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ZONING AND LAND USE PLANNING

Alternatives for Adult Uses Required When Town Is Sued

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Over the past few decades, many of the most significant federal[1] and state court[2] decisions on the constitutionality of local zoning rules have involved adult entertainment establishments. That is because adult entertainment, unlike obscenity,[3] has been held by the U.S. Supreme Court to be protected by the First Amendment, and the Court has permitted local governments to treat adult entertainment establishments and the activities they support as different from "core" First Amendment speech.

For example, in 1976, in *Young v. American Mini Theatres Inc.*,[4] the Court upheld zoning ordinances providing that adult theaters could not be located within 1,000 feet of any two other "regulated uses," nor within 500 feet of a residential area. The Court concluded that "[t]he city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of [minimum spacing] restriction." The Court held that "apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment."

A decade later, in *City of Renton v. Playtime Theatres Inc.*,[5] the Court decided that the First Amendment permitted municipal governments to use zoning laws as a means of addressing the "secondary effects" of adult establishments. Under *Renton*, local governments may limit the location of adult entertainment establishments to prevent crime, protect a city's retail trade, maintain property values, and generally protect and preserve the quality of a city's neighborhoods, commercial districts, and the quality of urban life, but not to suppress the expression of unpopular views. Thus, under *Renton*, if a zoning ordinance serves a substantial governmental interest "and allows for reasonable alternative avenues of communication," the First Amendment is satisfied.

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ADULT ENTERTAINMENT establishment **"The Oasis"** in Smithtown

Recently, in *TJS of New York Inc. v. Town of Smithtown*,[6] the U.S. Court of Appeals for the Second Circuit issued a decision on an issue that is present in many First Amendment zoning challenges, namely whether a challenged zoning ordinance preserves "reasonable alternative avenues of communication" for adult-oriented businesses. Prior Second Circuit decisions in adult entertainment cases have made it clear that the reasonableness inquiry requires an assessment of the availability of other locations[7] and whether these alternatives afford a reasonable opportunity to locate and operate such a business.[8] This does not mean that a municipality must identify the exact locations to which adult establishments may locate; rather, they only need to identify the general areas that remain available and prove that such areas contain enough potential relocation sites that are physically and legally available to accommodate the adult establishments.[9]

The particular issue in *TJS* was whether the constitutionality of a zoning ordinance should only be evaluated with regard to the "alternative avenues of communication" the ordinance left open at the time it was passed, or those it left open at the time it was challenged. In *TJS*, the Second Circuit held that the First Amendment required courts to consider the adequacy of alternative sites available when the ordinance was challenged. Although the ruling necessitates further proceedings in the district court in the *TJS* case, it also may signal the coming end of a more-than-15-year-battle over a topless bar in the Town of Smithtown on Long Island.

The Beginnings

The roots of the case were formed in 1994, when Smithtown enacted a zoning ordinance limiting new adult entertainment uses[10] to three kinds of zoning districts: shopping center business ("SCB"), light industry ("LI"), and heavy industrial ("HI"). The ordinance also created an amortization schedule providing that any existing adult entertainment uses located in zones other than SCB, LI, and HI would become nonconforming uses after Jan. 1, 1998. In addition to these general zoning restrictions, the ordinance also required that adult entertainment uses be located at least 500 feet from each other and from any "residence district, park, playground, school, church or similar place of public assembly."

The building at 490 West Jericho Turnpike in Smithtown had been used as an adult entertainment site since 1979, under various owners. It was located fewer than 500 feet from three different parks, and it also was located in a neighborhood business ("NB") zone. Accordingly, it became a nonconforming use under the 1994 ordinance. At that time, the site was owned by 490 Habitat Inc. In July 1999, Habitat filed a lawsuit challenging the ordinance, arguing, among other things, that the ordinance violated the First Amendment because it did not provide a reasonable number of locations for new adult entertainment businesses to open and operate in Smithtown. As the case proceeded to trial, the district court ordered the town to compile a list of alternative locations at which an adult entertainment use could be located; the town did so, coming up with 35 sites.

On May 30, 2000, while Habitat's challenge was pending, Smithtown amended its code by requiring the 500-foot minimum spacing to be measured building-to-building rather than property line-to-property line, and by removing a special exception requirement that Habitat had argued was an unconstitutional prior restraint. Soon afterward, Habitat and the town ended their litigation pursuant to a stipulation in which Habitat agreed to make a "diligent good faith effort" to relocate, but was permitted to continue operating at the site until Sept. 1, 2003.

In 2002, Habitat sold the property to TJS, which used it as an adult entertainment establishment

called "The Oasis." The following June, the town moved for an order of closure, and TJS responded by seeking a declaratory judgment and permanent injunction against enforcement of the ordinance. The case proceeded to a six day bench trial in the U.S. District Court for the Eastern District of New York. At trial, experts testified for both the town and TJS as to whether the ordinance preserved adequate alternative locations for adult entertainment uses, as required by First Amendment jurisprudence.

In addition to disputing whether certain sites were in fact "available," the parties disagreed strongly about what time period was relevant to the inquiry. The town argued that the only relevant question was whether adequate alternative locations existed at the time the ordinance was passed. TJS, however, argued that the constitutionality of the ordinance should be evaluated with regard to the adequacy of alternative sites available at the time the complaint was filed. The district court concluded that TJS was "incorrect." In the district court's opinion, it was the municipality's burden to pass a constitutional ordinance that, to be constitutional, had to provide sufficient alternative avenues of expression on the date of enactment. The district court then proceeded to evaluate the sites available on that date, found them to be adequate, and denied TJS's request for a declaratory judgment and permanent injunction. TJS appealed.

Second Circuit's Decision

In its decision, the circuit court held that, in assessing the adequacy of alternative sites left open by a zoning ordinance, courts must consider the adequacy of alternatives available at the time the ordinance was challenged. This evaluation, the circuit court reasoned, should account for circumstances as they existed at the time a court issued its judgment, or as close as was practicable to that time in light of the need for discovery and the presentation of evidence.

The Second Circuit stated that it reached that result because the First Amendment did "not allow courts to ignore post-enactment, extralegal changes and the impact they have on the sufficiency of alternative avenues of communication." It noted that the alternatives available when a statute was passed could disappear, thus decreasing the adequacy of alternative sites actually available. Conversely, the Second Circuit observed, if a municipality opened up new land to development, the availability of alternative sites might very well increase, and thereby expand options, thus rendering constitutional zoning ordinances previously enacted. Moreover, "even something as simple as growth in a community's population may be relevant to the adequacy of available sites."

The appellate court declared that its holding was grounded in the approaches taken by the Supreme Court in *Young*, *Renton*, and their progeny. The Second Circuit explained that these cases focused on the "practical and continuing impact" of zoning regulations on adult entertainment uses as applied, rather than on their facial constitutionality when passed. It pointed out that in *Renton*, for example, the Supreme Court specifically noted that no adult uses existed in the city at the time the ordinance was passed. A year later, however, the plaintiffs acquired two theaters and intended to use them to show adult films. The Second Circuit reasoned that if the only question had been whether the challenged ordinance permitted adequate alternatives at the time it was passed, *Renton* would have virtually been a "non-case." That was because, given that there had been no adult establishments in existence when the ordinance had been passed, the ordinance could not have unconstitutionally limited them as of that time.

The Second Circuit conceded that its decision might, in some circumstances, open ordinances up to more than one attack, but said it would only do so "if there were significant changes in the surrounding community," adding that the burden of pleading and proving such changes with particularity "could well be put on the plaintiff."

The Second Circuit acknowledged that not all courts have read *Renton* in this way, and that its holding appeared to conflict with the holding of the U.S. District Court for the District of Maryland in *Bigg Wolf Discount Video Movie Sales Inc. v. Montgomery County, Md.*,[11] which concluded that "[a]lthough many courts have not explicitly said so, most have logically analyzed the number of available sites in relation to the number of adult businesses that would need to relocate at the time the ordinance was passed."

The Second Circuit in *TJS* responded that these cases held no more than that courts should in the ordinary course consider the adequacy of alternative sites available when an ordinance was passed. It disagreed with these cases to the extent they suggested that courts should only consider the adequacy of alternatives existing at the time of an ordinance's passage. The Second Circuit noted (but did not decide) that the adequacy of sites left available by an ordinance at the time of its passage may be relevant to its constitutionality, but concluded that whether or not it was constitutionally necessary in some circumstances for an ordinance to preserve adequate alternatives at the time of passage, it was "not constitutionally sufficient."[12]

Conclusion

The town in *TJS* argued that if adequacy were measured exclusively at the time of the ordinance's enactment, adult entertainment businesses would repeatedly challenge the constitutionality of the same ordinance and thus would delay its enforcement. The Second Circuit conceded that its decision might, in some circumstances, open ordinances up to more than one attack, but said that it would only do so "if there were significant changes in the surrounding community," adding that the burden of pleading and proving such charges with particularity "could well be put on the plaintiff." In any event, it stated, the implications of the reverse rule "would be constitutionally troubling," because if the only relevant question were whether an ordinance provided adequate alternatives on the day of its passage, "any law that did so would thereafter be immune from First Amendment challenge."

The circuit court vacated the district court's decision and remanded the case for further proceedings. The district court will now have to consider the current availability of alternatives for *TJS*. If it finds that they exist, it is likely that a long-operating adult use at that site will have to cease.

1. See, e.g., *Isbell v. City of San Diego*, 258 F.3d 1108 (9th Cir. 2001).
2. See, e.g., *Stringfellow's of New York, Ltd. v. City of New York*, 91 N.Y.2d 382 (1998).
3. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957).
4. 427 U.S. 50 (1976).
5. 475 U.S. 41 (1986).
6. 598 F.3d 17 (2d Cir. 2010).
7. See, e.g., *Hickerson v. City of New York*, 146 F.3d 99 (2d Cir. 1998).
8. See, e.g., *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998).
9. See, *Hickerson*, supra.
10. The town's zoning code identified "adult entertainment" as: "A public or private establishment which presents topless dancers, strippers, male or female impersonators, exotic dancers or other similar entertainments and which establishment is customarily not open to the public generally and excludes any minor by reason of age. This includes adult massage parlors, peep shows and adult theaters and similar types of businesses." Town of Smithtown Town Code, Chapter 322-3.
11. 256 F.Supp.2d 385 (D. Md. 2003). See, also, *Daytona Grand Inc. v. City of Daytona Beach*, Fla., 490 F.3d 860 (11th Cir. 2007) (new zoning regime must leave adult businesses with a "reasonable opportunity to relocate," and "the number of sites available for adult businesses under the new zoning regime must be greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect").
12. It should be pointed out that the circuit court upheld the district court's standard for determining whether specific sites were "available," and thus rejected arguments by TJS that, for example, the district court should have excluded from consideration any site that was best suited for a "big box" enterprise as "too large…too expensive…and not pragmatic" for TJS. The Second Circuit stated that an adult entertainment establishment "must compete for commercial real estate like any other market participant. And, like for other market participants, the physical size or nature of the business may affect the availability of commercially viable sites or the willingness of property owners to sell or lease to them." Among the sites deemed to be "unavailable," as described by the Fifth Circuit, are "land under the ocean, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking in proper infrastructure, and so on." *Woodall v. City of El Paso*, 49 F.3d 1120, 1124 (5th Cir. 1995).