing Provisions);
- SCC 6.25.050 (Adult Entertainment Dance Studio License);
- SCC 30.22.100 (Urban Zone Categories: Use Matrix);
- SCC 30.22.130(67) (Reference Notes for the Use Matrix); and
- SCC 30.28.015 (Adult Entertainment Uses).

According to the County’s general licensing provisions set forth in SCC 6.01.040(8):

No license/permit shall be issued unless the premises where the activity is to be conducted complies with the requirements of all governmental agencies, including but not limited to, federal, state, city and county laws and ordinances relating to buildings, fire, health, sanitation, zoning, taxation, public safety and all other requirements and conditions specifically set forth in other sections of this title. Issuance of a license/permit shall not be deemed to constitute approval or waiver of non-compliance by the applicant.

(Emphasis added). Based on this Section, the Auditor must review, in addition to other regulations, whether the adult entertainment dance studio license application meets all of the requirements of SCC 6.25.050, and the County’s zoning regulations (SCC 30.22.100, the “use matrix” for urban zones) together with SCC 30.22.130(67), which refers to SCC 30.28.015 (adult entertainment use regulations). Section 6.25.050(5) requires that various County agencies and departments investigate and review the application within 25 days. It states that, “No license may be issued unless each department reports that the application and premises comply with the relevant laws.” Id. The question here is whether the Hades Group, LLC application meets the County’s zoning regulations, specifically SCC 30.28.015.

¹Other provisions of the Snohomish County Code are applicable to the licensing and operation of an adult entertainment dance studio. However, the citations listed are the provisions relevant to the instant license denial and appeal.

In the Light Industrial Zone, the use matrix provides that Adult Entertainment Business/Uses are permitted, subject to SCC 30.28.015. (See, SCC 30.22.100 and 30.22.130(67)). The County has placed separation requirements on adult entertainment dance studios in order to mitigate or eliminate potential secondary effects of the adult entertainment use on certain adjacent uses. (Exhibit 5) SCC 30.28.015 provides:

Adult entertainment uses must meet the following requirements:

(1) Adult entertainment businesses or uses are prohibited within the area circumscribed by a circle which has the radius shown below from any public or private school, preschool, educational institution, church or other religious facility, public or private park, youth oriented facility, establishment serving alcohol by the drink, or from the following zones . . . (b) Adult entertainment dance studios-- 660' . . .

(Emphasis added). Accordingly, no adult entertainment dance studio may be located within 660 feet of an establishment serving alcohol by the drink. Id.

7. The Planning and Development Services Department (PDS) performed the required analysis of the license application. As noted in the "Zoning Preliminary Review for Proposed Business Activity and Location," PDS determined that the proposed business location did not meet the 660 foot separation requirement from "an establishment serving alcohol by the drink" as required by SCC 30.28.015(1)(b). (Exhibit 5 at Respondent's Exhibit 3). PDS notified the Auditor in writing of its recommendation of denial of the license on August 24, 2011. (Exhibit 1.1) In a letter dated September 8, 2011, the Auditor's Office advised the Appellant of the PDS recommendation and provided Appellant with a copy of PDS's response. (Exhibit 1.1)
8. On September 13, 2011, the Appellant responded, raising constitutional challenges to the validity of SCC 30.28.015 as applied to the license application. (Exhibit 5 at Respondent's Exhibit 4)
9. On October 6, 2011, the Auditor's Office issued a final decision denying the Adult Entertainment Dance Studio License. (Exhibit 1.1) The basis of the denial is that the parcel is located within a radius of 660 feet of two restaurants in a strip mall.
10. On October 11, 2011, the Appellant's attorney sent a letter to the Auditor's Office again raising an "as applied" constitutional challenge to the ordinance and raising other claims. (Exhibit 2) On October 12, 2011, Appellant appealed the denial of the Adult Entertainment Dance Studio license. (Exhibit 1)
11. On October 20, 2011, the Office of the Hearing Examiner issued Notice of the public hearing. (Exhibit 4). As noted above, a public hearing on the appeal was held on December 7, 2011.
12. The parties stipulated to various facts prior to the public hearing. (See, Exhibit 7)
13. SCC 30.28.015 was adopted by Snohomish County Ordinance No. 02-064, as a re-codification of prior ordinances that were enacted by the Council in 1996, as part of a comprehensive amendment to the County's adult entertainment ordinances. The legislative record for Ordinance 02-064 is part of the record as Exhibit 5 (formerly Joint Exhibits 2, 3, 4

and 5), and consists of approximately 1,500 pages of documents, which have been copied onto four compact disks for convenience.

14. The Hearing Examiner is required to presume that Ordinance No. 02-064 is constitutional, and lacks the authority to rule on the constitutionality of the Ordinance. However, the Examiner has been asked by the Appellant to find that (1) SCC 30.28.015(1)(b) is constitutionally overbroad in its regulatory scope; (2) the ordinance should be narrowly tailored in its scope to exclude restaurants from the phrase "establishments serving alcohol by the drink;" and (3) there is no evidence in the legislative history of Ordinance No. 02-064 that would support a construction of the phrase "establishments that serve alcohol by the drink" to include restaurants. (Exhibit 8)
15. In support of its arguments, Appellant presented the testimony of Jennifer Kaplain, an attorney working for the Appellant's legal counsel. Ms. Kaplain performed a review of the legislative record for Ordinance No. 02-064, looking for evidence relating to the secondary effects of adult entertainment uses on restaurants that sell alcohol. She testified that she spent approximately 10 hours reviewing the record and did not find any transcripts of public testimony, case studies, reports from the Adult Entertainment Citizen Committee, law enforcement testimony, statistical studies or police reports relating to "secondary effects" on restaurants serving alcohol.
16. However, in rebuttal, the Auditor presented proof by a clear preponderance of the evidence that the legislative record for Ordinance 02-064 included testimony and facts that were considered by the Council as to the secondary effects of adult entertainment businesses on nearby taverns, bars and other "establishments serving alcohol by the drink," including restaurants.²
17. It is clear from the legislative history of Ordinance No. 02-064 that when the County Council adopted SCC 30.28.015(1)(b), they considered several alternatives and knowingly chose to include restaurants within the regulatory scope of the phrase "establishments serving alcohol." This is shown through the testimony of Dave Gossett at the public hearing on June 24, 1996 (Exhibit 5 at Joint Exhibit 5, Disk 4 at pages 81, 82, Attachment G).
18. Lastly, the Appellant argues that the County's zoning regulations cannot be imposed on properties within the County to protect properties that lie outside the County's municipal boundaries. However, the Appellant presented no case law or statutory authority in support of this novel theory. In rebuttal, the Auditor presented case law from the Washington State Supreme Court holding that it is not only permissible to consider and mitigate the negative effects of a development on properties outside of a municipal boundary, the County is required to do so and acts in an arbitrary and capricious manner if it does not. (Exhibit 6, citing *Save our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983); *Cathcart-Maltby Clearview Community Council v. Snohomish County*, 96 Wn.2d 201, 634 P.2d 853 (1981); *Save a Valuable Environment v. Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978); and *Miller v. Port Angeles*, 38 Wn. App. 904, 912, 691 P.2d 229 (1984).

² (See, Exhibit 5, at Joint Exhibit 5, Disk 4, pages 374, 375, Attachment B). See also, Report of the Adult Use Citizens Committee (Exhibit 5, at Joint Exhibit 5, Disk 4, pages 374, 375, Attachment B, page 486, Attachment F; pages 633-684; page 668, Attachment D, page 672, Attachment E); and Findings from the Report of the Adult Use Citizens Committee based on the testimony of Sergeant Joe Belinc and Sergeant John Stewart (Exhibit 5 at Joint Exhibit 5, Disk 4, pages 661, 662, Attachment C). This was also shown through the testimony of Dave Gossett at the public hearing on June 24, 1996 (Exhibit 5 at Joint Exhibit 5, Disk 4 at pages 81, 82, Attachment G). See also, Exhibit 6 at Attachments B through G.

19. Any Finding of Fact which should be deemed a Conclusion of Law in this Decision is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Examiner has ³original ~~original~~ appellate jurisdiction over the rezone application pursuant to Ch. 2.02 SCC and SCC 6.25.050(6).
2. The Hearing Examiner lacks the authority to find that SCC 30.28.015(1)(b) is unconstitutionally overbroad and declines to enter such an order.
3. In order to provide the Appellant with the remedy sought, that is, to narrow the interpretation of SCC 30.28.015(1)(b) based on an over breadth claim, the Examiner concludes that she would first have to find that the ordinance is unconstitutional. As noted above, the Examiner lacks such authority.
4. Contrary to Appellant's suggestion, SCC 30.28.015(1)(b) is not ambiguous. It clearly prohibits the issuance of a license to an adult entertainment dance studio where it is located within 660 feet of an establishment, including a restaurant, that sells alcohol by the drink. Accordingly, the Hearing Examiner interprets the regulation based on the plain meaning of the words. *G-P Gypsum Corp. v. Dept. of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). An undefined term in the County Code is given its plain meaning, as understood through reference to the Dictionary. *City of Redmond v. Burkhardt*, 99 Wn. App. 21, 24, 991 P.2d 717 (2000). An "establishment" means "[a]n institution or place of business." (Black's Law Dictionary, Sixth Edition (1990)). Restaurants plainly fall within the definition of an "establishment." The evidence in the record demonstrates that the County Council was aware that the use of the term "establishment" would include restaurants when it adopted SCC 30.27.015(1)(b). Had they intended otherwise, the Council could have expressly excluded restaurants. They have not done so and the Hearing Examiner will not now interpret the ordinance to read in a manner that was not intended by the Council.
5. The Auditor did not err when it denied the Appellants request for an adult entertainment dance studio license because there are two restaurants authorized to sell alcohol by the drink located within 660 feet of the proposed adult entertainment dance studio. The Auditor's decision denying the issuance of an adult entertainment dance studio license should be affirmed.
6. The Appellant failed to meet its burden of proof in arguing that the County is not allowed to consider the effects of an adult entertainment dance studio on an establishment within the municipal boundaries of the City of Mukilteo. Well-established case law shows that the County was required to consider effects on adjacent properties, even where such properties lie outside of its municipal boundaries. The Auditor did not err on this basis.
7. The Examiner concludes that the appeal should be denied.
8. Any Conclusion of Law in this Decision which should be deemed a Finding of Fact, is hereby adopted as such.

³ Clerical error corrected as to Examiner's authority.

DECISION AND ORDER

The appeal is denied. The Auditor's decision denying an adult entertainment dance studio license is affirmed.

Corrected Decision issued this 16th day of December, 2011.

Millie M. Judge, Hearing Examiner

EXPLANATION OF RECONSIDERATION and APPEAL PROCEDURES

The Decision of the Hearing Examiner is final and conclusive with right of appeal to the Superior Court. However, reconsideration by the Examiner may also be sought by one or more Parties of Record as provided by SCC 2.02.170. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 2.02 SCC and the respective Examiner Rules of Procedure.

Reconsideration

Any Party of Record may request reconsideration by the Examiner pursuant to SCC 2.02.170. A Petition for Reconsideration must be filed in writing with the Office of the Hearing Examiner, 3000 Rockefeller Avenue, M/S #405, Everett WA 98201, on or before **DECEMBER 27, 2011**. There is no fee for filing a Petition for Reconsideration. The person filing for reconsideration (known as the "petitioner"), shall mail or otherwise provide a copy of the petition of reconsideration to all parties to the appeal on the date of filing. SCC 2.02.170(1)

The petition for reconsideration does not have to be in any special form but must:

- (a) Contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner's attorney, if any;
- (b) Identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested;
- (c) State the relief requested; and,
- (d) Where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner's decision;
- (c) The Hearing Examiner committed an error of law;

- (d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record; or
- (e) New evidence which could not reasonably have been produced and which is material to the decision is discovered.

Petitions for Reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 2.02.170. Please include the County file number in any correspondence regarding this case.

Appeal

This decision of the Hearing Examiner is final and conclusive and is reviewable by an action for Writ of Review filed in Snohomish County Superior Court **within 21 days**. (SCC 2.02.195) Where reconsideration has been sought by any party, no action for judicial review may be filed until the reconsideration process has been completed. NOTE: No action for judicial review by the petitioner for reconsideration may raise an issue which he/she did not raise during the reconsideration process. (See, SCC 2.02.195(1))

The Hearing Examiner's Office cannot provide you with legal advice. For more information about appeals to Superior Court, please see Chapter 2.02 SCC, applicable Superior Court Civil Rules or consult with your attorney.

The cost of transcribing the record of proceedings, of copying photographs, video tapes, and oversized documents, and of staff time spent in copying and assembling the record and preparing the return for filing with the court shall be borne by the petitioner. [SCC 2.02.195(1) (b)] Please include the County file number in any correspondence regarding this case.

Staff Distribution:

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PARTIES OF RECORD REGISTER
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