IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Case No. 30380

STATE OF NEW MEXICO
CITY OF ALBUQUERQUE,

Appellee,

v.

PANGAEA CINEMA LLC d/b/a
GUILD CINEMA LLC,
HENLEY, KEIF, Registered Agent,

Appellants.

Appeal from the Second Judicial District Court, County of Bernalillo
(The Honorable Carl J. Butkus)

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee City of Albuquerque ("Appellee City" or "City of Albuquerque) is a homerule municipality. RP 95.

Appellant is Pangaea Cinema, LLC, d/b/a Guild Cinema ("Appellant" or "Pangea Cinema"). Appellant held an event called the Pornotopia Erotic Film Festival at the Guild Cinema at 3405 Central Ave., N.E. in the City of Albuquerque, County of Bernalillo, from November 14 - 16, 2008. RP 118. This was the second time that such an erotic film festival had been held by Appellant at this location. RP 118-119. The theater owned by Pangaea Cinema is in an area zoned as Community Commercial Residential One (CCR-l) in the Nob Hill Highland Sector Development Plan. RP 120. The CCR-1 land use category corresponds to the C-2 Community Commercial Zone in the Zoning Code, for non-residential uses. RP 120. This area is not zoned for adult amusements. RP 120.

The film "Couch Surfers, Trans Men in Action" was shown by Appellant on November 15, 2008. RP 119. "Couch Surfers, Trans Men in Action," contained an emphasis on females'/males' specified anatomical areas and females and males conducting specified sexual activities, defined in the zoning code as 'adult amusement." RP 119. Two City of Albuquerque zoning officers viewed the film on assignment. RP 119. A Criminal Complaint was filed by the City Appellant charging Appellant with "operating as an 'Adult Amusement Establishment' in a

Community Commercial Zone." RP 119.

"Adult Amusement Establishment" is defined in § 14-16-1-5(B) as follows:

> "ADULT AMUSEMENT ESTABLISHMENT. An establishment such as an auditorium, bar, cabaret, concert hall, nightclub, restaurant, theater, or other commercial establishment that provides amusement or entertainment featuring one or more of the following:
>
> > (1) A live performance, act or escort service distinguished or characterized by an emphasis on the depiction, description, exposure, or representation of specified anatomical areas or the conduct or simulation of specified sexual activities; Or
> >
> > (2) Audio or video displays, computer displays, films, motion pictures, slides or other visual representations or recordings characterized or distinguished by an emphasis On the depiction, description, exposure or representation of specified anatomical areas or the conduct or simulation of specified sexual activities."

In addition, § 14-16-1-3(B), ROA 1994 provides that: "(B) Any use not designated a permissive or conditional use in a zone is specifically prohibited." § 14-16-2-17(A) identifies permissive uses. § 14-1 6-2-17(A)(13) states:

> "(13) Retailing of any consumer product and provision of any customer, personal, or business service, except adult amusement establishments and adult stores, hospitals for human beings and transit facilities, provided it is not listed as a conditional use in this Zone, or as a permissive or conditional use listed for the first time in the C-S zone.

§ 14-16-2-17(B) identifies conditional uses. It does not include adult amusement establishments.

Pangea Cinema does not routinely show adult films. RP 120. "Couch Surfers, Trans Men in Action" did not cause any negative secondary effects to

businesses on the same street as the Guild Cinema or to the neighborhood ('Nob Hill') generally and did not attract any criminal activity to the neighborhood. See RP 123.

After conviction in Metropolitan Court, Appellant appealed de novo to the District Court.

The parties filed a "Joint Stipulated Facts And Stipulated Exhibits" (Stipulation) in District Court May 14, 2009. RP 118. In the Stipulation, the parties stipulated that "a facial challenge to the city ordinance" was not involved in the case: "Defendant will not be asserting a facial challenge to the city ordinance, but only an as-applied challenge." RP 118.

Appellant's "Motion To Dismiss" (Motion) was filed May 20, 2009. RP 138. In its Motion, Appellant stated: "Defendant's argument herein is pled solely under Article 11, § 17 of the New Mexico Constitution, which grants broader free speech rights than the First Amendment to the United States Constitution." RP 140-141.

The District Court affirmed the Metropolitan Court's findings and found that Appellant violated the ordinance. RP 243. Appellant then filed a Motion for Reconsideration. RP 249-262, which the City argues is actually a motion for a new trial and was therefore untimely. RP 268-270. The District Court, which saw this as a "procedural conundrum," SRP 380, briefly discussed the law but ultimately

determined the motion's purpose was to ask the District Court to engage in a new facial challenge. SRP 380-385. The District Court recognized the careful work the parties had done in crafting and focusing a narrow argument and denied the request. SRP 385.

ARGUMENT

The principal issue is whether the City of Albuquerque can enforce its stipulated facially valid adult entertainment and amusement zoning laws against a theater for showing of a film which fell under the definition of an "Adult Amusement Establishment," where that single showing, by itself and considered in isolation, produced no negative secondary effects.[1]

I. STANDARD OF REVIEW

The City Appellee agrees Appellant that the appellate courts review constitutional questions and issues of statutory construction de novo. In a vagueness analysis, there is "[a] strong presumption of constitutionality underlies each legislative enactment, and the party challenging constitutionality has the burden of proving a statute is unconstitutional beyond all reasonable doubt." State v. Laguna, 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896.

[1] Although the Appellee addresses the merits of the appeal, the Appellee is concerned about the Court of Appeal's jurisdiction to hear this claim because of what the Appellee believes is an untimely motion for a new trial in the District Court. See RP 268-270. Further, the District Court Judge was aware of this conundrum but opted instead to address the Appellant's Motion for Reconsideration. SRP 379-386.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLANT'S CONDUCT IN SHOWING "COUCH SURFERS, TRANS MEN IN ACTION" VIOLATED CITY OF ALBUQUERQUE'S ADULT AMUSEMENT ZONING ORDINANCE, §14-16-1-5(B), ROA 1994

At issue is the City of Albuquerque's adult amusement zoning ordinance, §14-16-1-5(B), ROA 1994, which in pertinent part defines "adult amusement establishment" as:

> ADULT AMUSEMENT ESTABLISHMENT. An establishment such as an auditorium, bar, cabaret, concert hall, nightclub, restaurant, theater, or other commercial establishment that provides amusement or entertainment *featuring one or more of the following*:
> ...
> (2) Audio or video displays, computer displays, films, motion pictures, slides or other visual representations or recordings characterized Or distinguished by an emphasis on the depiction, description, exposure or representation of specified anatomical areas or the conduct or simulation of specified sexual activities.

(emphasis added). § 14-16-l-5(A)(2), ROA 1994, further provides that: "(2) The singular includes the plural. The plural includes the singular."

The District Court correctly concluded that Appellant's conduct violated the Appellee City's Adult Amusement ordinance. RP 222. However, the issue of statutory interpretation should have been precluded based on the stipulations of the parties, which had been carefully crafted to present a single but multifaceted issue to the District Court.

A. The Parties Entered into Stipulations that Should have Precluded the Necessity of Statutory Interpretation of Albuquerque's Adult Amusement Zoning Ordinance, 14-16-1-5(B), ROA 1994

The Appellant Pangea Cinema assured the Appellee City and the District Court that it was bringing only a constitutional defense. In fact, the statutory interpretation issue was first raised by a response to a question by the District Court during oral argument of the case---it was not raised in the Metropolitan Court and it was not raised in Appellant's Motion to Dismiss in the District Court. Appellant's argument to the District Court was basically concluded when the Court's question came. TR vol. 1 at 18. The Joint Stipulation states: "The parties submit that these stipulations abrogate the need to call witnesses at the trial or the hearing on Defendant's motion to dismiss in this matter." RP 118. This Stipulation has never been revoked or modified. It is still binding on both parties. See SRP 385.

The parties worked hard on the Joint Stipulations and the District Court was appreciative. RP 219. If the interpretation of the ordinance was to be an issue it would have been defined in the stipulations and the City would have called a zoning official as a witness to testify as to the City's consistent interpretation of § 14-16-l-5(A)(2), ROA 1994, since deference is given by the courts to the interpretation of the ordinance by those charged with administration, Texas National Theatres v. City of Albuquerque, 97 N.M. 282, 286, 639 P.2d 569, 573

(1982); Harris Books, Inc. v. City of Santa Fe, 98 N.M. 235, 236, 647 P.2d 868, 869 (1982).

Appellant should not be permitted to dodge the clear implication of the voluntary stipulations. The courts should encourage carefully crafted stipulations since they save time and money. See, e.g., Rule 5-102 (B). This Court should find that Appellant waived any contention that the ordinance did not apply to the facts of this case because it is clear that this was never meant to be an issue.

B. The District Court Correctly Construed "Featuring" in Albuquerque's Adult Amusement Zoning Ordinance, §14-16-1-5(B), ROA 1994, to Include the Conduct Stipulated to by Appellant

Without the benefit of any testimony, and despite the fact that the issue was not identified in the stipulations, the District Court accurately interpreted the ordinance. There is no question that the showing of the film "Couch Surfers, Trans Men in Action" occurred in a location not zoned for adult amusement. In addition, the parties stipulated that 'Couch Surfers, Trans Men in Action,' contained an emphasis on females'/males' specified anatomical areas and females and males conducting specified sexual activities, defined in the zoning code as 'adult amusement.' RP 119.

The ordinance requires two things: (1) an "establishment," and (2) an "amusement or entertainment" containing an emphasis on specified anatomical areas and showing sexual acts. Both elements were clearly present in this case.

The 'establishment' was the Pangea Cinema also known as the Guild Theater. The term "establishment" in § 14-16-1-5 (B) is given a broad definition that explicitly includes "an auditorium...[or] concert hall." In fact, if Appellant's interpretation is accepted, it is hard to imagine an auditorium or concert hall in the City of Albuquerque that would regularly present or have as predominate business purpose the showing or selling of the things listed in § 14-16-1-5 (B) (1 & 2 of "Adult Amusement Establishment" definition). The 'amusement or entertainment' was the presentation of the film "Couch Surfers, Trans Men in Action."

A plain reading of the text demonstrates that the term "featuring" in the ordinance modifies "amusement or entertainment," not the 'establishment' as contended by Appellant. "Featuring" also must be given its plain meaning as "a prominent element or item." **The Scribner-Bantam English Dictionary** (Bantam Books: New York, 1979) p. 330. As noted by the District Court, a single film can obviously be a "feature." Movie theaters and television stations frequently advertise the presentation of a "feature" film. RP 221.

III. THE DISTRICT COURT PROPERLY DECIDED THAT THE PRINCIPAL OF INTERSTITIAL EVALUATION ART. II, § 17 OF THE NEW MEXICO CONSTITUTION AND THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION ARE THE SAME

Appellant cites City of Farmington v. Fawcett, 114 N.M. 537, 843 P.2d 839 (Ct. App. 1992) for the proposition that there are textual differences between N.M. Const. art II, § 17 and the First Amendment of the U.S. Const. entitling Appellant

to more protection under the former provision. Fawcett notes that the language in Article II, Section 17 of the New Mexico Constitution only "differs somewhat from the Article II, Section 17 of the New Mexico Constitution First Amendment of the United States Constitution", and that "it is virtually identical to the language adopted by thirty-nine other states..." Id. at 541. This slight difference does not aid Appellant's effort to avoid compliance with content neutral zoning laws such as the one at issue here.

First, Fawcett is an obscenity case. Obscenity cases are inextricably linked to the prurient interests of the community such that local standards may be different. An ordinance outlawing obscene material is hardly content neutral. Obscenity is not an issue in this case. The Appellant, by failing to attack the constitutional validity of the underlying ordinance, has conceded that the zoning ordinance at issue is content neutral and agrees this is not an obscenity case. The District Court correctly found that the ordinance is a valid time, place and manner restriction. RP 222-223.

Second, State v. Cardenas-Alvarez, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225 (2001), provides a framework for analysis when a party claims relief under both constitutions. The New Mexico Constitution gives an individual more protection under its counter-part to the United States Constitution only if "interstitial analysis" mandates such enhanced protection:

> Pursuant to *Gomez* [1997-NMSC-006, ¶19, 122 N.M. 777, 783, 932 P.2d 1, 7], we ask: (1) whether the right being asserted is protected under the federal Constitution; (2) whether the state constitutional claim has been preserved; and (3) whether there exists one of the three reasons for diverging from federal precedent . . . a state court may diverge from federal precedent for one of the following three reasons: "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."

Cardenas-Alvarez, 2001-NMSC-17, ¶ 18.

In applying the above interstitial analysis to Article II, § 17, of the New Mexico Constitution, the federal court in American Ass'n of People with Disabilities v. Herrera, 580 F.Supp.2d 1195, 1224 (D.N.M., 2008) found that:

> No New Mexico case law suggests that the federal analysis of content-neutral laws that impact speech is flawed. In fact, the New Mexico courts have held that such content-neutral laws are treated the same under both the federal and state constitutions. *See State v. Rendleman,* 2003-NMCA-150, ¶ 58, 134 N.M. 744, 760, 82 P.3d 554. *See Temple Baptist Church, Inc. v. City of Albuquerque,* 98 N.M. 138, 146, 646 P.2d 565, 573 (1982) (applying federal analysis and citing federal case law in discussion content neutral regulation of speech).

Thus, the court in Herrera concluded that "the federal and state [of New Mexico] constitutional protections are the same." Id. The District Court arrived at the same conclusion in this case. RP 223.

This result is not unique to New Mexico. For example, in D.H.L. Assoc., Inc. v. Board of Selectmen of Tyngsborough, 64 Mass.App.Ct. 254, 833 N.E.2d 149 (Mass.App.Ct., 2005), the Appeals Court of Massachusetts found that its state constitution and the First Amendment of the U.S. Constitution were the same when

a municipality employs its zoning power in manner so as not to completely ban or prohibit a constitutionally protected form of expressive conduct, but rather confined such conduct to a particular zoning district in order to advance substantial governmental interests such as curbing crime, preserving property values, and minimizing dangers to public health. Id. at 256.

The City Appellee relied on numerous studies and other evidence concerning the substantial government interest in alleviating the adverse secondary effects of adult entertainment/amusement establishments in passing the ordinances at issue here. RP 163 and 123. It is also clear that the City Appelle does not completely ban adult entertainment or adult amusement establishments and that at least 5% of the land within the borders of the City of Albuquerque are available for such uses under current City zoning laws. *See* RP 120. Appellant is free to commercially show films such as "Couch Surfers, Trans Men in Action" in Albuquerque once or as many times as it wants, so long as Appellant does so in a properly zoned area.

IV. THE CITY OF ALBUQUERQUE'S ADULT AMUSEMENT ZONING ORDINANCE, §14-16-1-5(B), ROA 1994, IS NOT UNCONSTITIONALLY VAGUE AS-APPLIED

As pointed out by the District Court, "Facial validity has been stipulated in this case." RP 231. No matter how the Appellant attempts to slip and slide around, over and under this stipulation, the conceded constitutional validity of the City

Appellee's ordinance directly impacts and weakens an as-applied attack, to which the District Court agreed. See RP 226. For the reasons stated by the District Court, RP 226-243, and for the reasons described below, the ordinance is a valid, unambiguous, and content neutral time, place, and manner regulation as applied to this instance. "That means: (1) the City ordinance is justified without reference to the content of the regulated speech; (2) the ordinance is narrowly tailored to serve a significant governmental interest in curbing adverse secondary effects; [and] (3) the ordinance leaves open ample alternative channels for communication." RP 226 (citations omitted).

A. Albuquerque's Adult Amusement Zoning Ordinance, §14-16-1-5(B), ROA 1994 is designed to serve a Substantial Governmental Interest, is Not Content Based, and Reasonable Alternative Avenue of Communication Remain Open to Appellant

Since the movie "Couch Surfers, Trans Men in Action," and others like it, can be viewed or purchased for viewing at numerous properly zoned adult entertainment and adult book stores throughout the City, the Appellant is hard pressed to make a case that the City opposes the content of such films rather than the negative secondary effects that adult amusement establishments in such a zone would bring. As noted above, at least 5% of land within the borders of the City of Albuquerque is available for adult entertainment or adult amusement establishment use under current municipal laws. In addition, there are approximately 9 adult amusement establishments that could lawfully show "Couch Surfers, Trans Men in

Action" within the City given current City zoning laws and where consumers of such fare could view it lawfully. RP 87. Thus, this is a zoning land use case involving an adult business establishment, not an 'obscenity' case. Therefore, cases involving obscenity ordinances like City of Farmington v. Fawcett, 114 N.M. 537, 843 P.2d 839 (Ct. App. 1992) and other such cases cited by Appellant are simply not relevant or helpful.

1. The City Appellee's Enforcement Action in This Case Passes the Free Speech Analysis of Zoning Limits on Speech and Supreme Court Tests.

The City Appellee's enforcement action against the Pangea Cinema has to be understood in the context of the legal history of adult amusement zoning law. It was not until 1976 that the Supreme Court first dealt with a zoning ordinance concerning adult business. In Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976), the Supreme Court upheld a Detroit ordinance requiring that adult theaters be licensed and a Detroit zoning ordinance providing that, absent a waiver from the zoning commission, an adult theater could not be located within 1000 feet of any other regulated use, which included 10 types of establishments as well as adult theaters. The Detroit ordinance defined adult theaters as establishments characterized by an emphasis on movies relating to specify sexual activities or specified anatomical areas. Id.

This Detroit ordinance became the beginning point for review of all ordinances coming later because of its approval by the Supreme Court. The

ordinance contained findings that established that it was recognized that there are some uses which because of their very nature are recognized as having serious objectionable, "operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to ensure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood." Id. at 54 n.6. It was established in the record of the case in Young that in the opinion of urban planners and real estate experts, the location of several adult businesses in a neighborhood attracts transients, adversely affects property values, increases crime (particularly prostitution) and encourages residents and businesses to move elsewhere. Id. at 55

The challenges by adult businesses to the Detroit ordinance included a vagueness challenge under the due process clause, a First Amendment challenge that this ordinance was a prior restraint on protected communication, and that the classification of theaters based upon the content of their exhibitions violated the equal protection clause of the Fourteenth Amendment. The Court found the ordinance constitutional on each point. On the First Amendment issue in Young, there was no claim that the theaters were denied access to the market, but instead the claim focused on the fact that the 1000-foot restriction is an impermissible prior restraint on protected communication. Id. at 62. The Supreme Court held that

Detroit's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support a restriction applicable to all adult theaters within it's city limits. Id. at 63

The Court then turned to the claim that the Detroit ordinance violated the equal protection right of the adult theaters since the ordinance only applied to adult theaters and not theaters of a general nature. The Court upheld the ordinance on the basis that it was a content neutral ordinance because it did not focus on the content of the films and treated all adult theaters, regardless of what they were showing, in the same manner. Id. at 72-73.

Ten years later, in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Supreme Court upheld an ordinance that clearly articulated the adverse affects of adult amusements that the city was attempting to regulate. Id. at 54. The City of Renton, Washington, chose to address its growing concerns over adult amusement by first enacting a moratorium on opening the adult amusements in the community until they could be addressed through ordinance by the city. Id. at 44. Approximately a year later an ordinance was enacted by the city based upon a review of findings from Seattle and other communities of the serious community problems created by adult motion picture theaters. Id. An ordinance was enacted that prohibited adult motion picture theaters from locating within 1000 feet from any residential zone, single or multiple family dwellings, church, park or school.

Id. at 41.

The ordinance left approximately 520 acres within that city, which equaled more than 5% of the entire land area open for the location of adult businesses. Id. at 53. The Court began its First Amendment analysis by determining that the ordinance would properly be analyzed as a time, place and manner regulation. The Court found that:

1) the ordinance was a content neutral speech regulation since it was designed to combat the secondary effects of the adult theaters and not to regulate the content of the speech;

2) the ordinance was designed to serve a substantial government interest in protecting the community;

3) the ordinance allowed for reasonable alternative avenues of communication;

4) the city was entitled to rely on the experience of other cities in enacting a zoning ordinance for adult motion picture theaters; and

5) there was no constitutional defect in the method chosen by the city to further its substantial interests.

See id.; In re Town of Islip v. Caviglia, 73 N.Y.2d 544, 552, 540 N.E.2d 215, 218 (N.Y. 1989)

The Court found that the City of Renton did not use its power to zone as a pretext for suppressing expression, but rather sought to make some areas available for adult amusement while preserving the quality of life in the community. Id. at 54. It is important to note that the Court in Renton found that the land made

available in Renton for the location of these businesses did not have to be open, available land at bargain prices, but simply had to place the adult amusements on equal footing in the real estate market with other prospective purchasers and lessees. See id.

The City Appellee's ordinances at issue are likewise constitutional because: (1) the City of Albuquerque regulated pursuant to a legitimate governmental power; (2) the zoning regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating negative secondary affects; and (4) the regulation is designed to serve a substantial governmental interest, is narrowly tailored, and reasonable alternative avenues of communication remain available, or, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest.

The District Court correctly concluded that the ordinance is not vague as-applied. In fact, the ordinance is so clear and unambiguous that Appellant voluntarily stipulated or admitted that: (1) the ordinance is facially valid; RP 118 ; (2) that the ordinance applied to the zone in which Appellant conducted its business; RP 120; (3) the fact that the film it showed met the definition of an 'adult amusement' in that it contained an emphasis on specified anatomical areas and

specified sexual activities and thereby violated the ordinance; RP 119; and (4) that the ordinance is lawfully applied in other instances. See RP 222.

2. A Showing of Negative Secondary Effects is Not Constitutionally Required

It is not a constitutional or even a logical requirement that the City Appellee show adverse secondary effects stemming from the showing of this particular film on the specific date and time alleged in the complaint filed against the Appellant. The City Appellee, having validly forbidden adult use within the zone that the Appellant is situated, need not show that the Pangea Cinema generated negative secondary effects on or about the date and time cited in the complaint. Independence News, Inc. v. City of Charlotte, 568 F.3d 148, 155-157 (4th Cir. 2009). See also, City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 284, 531 S.E.2d 518, 521 (S.C., 2000) ("Municipalities do not have to show negative secondary effects in order to enforce adult zoning provisions.").

In BZAPS, Inc. v. City of Mankato, 268 F.3d 603 (8th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), in upholding a city ordinance that prevented a bar from having a single adult entertainment performance was constitutionally valid, correctly applied Renton, *supra*, and reasoned as follows:

> Once a city has decided to regulate adult entertainment to prevent its secondary effects, however, the city is not required to prove that a particular adult use creates secondary effects before regulating that

> use, so long as the city reasonably believes that the use is related to other uses that have been shown to cause secondary effects. ... [O]nce a city has validly forbidden adult uses within a particular area, it may enforce that ordinance against all adult uses in that area without showing that a particular use will produce secondary effects. Renton, 475 U.S. at 52-53, 106 S.Ct. 925, does not require cities to discriminate among adult uses; it merely requires that laws of this type not sweep so broadly as to regulate establishments that never present adult entertainment ... The Mankato ordinance is narrowly tailored to apply solely to a "category of [establishments] shown to produce the unwanted secondary effects," Renton, 475 U.S. at 52, 106 S.Ct. 925, namely, establishments that present adult entertainment. If we were to accept BZAPS's argument, a city would have the burden of showing precisely how many adult performances were capable of producing an unacceptable level of antisocial activity before the city could regulate those performances. We are satisfied that neither the first amendment nor Supreme Court precedent requires a city to do the impossible.

268 F.3d at 606-607.

The Appellant's argument is equivalent to a person cited for burning a log in his fireplace during a 'no burn' night complaining that there is no evidence that his particular burning log adversely affected the air quality and producing affidavits from his neighbors that they like the smell of the burning cedar. The adverse secondary effects go to the combined effect of many burning fireplaces. Similarly, it is the combined effect of adult amusement establishments in a zoned area that causes the negative secondary effect.

If the Appellant is legally successful here, the City can reasonably fear that other theaters like the Appellant will move into the zone to show adult entertainment on a periodic but not constant basis. One might show adult

entertainment only three days a week. Another might show two non-adult films for every one adult film. How many films featuring adult entertainment must be shown before the City can ban them all in that zone? The BZAPS court quoted above is correct to reason that it will be impossible to know.

The Appellee posits a factual and legal view that is static and narrow, but the City of Albuquerque zoning ordinances, and the constitutional standards under which they were passed and enforced, recognize a dynamic and broad view of land use conduct. See West Bluff Neighborhood Assoc. v. City of Albuquerque, 2002-NMCA-075 ¶ 33, 132 N.M. 433, 442, 50 P.3d 182, 191 (finding that "because the needs of a municipality do not remain static, planning goals and policies must be flexible in order to adapt to fluctuating community needs and growth patterns.") (overruled on other grounds). Appellant would have this Court myopically center its attention on a single theater in a single point in time without looking at the larger and more dynamic picture that zoning laws address. Individual harms when viewed in isolation may be *de minimis*, but the cumulative effect of many individuals engaging in the same conduct causes harm, and so each individual is forbidden in engaging in that conduct. The zoning laws legislate over a class of behaviors but pragmatically must enforce against particular individuals or businesses on a particular day for particular behavior that fall under that class.

The entire area in which the Pangea Cinema conducts its business is not zoned for adult entertainment, and therefore the Pangea Cinema may not behave as an adult entertainment establishment even though the secondary negative effects of that behavior is negligible. The City relied on numerous studies and other evidence concerning the substantial government interest in alleviating the adverse secondary effects of adult entertainment/amusement establishments in passing the ordinances at issue here. RP 123. The Appellant does not challenge these facts. Appellant does not challenge that its behavior falls under the class of behaviors forbidden.

The constitutional law regarding adult entertainment zoning recognizes and embraces the dynamic and broad view, which is at the heart of all zoning ordinances. There is simply no constitutional requirement that the City show a discreet secondary harmful effect from a single event.

CONCLUSION

The City of Albuquerque's adult amusement establishment provisions, §14-16-1-5(B), ROA 1994, which are part of its comprehensive zoning ordinance, are constitutional and are constitutionally applied in this case. The District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of *Response Brief of Appellee* was mailed to the following on 2nd day of May, 2011:

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STATEMENT OF COMPLIANCE WITH RULE 12-213(F) NMRA

Undersigned counsel certifies that the body of this response brief has a total of 5,164 words, is in 14-point font, is proportionately spaced, and complies with Rule 12-213 (F) NMRA. The brief was created using MS Word 2003, and that program was used to obtain the above word count.

RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

When citing to the record proper and the supplemental record proper, counsel for Appellee uses the numbers assigned by the clerk to the trial court in preparing the record for transmission to the Court of Appeals, e.g., RP.