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Zoning and Land Use Planning

Adult Entertainment Industry Loses Another Challenge

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The story of New York City's efforts to regulate the adult entertainment industry, which began under Mayor Rudolph Giuliani more than two decades ago, finally may be at an end.

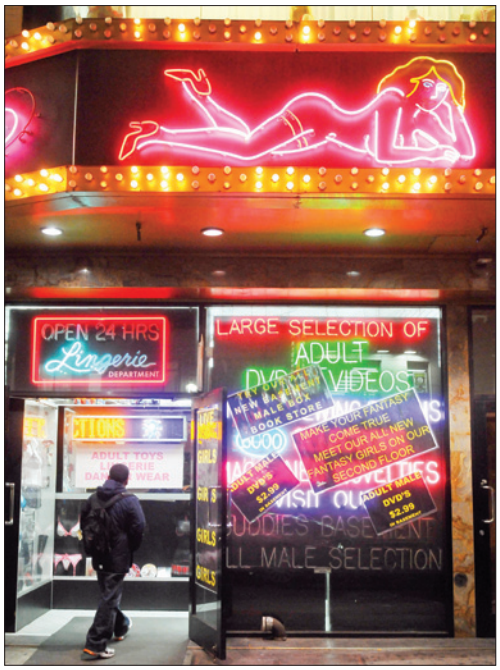
In early June, in *For the People Theatres of N.Y. v. City of New York*, No. 59 (N.Y. June 6, 2017), the New York Court of Appeals overturned a decision by the Appellate Division, First Department, and ruled that the 2001 amendments to the city's adult entertainment zoning rules, which amended the city's 1995 zoning ordinance governing the industry, were constitutional and did not violate the plaintiffs' First Amendment rights.

More than two-thirds (22 pages) of the court's 32-page decision, by Judge Eugene Fahey for a unanimous court (with Chief Judge Janet DiFiore taking no part), discusses the history of the city's zoning efforts toward the industry. But it is the balance of the court's opinion that seals the fate of the remaining members of what once was a booming adult entertainment industry in mid-town Manhattan and other city environs.

A (Somewhat) Quick History

In 1994, the New York City Department of City Planning (DCP) completed a study of sexually focused businesses, namely "adult video and bookstores, adult live or movie theaters, and topless or nude bars," and identified significant negative secondary impacts, including increased crime, diminished property values, reduced shopping and commercial activity, and a perceived decline in residents' quality of life. After public hearings, the city's Planning Commission issued a report, adopting the findings and conclusions of the study and noting that the businesses with adverse secondary impacts had "a predominant, ongoing focus on sexually explicit materials or activities."

The next year, the New York City Council added zoning regulations barring adult establishments from residential zones and most commercial and manufacturing zones, and mandating that, where permitted, adult businesses had to be at least 500 feet from houses of worship, schools, day care centers, and other adult businesses.



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AN ADULT video store in Manhattan in 2009

Certain adult establishments challenged the 1995 ordinance as violating their right of free speech but, in *Stringfellow's of New York v. City of New York*, 91 N.Y.2d 382 (1998), the New York Court of Appeals held that the ordinance was "not constitutionally objectionable." The court found that the ordinance was narrowly

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tailored to serve a substantial governmental interest and allowed for reasonable alternative channels of communication.

Meanwhile, in 1998, the city's Department of Buildings and its Planning Commission determined that any commercial establishment with at least 40 percent of its customer-accessible floor/cellar area or stock-in-trade used for adult purposes qualified as an adult establishment. This so-called "60/40 test" was applied to identify adult bookstores and adult eating or drinking establishments.

As the city began to enforce the 1995 ordinance, it concluded that adult establishments were achieving technical compliance with the 60/40 test, but without altering their predominant focus on sexually explicit activities or materials. As the city saw it, the 60/40 businesses were engaged in a "sham." In *City of New York v. Les Hommes*, 94 N.Y.2d 267 (1999), the New York Court of Appeals ruled, however, that the zoning ordinance had to be enforced as written, without considering such factors as whether the non-adult stock was unprofitable or located in a remote part of the premises.

The DCP then applied to the Planning Commission for amendments to the ordinance. The Planning Commission held further public hearings and issued a report endorsing the proposed amendments. In 2001, the city council approved significant changes to the zoning regulations, greatly reducing the significance of the 60/40 test.

The 2001 amendments provided that a venue was covered if it regularly featured live performances characterized by an emphasis on certain "specified anatomical areas" or "specified sexual activities" in any portion of the establishment, regardless of whether it limited those performances to less than 40 percent of its floor area. Therefore, a club featuring topless or nude dancers qualified as an "adult eating or drinking establishment" no matter the proportion of its space devoted to adult entertainment.

The 2001 amendments formally kept the 60/40 test for adult bookstores but added eight criteria to be used to determine if a store was subject to the regulation even if it passed that test.

> At what appears to be the end of the court battles, perhaps the most succinct thing that can be said is that valid zoning regulations can be drawn to support important government interests

In 2002, For the People Theatres of N.Y., which showed adult films, and JGJ Merchandise Corp., an adult video store also known as Vishans Video and as Mixed Emotions, challenged the 2001 amendments in an action against the city and various city officials. Both companies had reconfigured their establishments prior to the 2001 amendments to comply with the 60/40 test, and they sought a judgment declaring the definitions of "adult theater" and "adult bookstore" in the 2001 amendments to be facially unconstitutional, as a violation of free speech. They argued principally that the city had not supported the amended regulations with a study aimed at the specific secondary effects of the class of 60/40 businesses. At the same time, a number of clubs brought an action challenging the definition of "adult eating or drinking establishment" in the 2001 amendments. The actions were consolidated.

The Supreme Court, New York County, declared the 2001 amendments unconstitutional, and enjoined their enforcement. The First Department reversed, ruling that the 2001 amendments were constitutional.

In 2005, in *For the People Theatres of N.Y. v. City of New York*, 6 N.Y.3d 63 (2005), the New York Court of Appeals modified the Appellate Division's order by denying the city's motions for summary judgment, and it remitted the matter for further proceedings. Among other things, the court held that the city had satisfied its initial burden to justify a rationale for the 2001 amendments. It also ruled that the city was "not required…to relitigate the secondary effects of adult uses, or to produce empirical studies connecting 60/40 businesses to adverse secondary effects," and that the sole remaining question of fact was whether 60/40 businesses were "so transformed in character" that they no longer resembled the kinds of adult uses found to create negative secondary effects.

Two bench trials followed. There, the city presented evidence

concerning the characteristics of 14 adult bookstores and 10 adult eating and drinking establishments (as defined by the 2001 amendments) that identified themselves as compliant with the 60/40 test. In 2010, the New York Supreme Court upheld the amended zoning regulations as to both the adult bookstores and the adult eating or drinking establishments, and entered judgments in favor of the city. The court emphasized that under the standard imposed by the Court of Appeals' 2005 decision, the city's burden was a "light" one and that the city had "provided substantial evidence" as to the "dominant, ongoing focus" of the bookstores and topless clubs on sexually explicit materials and activities. The First Department reversed.

More than two-thirds of the court's decision discusses the history of the city's zoning efforts toward the industry. But it is the balance of the court's opinion that seals the fate of the remaining members of what once was a booming adult entertainment industry in midtown Manhattan.

On remand, the city relied on the prior record. In 2012, the trial court struck down the 2001 zoning regulations as to adult eating and drinking establishments and adult bookstores as an unconstitutional violation of the First Amendment, enjoining the city from enforcing them. A divided Appellate Division affirmed, and the dispute, once again, reached the Court of Appeals.

The Court's Decision

The Court reversed.

The court explained that, in the adult use zoning context, it applied "intermediate scrutiny" to determine whether the government's purpose justified the law—in particular, in this case, whether the 2001 zoning ordinance was narrowly tailored to serve a substantial governmental interest and allowed for reasonable alternative avenues of communication. Under this "deferential" standard, the court continued, a court reviewing a legislature's factual or predictive judgments had to determine if the legislature had "drawn reasonable inferences based on substantial evidence."

The court indicated that the evidentiary burden on the city in this case was "modest," and that the city did not have to "perform a formal study or a statistical analysis, or…establish that it has looked at a representative sample of 60/40 businesses in the city."

In other words, the court made clear, the trial court only had to decide whether the city had relevant evidence reasonably adequate to support its conclusion that the adult establishments retained a predominant, ongoing focus on sexually explicit activities or materials.

The court then concluded that the evidence and the factual findings of the lower courts supported "only one" conclusion: that the city had met its burden of showing continued focus on sexually explicit activities and materials by the adult bookstores and adult eating and drinking establishments. In the court's view, the evidence demonstrated that the adult bookstores continued to have a predominant focus on sexually explicit materials and activities and that the adult eating and drinking establishments "retained a predominant sexual focus."

Accordingly, the court, having clarified the standard, held that, as a matter of law, the city had met its burden of showing that the adult establishments continued to have a predominant focus on sexually explicit materials and activities. It concluded that the 2001 amendments were facially constitutional and did not violate the plaintiffs' First Amendment rights.

Conclusion

Many lessons can no doubt be drawn from the extensive litigation over the zoning rules the city has adopted over the years to regulate the adult entertainment industry. At what appears to be the end of the court battles, perhaps the most succinct thing that can be said is that valid zoning regulations can be drawn to support important government interests, including with respect to the adult entertainment industry.

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