

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

June 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 97-0427-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**VILLAGE OF BONDUEL,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ELDORADO'S ADULT PARTY STORE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Shawano County:  
EARL SCHMIDT, Judge. *Affirmed.*

CANE, P.J. Eldorado's Adult Party Store appeals a judgment holding that it had violated the Village of Bonduel's ordinance by operating an adult-oriented establishment without a required Village license.<sup>1</sup> It is undisputed that Eldorado's did not obtain a license from the Village to operate its store where

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

adult party items were sold. Eldorado's contends however that because the store contains no booths, rooms, compartments or stalls separate from the common areas of the premises for viewing adult movies or watching adult entertainment, it is not an adult-oriented establishment as defined in Bonduel's Village ordinance and therefore a license is not required. This court rejects Eldorado's argument and affirms the judgment.

The store was operated as a retail establishment on Bonduel's main street with a sign displaying its identity as "ELDORADO'S ADULT PARTY STORE." It sold adult items including XXX rated videos, sexual devices such as artificial penises and vaginas, and magazines exhibiting explicit nudity. There were no booths, cubicles, rooms, compartments or stalls separate from the common area where the adult items were sold, nor was there ever an entertainer providing adult entertainment.

The relevant portion of the ordinance states:

(1) DEFINITIONS: For the purpose of this section, the terms used shall be defined as follows:

(a) Adult-Oriented Establishment. Includes, but is not limited to, "adult book, sexual novelties & device stores," "adult motion picture theaters," *further means* any premises to which public patrons or members are invited or admitted and which are so physically arranged so as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purposes of viewing adult-oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, whether or not such adult entertainment is held, conducted operated or maintained for a profit, direct or indirect.

(b) Adult Bookstore. An establishment having as its stock in trade, for sale, rent, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals which are distinguished or characterized by their emphasis on matters depicting, describing or

relating to "specific sexual activities" or "specified anatomical areas," as defined below, and, in conjunction therewith, have facilities for the presentation of adult entertainment, as defined below, including adult-oriented films, movies or live performances, for observation by patrons therein.

....

(2) LICENSE REQUIRED.

(a) No adult-oriented establishment shall be operated or maintained in the Village without first obtaining a license to operate, issued by the Village. (Emphasis added.)

Eldorado's contends that the phrase "further means" in the definition of adult-oriented establishment limits or qualifies the preceding language so as to indicate that the ordinance covers only those premises that have booths or other facilities for on-site viewing or provides on-site adult entertainment. Because it does not have these physical facilities, it reasons that it is not subject to the ordinance. Read otherwise, it reasons the ordinance is unconstitutionally vague or overbroad. This court notes that Eldorado's does not challenge the Village's authority to license or regulate adult-oriented establishments.

The interpretation of an ordinance and its application to undisputed facts is a question of law which the appellate court reviews without deference to the trial court. *Browndale Int'l, Ltd. v. Board of Adj.*, 60 Wis.2d 182, 199, 208 N.W.2d 121, 130 (1973). This court agrees with the trial court that the ordinance is sufficiently precise to give notice to sellers of adult material that licensing is required. An adult-oriented establishment is defined in the disjunctive and without an attempt to make an all-inclusive list of proscribed conduct, but rather to indicate the general types of adult-oriented establishments to be regulated through licensing. A common-sense reading of the ordinance indicates that among the establishments covered under the ordinance are also those facilities where booths,

cubicles, rooms, compartments or stalls are provided for the public to view adult-oriented motion pictures or live adult entertainment. It does not, however, as suggested by Eldorado's, include only those facilities that are physically arranged for viewing adult entertainment or adult motion pictures.

Next, Eldorado's argues that the trial court's reading of the ordinance results in the ordinance being unconstitutionally vague or overbroad. Although this case is on appeal without a transcript, the Village contends that this issue was never presented to the trial court. Eldorado does not dispute this contention. Propositions of the opposing side are taken as confessed when not refuted. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Appellate courts will generally not review an issue raised for the first time on appeal. *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Therefore, because this issue was not preserved for appeal, this court declines to review this issue.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

