COURT OF APPEALS DECISION DATED AND FILED

March 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP646

Cir. Ct. No. 2003CV1264

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

WISCONSIN GIFTS, INC. D/B/A CUPID'S TOYS,

PLAINTIFF-APPELLANT,

V.

CITY OF OAK CREEK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Wisconsin Gifts, Inc. ("WGI"), doing business as Cupid's Toys, appeals from an order granting summary judgment dismissing WGI's complaint for a declaratory judgment that the comprehensive adult entertainment ordinances and a new zoning ordinance adopted by the City of Oak

Creek ("City") are both unconstitutional. The trial court concluded that the ordinances were constitutional and therefore granted summary judgment in the City's favor. We affirm because we conclude that WGI did not establish disputed material facts tending to make a *prima facie* case that the ordinances in question are unconstitutional.

BACKGROUND

¶2 WGI is a corporation. It is currently owned by Kathleen Rothen. WGI has been doing business at the same location on South 27th Street in Oak Creek since 1981; its current name is Cupid's Toys.[1] WGI, which sells adult entertainment materials, does not allow individuals under the age of eighteen in its retail establishment.

¶3 In 1981, WGI's store was in a B-3 zoning district and was issued an occupancy certificate for a gift shop. Its sale of adult entertainment materials was a permitted use. In 1983, the City adopted a new zoning ordinance that created a B-5 zoning district where adult businesses could operate as permitted uses. Because WGI's South 27th Street location was not in the B-5 zone, WGI's store became a legal nonconforming use.[2]

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[1] At one point the business used the name Naughty But Nice. The record does not reflect whether the business has operated under other names as well.

[2] WISCONSIN STAT. § 62.23(7)(h) (2003-04) defines nonconforming uses:

> The lawful use of a building or premises existing at the time of the adoption or amendment of a zoning ordinance may be continued although such use does not conform with the provisions of the ordinance. Such nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building shall not during its life exceed 50 per cent of the assessed value of the building unless permanently changed to a conforming use. If such nonconforming use is

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¶4 In 1991, the previous owner of WGI expanded the facility without obtaining a permit from the City. City officials advised WGI that this amounted to an illegal expansion of a nonconforming use. Ultimately, WGI removed the expansion.

¶5 In 2002, the City proposed changes to its zoning and licensing of adult entertainment businesses. The City's Common Council reviewed the matter at length, consulting studies from other cities and materials from the National Obscenity Law Center regarding the secondary effects of adult entertainment businesses on the community. A public hearing was held on August 20, 2002, which over one hundred citizens attended. The majority of those individuals in attendance opposed the proposed changes to the ordinances out of a concern that the new ordinances could lead to the expansion of adult entertainment businesses. Despite this opposition, the Common Council adopted the proposed ordinances.

¶6 The ordinance related to adult entertainment businesses is Oak Creek Code of Ordinance ("C.O.O.") § 7.203. It defines an "adult entertainment business" as "any establishment providing adult entertainment as defined herein, including, but not limited to, adult arcade, adult bookstore, adult novelty store, adult video store, adult motion picture theater, and exotic dance studio…." and then defines each of those categories of establishments in greater detail. Sec. 7.203(3)(b). As relevant to this case, § 7.203(3)(b)(4) defines "adult retail establishment" as:

> any bookstore, adult novelty store, adult video store, or other similar commercial establishment, business, service,

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> discontinued for a period of 12 months, any future use of the building and premises shall conform to the ordinance.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> or portion thereof, which for money or any other form of consideration provides as a significant or substantial portion of its stock-in-trade the sale, exchange, rental, loan, trade, transfer, and/or provision for viewing or use off the premises of the business adult entertainment material as defined in this section. For purposes of this provision, it shall be a rebuttable presumption that thirty (30) percent or more of a business' stock-in-trade in adult retail material, based on either the dollar value (wholesale or retail) or the number of titles of such material, is significant or substantial.

Section 7.203(3)(b)(4) also provides a procedure for determining whether an establishment falls within the definition of adult retail establishment. *See **id.*** Another part of the ordinance, § 7.203(3)(c), defines "adult entertainment material" as:

> any books, magazines, cards, pictures, periodicals or other printed matter, or photographs, films, motion pictures, video tapes, slides, or other photographic reproductions, or visual representations, CD roms, DVDs, disks, electronic media, or other such media, or instruments, devices equipment, paraphernalia, toys, novelties, games, clothing or other merchandise or material, which are characterized by an emphasis on the depiction, description or simulation of "specified anatomical areas" or "specified sexual activities."

Id.[3]

¶7 The new ordinances also included the adoption of a licensing system for employees and managers of adult entertainment businesses. *See* C.O.O. § 7.203(4)-(9). This included a $1600 licensing fee for new applications for adult entertainment businesses (with a $1000 renewal fee) and licensing fees for each full-time and part-time employee ($40 annually) and each manager and assistant

[3] The parties do not appear to quarrel with the accuracy of this definition of adult entertainment material. When we refer to "adult entertainment material" throughout this opinion, we are referring to those materials that fall within the definition in C.O.O. § 7.203(3)(c).

manager ($250 annually). *See* §§ 3.40(c)(1)[4] and 7.203(5). These fees were set based on the City's estimate of hours needed to conduct activities related to licensing, such as processing adult entertainment business license applications and renewals, conducting background checks, processing employee licenses and conducting monthly inspections. On December 5, 2002, the City notified WGI that it had sixty days to submit the appropriate paperwork and fees to apply for licenses for its business, managers, assistant managers and employees, which were now required under the adult entertainment business ordinance.

¶8 Another one of the adopted ordinances affected zoning. *See* C.O.O. § 17.0317(a). The zoning at WGI's location changed from B-3 to B-4. In addition, the only area where adult entertainment businesses could operate as a permitted use was a new zoning district called M-1.[5] WGI was not in the M-1 district, but continued to operate as a legal nonconforming use in its present location.

¶9 On December 23, 2002, WGI, through its architect, requested a concept plan review that proposed razing WGI's current building and building a new facility approximately three times as large as the current building at the same location. WGI represented that it would operate its current nonconforming use business (sale of adult entertainment materials) in *less* space in the new facility than it currently used, and that it would have a permitted use business (sale of

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[4] Licensing fees for a wide variety of businesses and events are addressed in C.O.O. § 3.40.

[5] In its brief, WGI complains about the fact that Oak Creek did not designate any specific land as M-1. As WGI has not sought to relocate its building to an M-1 district to operate as a legal conforming use, whether WGI would have standing to seek declaratory judgment on that issue is not before us. *See* ***Chenequa Land Conservancy, Inc. v. Village of Hartland***, 2004 WI App 144, ¶11, 275 Wis. 2d 533, 685 N.W.2d 573.

women's clothing) in the enlarged space. On January 7, 2003, the City rejected WGI's concept plan, explaining:

> This property is currently zoned B-4, Highway Business. An adult book store, the current use of the property, is not a permitted use in this zoning district. Therefore the current use is nonconforming. In investigating your proposed redevelopment it was determined that, based on the standards of Section 17.0901 of the Municipal Code, this nonconforming use may not be extended, enlarged, substituted or moved; and that the structure may not be extended, enlarged, reconstructed, substituted, moved or structurally altered except as to comply with the provisions of the Municipal Code.
>
> Essentially, it appears that a redevelopment of the site to accommodate the current user would not be possible under the terms of the Municipal Code.

WGI did not appeal the decision from the City, nor did WGI formally request a permit for the proposed modifications.

¶10 On February 7, 2003, WGI filed this action in the circuit court seeking a declaration that several ordinances were unconstitutional, based in part on WGI's assertion that it is the only adult entertainment business that falls under C.O.O. § 7.203(3)(b) (defining adult entertainment businesses). Specifically, WGI sought a declaratory judgment finding that: (1) C.O.O. § 17.0901, relating to existing, non-conforming uses, "is ambiguous, vague, overreaching, and otherwise discriminatory and therefore defective"; (2) "the licensing fees charged [WGI] and its employees are unreasonable, not in line with fees charged other businesses in the municipal district and are otherwise discriminatory and unreasonable"; and (3) that C.O.O. § 17.0317(a), defining permitted uses in the M-1 Manufacturing District, "is constitutionally defective for its failure to designate an area of the

municipality Manufacturing-5."[6] WGI also sought a permanent injunction enjoining and restraining the City from enforcing the identified ordinances.

¶11 The City agreed not to enforce C.O.O. §§ 17.0317, 17.0901 and 7.203 against WGI while the case was pending, and a temporary restraining order to that effect was issued on February 7, 2003. Under the temporary restraining order, WGI was forbidden to modify or improve its building without further order of the court.

¶12 The City moved for summary judgment, arguing that the licensing and zoning ordinances were constitutional. WGI opposed the motion, arguing that disputed issues of material fact precluded summary judgment. In a surprising twist, WGI asserted that because it had modified the way it conducts its business, *i.e.*, that the adult entertainment materials it offered for sale constituted less than thirty percent of its inventory and revenues, it was no longer an adult entertainment business. WGI's position contradicted the original complaint, which was based on the theory that WGI could seek declaratory judgment with respect to ordinances that applied to WGI.

¶13 In its brief opposing the City's summary judgment motion, WGI argued that whether WGI was an adult entertainment business and whether the licensing fees were reasonable presented disputed issues of material fact. WGI moved to amend its complaint to assert that it no longer falls within the statutory definition of "adult entertainment business." The amended complaint incorporated by reference the first complaint, but also asserted that WGI was not an adult retail establishment and asked the trial court to "enter a declaratory judgment finding

[6] We were unable to identify a Manufacturing-5 District in the ordinance. This fact is not crucial to our analysis.

that the business operated by [WGI] does not constitute an adult retail establishment as defined by [C.O.O. §] 7.203(3)(b)(4) … and that the City be enjoined and restrained from attempting to prohibit or restrict [WGI's] business[.]" WGI also demanded a twelve-person jury trial.

¶14 In both its reply brief and answer to the amended complaint, the City disagreed with WGI's assertion that it was no longer an adult retail establishment (and therefore no longer an adult entertainment business, which includes adult retail establishments and other establishments, *see* C.O.O. § 7.203(3)(b)). It noted that WGI had been in that business for over twenty years, and that WGI had not responded to the City's request for admissions, including the admission that WGI was an adult entertainment business. Thus, the City argued, that fact was deemed admitted.

¶15 On January 26, 2004, the City moved to dismiss WGI's amended complaint. The City asserted that the Common Council could consider numerous factors in determining whether a business is an adult retail establishment. Among the factors it may consider is whether thirty percent or more of an establishment's inventory is, or revenue is derived from, adult entertainment materials. *See* C.O.O. § 7.203(3)(b)(4). The City argued:

> Now that an issue has been raised as to whether [WGI's] business is an adult entertainment business that determination is to be made by the Oak Creek Common Council. The circumstances of this case have changed significantly since its inception. The original complaint that was filed challenged various ordinances on constitutional grounds. Presumably, [WGI] believed it was an adult entertainment business. Otherwise, it would not have standing to challenge the constitutionality of the ordinance. If [WGI] is not an adult entertainment business why challenge the validity of the ordinance?
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> With the filing of the amended complaint, [WGI] now alleges that it is not an adult entertainment business. That raises a factual issue, which per the municipal code, is to be

> determined by the Common Council. Once that determination is made, thereafter the [WGI] may, if it is aggrieved, file a review of the Common Council's decision.

¶16 The City also argued that WGI had failed to pursue administrative remedies with respect to its denial of WGI's proposal to expand its business. The City contended that WGI has to appeal to the Oak Creek Board of Zoning Appeals the City's decision that WGI is a legal nonconforming use and cannot expand its facilities.

¶17 After a hearing, the trial court ordered that the case be sent to the Oak Creek Common Council for a determination of whether WGI's business is an adult entertainment business as defined by C.O.O. § 7.203(3)(b). The Common Council conducted a hearing, over WGI's objection, and concluded that WGI is an adult entertainment business, as defined in § 7.203(3)(b). WGI did not, and has not subsequently, appealed that determination.

¶18 After the Common Council's determination, the trial court set a new briefing schedule on the City's motion for summary judgment. This schedule directed the parties to address three issues: (1) the constitutionality of the City's adult entertainment business licensing ordinance as applied to WGI; (2) the constitutionality of the City's zoning ordinances as applied to WGI; and (3) a challenge to the Common Council's Findings of Fact and Conclusions of Law that WGI is an adult entertainment business.

¶19 At oral argument, the trial court made clear that there had been no attempt to shut down WGI's current operation, and none was contemplated. Rather, the trial court expressed the opinion that the underlying reason for this litigation was WGI's wish to expand its building and still continue to sell adult entertainment materials. Whether the license fees WGI would be required to pay were reasonable was also in dispute.

¶20 With respect to WGI's assertion that it is not an adult entertainment business, the trial court concluded that there had been no appeal from the Common Council's finding that WGI is an adult entertainment business, and that any attack on that decision was therefore waived. Next, the trial court concluded that the zoning ordinance was constitutional, relying on the fact that nonconforming uses are still permitted. It noted that WGI could continue to operate its business at the present location, as long as it did not improve the building. Finally, the trial court concluded that the ordinance mandating the payment of licensing fees was constitutional, and that the license fees themselves were reasonable. This appeal followed.

DISCUSSION

¶21 WGI presents numerous arguments on appeal. We have grouped them into three main issues: (1) whether WGI is an adult entertainment business; (2) whether the zoning ordinances are unconstitutional; and (3) whether the licensing provisions are unconstitutional, and whether the fees themselves are excessive or abusive.[7]

A. Standards of review

¶22 The trial court granted summary judgment in the City's favor. We review summary judgments *de novo*, using the same methodology as the trial

[7] WGI also challenges the City's right to bar WGI from altering its conforming structure, alleging that the nonconforming use statute, WIS. STAT. § 66.23(7)(h), and C.O.O. § 17.0901 "do not empower[] the City to bar [WGI] from altering its conforming structure, on it[]s conforming property, to accommodate additional conforming uses." WGI's argument is related to WGI's concept plan review that proposed razing its old building and building a new one. WGI did not contest the City's denial of its concept plan review and never requested a permit for the proposed modifications. WGI can hardly be heard to complain about the denial of permits it never requested, or about a decision it did not properly appeal. We decline to address this issue.

court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987).

> We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. . . . [Next,] we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.

Frost v. Whitbeck, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted), *aff'd*, 2002 WI 129, 257 Wis. 2d 80, 654 N.W.2d 225. Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Other relevant standards of review will be identified in each discussion section.

B. Whether WGI is an adult entertainment business

¶23 Despite the fact that WGI's original complaint seeking declaratory judgment was based on its assertion that it was subject to the challenged zoning and licensing regulations by virtue of being an "adult entertainment business" as defined in C.O.O. § 7.203(3)(b), WGI later amended its complaint to allege the opposite. The trial court sent the matter to the Common Council for a determination, pursuant to § 7.203(3)(b),[8] of whether WGI was an adult

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[8] There is a provision in C.O.O. § 7.203(3)(b)(4) that provides a mechanism for the Common Council to determine whether the presumption that a business is an adult retail establishment (and, therefore, an adult entertainment business, *see* § 7.203(3)(b)) because it has thirty percent of its stock-in-trade in adult entertainment material has been rebutted:

> In determining whether or not the presumption is rebutted, the Common Council may consider the following factors, which are not conclusive:

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entertainment business. WGI objected to this procedure but participated in the Common Council hearing. The Common Council found that WGI was an adult entertainment business, as defined by § 7.203(3)(b), and WGI has not appealed that determination by seeking a writ of certiorari.[9] We conclude, as did the trial court, that WGI waived its right to challenge the Common Council's factual conclusions in this case.

¶24 At the hearing, several witnesses testified, and exhibits were received. An Oak Creek police captain who visited the store provided testimony that sixty-five to seventy-five percent of all the items in the store were adult

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> (a) Whether minors are prohibited from access to the premises of the establishment due to the adult entertainment nature of the inventory;
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> (b) Whether the establishment is advertised, marketed, or held out to be an adult merchandising facility;
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> (c) Whether adult entertainment material is an establishment's primary or one of its principal business purposes; or
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> (d) Whether thirty (30) percent or more of an establishment's revenue is derived from adult entertainment material.
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> An establishment may have other principal purposes that do not involve the offering for sale or rental of adult entertainment materials and still be categorized as an adult retail establishment….
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> The Common Council shall have full discretion to give appropriate weight to the factors set forth above as well as other factors considered depending on the particular facts and circumstances of each application.

[9] The City asserts that the appropriate process to appeal the Common Council's decision would be to file a writ of certiorari. No party suggests that there is any intermediate appeal provided for by the Code of Ordinances. Therefore, we will assume that to appeal, WGI needed to file a writ of certiorari. *See* WIS. STAT. § 68.13(1) ("Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination….") (part of the chapter on Municipal Administrative Procedure).

entertainment material. Such items included "merchandise in the shapes of penises and breasts, photographs of women … exposing their buttocks and genital areas, merchandise displaying pubic hair and male genitals in a discernibly turgid state, and photographs in which people were fondling themselves."

¶25 In contrast, Richard Rothen, who is the owner's husband, testified that as of December 31, 2002, approximately thirty-six percent of the inventory was adult entertainment material. He also testified that WGI planned to expand the business beyond adult entertainment material, such that WGI's inventory of adult entertainment material would fall to less than thirty percent of its total inventory.

¶26 The Common Council issued detailed Findings of Fact and Conclusions of Law. The Council's findings included: (1) WGI's business is identified by signage as an adult business, including an outdoor sign that advertises gifts for bachelor and bachelorette parties; (2) the business is not open to children under the age of eighteen; (3) the area of the business is about one thousand square feet; (4) the testimony of the police captain was credible; and (5) WGI did not overcome the presumption that, because more than thirty percent of its inventory was adult entertainment material, a substantial portion of its stock in trade was adult entertainment material. *See* C.O.O. § 7.203(3)(b)(4). The Common Council concluded that WGI was an adult entertainment business under § 7.203(3)(b).

¶27 WGI did not seek review of the Common Council findings, or challenge the propriety of the Common Council making those findings, as it was entitled to do under WIS. STAT. § 68.13, which provides the procedure for appealing a municipality's determinations. *See **id.*** Failure to pursue this administrative remedy bars relitigation of this same factual determination in this

case. *See* ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977) (judicial relief will be denied until the parties have exhausted their administrative remedies). Therefore, we will not consider further WGI's argument that it is not an adult entertainment business.

C. WGI's challenge to the zoning ordinances

¶28 Next, we examine WGI's challenge to the zoning ordinances that were enacted in 2002. WGI argues that the zoning ordinances interfere with the First Amendment right of free speech. WGI proposes to *reduce* the space it devotes to the sale of adult entertainment material (the non-conforming use) if the City will allow WGI to build a new and larger facility at the present location and sell women's clothing (a permitted use) at that location. WGI alleges no specific loss of right or property that it held before the adoption of the zoning ordinance, C.O.O. § 17.0317, which created a new zoning category, M-1, for adult entertainment as a permitted use. WGI is able to continue to operate as a nonconforming use as it has since 1983. WGI has presented no evidence that it has been negatively affected in the conduct of its existing business in the present location by the City's adoption of this zoning ordinance. Nor has WGI alleged that it wishes to relocate to the M-1 zone, but has not been allowed to do so. Because the new zoning ordinances have no established impact on WGI that differs in any way from the conditions under which it has operated for more than twenty years, there is no reason for us to engage in an extensive discussion of the creation of the new zoning ordinances. WGI's challenge fails.

D. Challenges to the licensing requirements of C.O.O. § 7.203

¶29 WGI argues that the licensing provisions of C.O.O. §§ 7.203 and 3.40[10] are an unconstitutional prior restraint on expression, and that the licensing fees themselves are excessive, abusive and unrelated to the City's stated purpose. WGI challenges the constitutionality of the licensing ordinances. "[A]lthough ordinances normally receive a presumption of constitutionality which the challenger must refute, when the ordinance regulates First Amendment activities 'the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt.'" ***City News & Novelty, Inc. v. City of Waukesha***, 231 Wis. 2d 93, 104, 604 N.W.2d 870 (Ct. App. 1999) (quoting ***County of Kenosha v. C & S Management, Inc.***, 223 Wis. 2d 373, 383, 588 N.W.2d 236 (1999). However, in ***City News*** we held that where the issue was a licensing ordinance involving the ministerial act of assessing license applications, the burden does not shift to the municipality to defend the ordinance's constitutionality. ***Id.***, 231 Wis. 2d at 104-06 (applying ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215, 229-30 (1990)). Applying this rule, we conclude that WGI bears the burden of proving the licensing ordinance unconstitutional beyond a reasonable doubt.

1. Vagueness

¶30 WGI challenges the ordinance on vagueness grounds. Vagueness is a due process issue, and due process determinations are questions of law that this court decides *de novo*. *See* ***State v. Aufderhaar***, 2005 WI 108, ¶10, 283 Wis. 2d 336, 700 N.W.2d 4. We interpret ordinances using the rules of construction that

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[10] WGI refers to C.O.O. § 3.50; however, it is clear it means § 3.40.

we apply to statutes. ***Board of Regents of Univ. of Wis. v. Dane County Bd. of Adjustment***, 2000 WI App 211, ¶14, 238 Wis. 2d 810, 618 N.W.2d 537. "A statute is unconstitutionally vague if it either fails to afford proper notice of the prohibited conduct or fails to provide an objective standard for enforcement." ***State v. Thomas***, 2004 WI App 115, ¶14, 274 Wis. 2d 513, 683 N.W.2d 497; *see also* ***State v. Dennis H.***, 2002 WI 104, ¶16, 255 Wis. 2d 359, 647 N.W.2d 851 (a statute is void for vagueness "if it fails to give notice to those wishing to obey the law that their conduct falls within the proscribed area."). A statute is not unconstitutionally vague if "ordinary people, exercising ordinary common sense, can understand it and avoid conduct which is prohibited." ***United States v. Salisbury***, 983 F.2d 1369, 1378 (6th Cir. 1993).

¶31 A statute may be challenged as unconstitutional on its face, or as applied. WGI first challenges the ordinance on its face, arguing that the definition of "adult entertainment business" is vague. *See* C.O.O. § 7.203(3)(b). Specifically, WGI objects to the phrase used in the definition of "adult retail establishment" which refers to a "significant or substantial portion of its stock-in-trade." *See* C.O.O. § 7.203(3)(b)(4).[11] WGI complains that the words

[11] As noted earlier, the relevant paragraph of C.O.O. § 7.203(3)(b)(4) states:

> (4) *Adult retail establishment* means any bookstore, adult novelty store, adult video store, or other similar commercial establishment, business, service, or portion thereof, which for money or any other form of consideration *provides as a significant or substantial portion of its stock-in-trade* the sale, exchange, rental, loan, trade, transfer, and/or provision for viewing or use off the premises of the business adult entertainment material as defined in this section. For purposes of this provision, it shall be a rebuttable presumption that thirty (30) percent or more of a business' stock-in-trade in adult retail material, based on either the dollar value (wholesale or retail) or the number of titles of such material, is significant or substantial.

(Underlining omitted; emphasis added.)

"significant" and "substantial" are not defined, and that any business with between one percent and twenty-nine percent of its inventory related to adult entertainment materials cannot be sure whether the ordinance applies to it. WGI states: "The area between the 1% … category and the 30% presumed adult business is the uncharted sea where the unconstitutional vagueness lurks."[12]

¶32 A statute that is facially void for vagueness is one that "may not constitutionally be applied to *any* set of facts." ***United States v. Powell***, 423 U.S. 87, 92 (1975) (emphasis supplied). There are certainly businesses that clearly fall within the ordinance. A business with an inventory made up entirely of sexually explicit material would be covered. *See* ***id.*** at 92. Likewise, WGI's admission that thirty-six percent of its inventory included sexually explicit material puts WGI itself squarely within the presumption that adult entertainment material is a "significant" and "substantial" portion of its business. WGI has not produced facts that rebut the presumption of constitutionality.

¶33 WGI also challenges the ordinance as applied. WGI offered no evidence that tended to show that its business, by revenue or inventory, was *not* substantially composed of adult entertainment material. WGI admitted at the Common Council hearing that thirty-six percent of its current inventory is sexually

[12] Referencing ***City News & Novelty, Inc. v. City of Waukesha***, 231 Wis. 2d 93, 604 N.W.2d 870 (Ct. App. 1999), WGI argues that the regulatory scheme cannot place "unbridled discretion in the hands of a government official or agency[.]" That language from ***City News***, *see* ***id.*** at 103, is a direct quote from ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215, 225 (1990). ***FW/PBS*** outlines a four-part test that considers discretion. 493 U.S. at 225-28. To the extent WGI is asking this court to employ this four-part test (which WGI does not restate or attempt to apply), or any other tests related to discretion, we decline to do so because this issue is not adequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). WGI has not sufficiently explained its position, and offers only a general reference to ***City News*** to guide our analysis. This is insufficient to warrant discussion.

explicit. WGI has not made a *prima facie* case that the ordinance is void as applied to WGI.

2. WGI's challenge to the licensing fees as excessive and an unconstitutional prior restraint on expression

¶34 WGI contends that the City had no basis to enact the licensing fees and that the fees themselves are excessive. WGI argues that the national studies the City relied upon in passing C.O.O. § 3.40 should not have been relied upon. It also argues that the City "has offered no evidence that would serve to factually confirm the need for its licensing legislation." WGI ignores the record.

¶35 Before passing the licensing ordinance, and in supporting its motion for summary judgment, the City provided extensive facts in support of the need for the ordinance and the cost to the City of administering the ordinance licensing provisions. WGI has not provided facts disputing the methodology employed, which it would need to create an issue of material fact. WGI complains that "the justification for the fee for a manager assistant is largely based upon the cost of police investigation…. There is absolutely no justification for this charge." WGI, however, ignores the research done by the City and simply disagrees with its conclusions. WGI has provided no competing data to suggest that a different fee would be more appropriate. WGI's attempt to dispute the reasonableness of the City's licensing fees under the adult entertainment ordinance is limited to an affidavit listing fees the City charges for other licenses. Those other fees are not disputed facts, and they add nothing to the question of whether the fees discussed here are reasonable. The City provided sufficient facts that established the need for the ordinance, and a rational basis for the licensing fees. WGI did not produce facts that put the case made by the City in dispute. We conclude that WGI did not establish disputed material facts tending to make a *prima facie* case that the

ordinances in question are unconstitutional. Therefore, summary judgment in the City's favor was appropriate.

¶36 For all of the foregoing reasons, we affirm the order of the trial court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.