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# Adult Uses

## *Court Provides Roadmap for Regulations*

**BY JOHN M. ARMENTANO**

New York City's efforts to regulate adult entertainment establishments reached another milestone recently when the New York Court of Appeals issued its decision in *For the People Theatres of N.Y. \v. City of New York*.[1] The Court's opinion, rejecting a challenge to the 2001 amendments to the city's adult use zoning regulations that were intended to close loopholes in a 1995 ordinance, clearly sets forth the steps that the city must take to be able to enforce the 2001 amendments. Although it may seem to some as if litigation over the city's efforts to use zoning law to regulate adult establishments might never end—more than a decade has passed since the original ordinance, and it has been nearly 30 years since the city concluded that adult entertainment uses negatively affected the city's communities—the Court's opinion makes it likely that the city's ordinance will become the model on which other local governments will rely when trying to deal with this seemingly intractable problem. The case is also important for those municipalities that modeled their adult use ordinances on New York City's.

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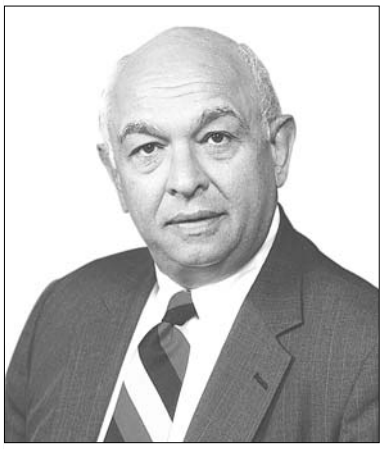
ZONING AND LAND USE PLANNING



### The Litigation

The city ordinance stems from a 1994 study conducted by the Department of City Planning (DCP) that was prompted by a dramatic increase in the number of adult establishments. The study showed a nexus between adult businesses and adverse secondary effects in the communities in which they were located. It recommended more stringent regulation, and was followed the next year by an ordinance adopted by the city.

The 1995 ordinance barred adult businesses from residential zones, as well as from many commercial and manufacturing areas; restricted adult businesses' locations in relation to residential areas, schools, day care centers, houses of worship and each other; and limited their maximum size to 10,000 square feet. The ordinance defined "adult establishment" as "a commercial establishment where a *substantial portion* of the establishment includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof" (emphasis added). Subsequently, the city's Department of Buildings, which is responsible for interpreting and enforcing the city's zoning resolution, issued guidelines to clarify what constituted a "substantial portion" within the meaning of the 1995 ordinance. In general, these guidelines provided that a business was an adult establishment if "at least 40 percent of the floor and cellar area…accessible to customers" was available for adult use.

A number of adult businesses sued the city, arguing that the ordinance improperly infringed on their free speech rights. *In Stringfellow's of N.Y. v. City of New York*,[2] the Court of Appeals determined that the ordinance was "not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose." Further, the Court ruled, the ordinance "represent[ed] a coherent regulatory scheme designed to attack the problems associated with adult establishments," declaring that by protecting only those communities and community institutions that were most vulnerable to adverse impacts, the 1995 ordinance was no broader than necessary. In addition, the Court stated, there were reasonable alternative avenues of communication, insofar as the ordinance allowed adult businesses to remain in zoning districts that permitted a wide mix of commercial, retail, entertainment and manufacturing uses and, in virtually every instance, were within a 10-minute walk from a subway line or

major bus route.[3]

The ordinance took effect in July 1998 after a series of judicial stays of enforcement lapsed. Numerous adult businesses reconfigured their floor areas and stock, seeking to fit within the 60/40 construct for defining "substantial portion." The city contended, however, that these so-called 60/40 businesses were merely engaged in ploys to evade enforcement and did not, in fact, comply with the ordinance.

Accordingly, the city went to court to shut down a store where only 24 percent of the stock consisted of adult videos, but the nonadult videos were offered only for sale, not for rent, did not turn over, had been supplemented very modestly, and were located in a back room. The lower courts agreed with the city that the store's compliance with the ordinance was a sham; that is, despite its technical compliance with the 60/40 formula, the store's business still centered on purveying sexually explicit materials. Based on the ordinance's "plain language" and the "precise guidelines" that the city had developed to enforce it, however, the Court of Appeals reversed.[4]

The Court observed that it had to enforce the city's administrative guidelines as written. "Either the stock is accessible or available, or it is not; either the appropriate amount of square footage is dedicated to nonadult uses, or it is not," the Court noted. It then added that questions about whether the owner of the store had a "good-faith desire" to sell nonadult products, whether the "essential nature" of the store was adult or nonadult, or whether the volume of nonadult stock was stable or profitable were "not part of the inquiry." The Court declared that it could not rewrite the city's guidelines to "include these additional considerations."

In light of the perceived continuing subversion of the 1995 ordinance and the unforeseen textual ambiguities and limitations that had hamstrung its enforcement efforts, in March 2001, the DCP filed an application for amendments with the City Planning Commission (CPC). In August 2001, the CPC issued a report that endorsed the proposed amendments, as modified after public hearings. As the CPC Report observed, it was anticipated in 1995 that the DCP "would report back to [the CPC] and the City Council on the effect of [the 1995 ordinance] in two years following the start of enforcement and that the [CPC] would review at that time whether any modifications [were] needed." The CPC Report stressed that the amendments were "limited in nature" and did not alter the 1995 ordinance's location restrictions. Instead, they were intended "to clarify" certain definitions in the original ordinance to effectuate the CPC's original intent, which was to address those establishments similar in nature to the types of enterprises described in a 1994 DCP study, namely, book and video stores, theaters, eating or drinking establishments and other commercial establishments with a predominant, on-going focus on sexually explicit materials or activities.

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The CPC Report disclosed that as of 2000, 101 self-identified 60/40 businesses, including triple-X book and video stores, topless bars and strip clubs and theaters offering adult entertainment, operated in locations where adult uses were prohibited. Of these 101 businesses, about 75 percent were preexisting establishments that assumed 60/40 configurations in response to the 1995 ordinance. At a public hearing on the proposed amendments in October 2001, counsel to the city's Criminal Justice Coordinator testified that the adult entertainment industry had exploited loopholes in the 1995 ordinance that distorted the original law "to make it almost meaningless." Counsel to the DCP testified that the proposed amendments were designed to close these loopholes by "establish[ing] objective factors relating to the physical layout and method of operation" for adult bookstores and to overcome the "artificial separation of adult and non-adult sections" in adult eating and drinking establishments. The City Council adopted the amendments in October 2001. In particular, the amendments provided that nonadult material would not be considered stock for "substantial portion" analysis if the store's interior configuration and layout required customers to pass through an area stocked with adult material in order to reach nonadult material; there were any individual booths available for viewing adult movies or live performances; purchasing nonadult material exposed the customer to adult merchandise; nonadult material was for sale only, while adult material might be purchased or rented; more adult titles than nonadult titles were available; minors were restricted from the store as a whole or from any area offering nonadult material; signs or window displays promoting adult material were disproportionate to those promoting nonadult material, or to the proportion of floor space devoted to adult material; or "other features relating to configuration, layout or method of operation" that the Commissioner of Buildings might determine by rule "render[s] the sale or rental of 'adult printed or visual material' a substantial purpose of the business conducted in such store," subject to "scheduled implementation" with respect to "commercial establishments in existence as of the date of adoption, as necessary."

About a year later, just before the expiration of the amendments' one year compliance period, a theatre that regularly featured adult films, a video store that had adult videotapes for sale, and a cabaret that regularly featured adult entertainment challenged the amendments. They argued that they had made considerable investments and radically altered their operations in order to meet the requirements of the 1995 ordinance and that the 2001 amendments violated their rights of free expression because the city failed to support the regulations with a study targeted at the secondary effects of the new class of 60/40 businesses.

## The Court's Opinion

The case worked its way through the courts, reaching the Court of Appeals. In its decision, the Court observed that the

"reasonable discretion" accorded most local legislative actions extends to adult use zoning. The Court noted that a local government implementing zoning that affects adult businesses must have a legislative record that establishes a substantial governmental interest in the subject matter of the regulation to justify restrictions on protected speech; however, it continued, the local government retains discretion to make its findings from studies or other supportive information before it, and to draw reasonable conclusions about which regulatory techniques will be most beneficial in addressing the findings.

In this case, the Court explained, the city sought to tighten up a zoning ordinance regulating adult businesses to limit superficial compliance unanticipated when the ordinance was initially enacted. Toward that end, it sought to rely principally on the same evidence of negative secondary effects that supported the original ordinance, including especially the 1994 DCP study — which the Court emphasized it already found to be sound in *Stringfellow's*—and its subsequent enforcement experiences to demonstrate that while many adult businesses may comply with the original ordinance, at least technically, their essential character remained unchanged. It was this essential character—as adult bookstores or adult video stores or strip clubs or topless clubs—that created negative secondary effects, the Court noted. It then held that, given the very low evidentiary hurdle, the city had "satisfied its burden to justify a secondary-effects rationale" for the 2001 amendments.

The Court then turned to whether the plaintiffs had demonstrated that the city's evidence did not support its rationale, or had furnished evidence that disputed the city's factual findings.

In this case, plaintiffs have disputed factual findings undergirding the 2001 amendments. In particular, they submitted affidavits and reports that concluded, among other things, that "no statistically significant relationship between the presence of 60/40 uses and an adverse impact on adjacent property values." Because plaintiffs furnished evidence that disputed the city's factual findings, the Court stated, the burden shifted back to the city to supplement the record with evidence renewing support for a theory that justified its ordinance.

Importantly, the Court emphasized 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. Moreover, the city was not required to conduct targeted empirical studies as a prerequisite for amending its existing adult use ordinance to regulate combined adult bookstores and adult arcades more closely.

As the Court noted, the city justified the amendments as a measure to eradicate the potential for sham compliance with the original ordinance, and thus to reduce negative secondary effects to the extent originally envisaged. It found "no evidence" in the record to suggest that the city adopted the amendments for any other reason, much less to abridge free speech. In furtherance of its rationale for the 2001 amendments, the city presented evidence of inspections conducted over three consecutive days in February 2001 of 12 self-identified 60/40 book and video stores within what appears to be a small area of Manhattan. This evidence supports the 2001 amendments by indicating that these businesses, while they technically comply with the 60/40 formula, belong to the class of enterprises described and studied in the 1994 DCP Study— "book and video stores, theaters, eating or drinking establishments and other commercial enterprises with a predominant, on-going focus on sexually explicit materials or activities"—and linked to negative secondary effects. Thus, the Court concluded, a triable question of fact was presented as to whether 60/40 businesses were so transformed in character that they no longer resembled the kinds of adult uses found, both in the 1994 DCP Study and in studies and court decisions around the country, to create negative secondary effects, as plaintiffs contended, or whether these businesses' technical compliance with the 60/40 formula was merely a sham, as the city contended.

In addressing this factual dispute, the city is likely to produce evidence relating to the purportedly sham character of self-identified 60/40 book and video stores, theaters and eating and drinking establishments or other commercial establishments located in the city. However, the Court made it clear that this did not mean that the city had to perform a formal study or a statistical analysis, or to establish that it had looked at a representative sample of 60/40 businesses in the city. Rather, if the trier of fact determines, after review of this evidence, that the city has fairly supported its position on sham compliance—i.e., despite formal compliance with the 60/40 formula, these businesses display a predominant, on-going focus on sexually explicit materials or activities, and thus their essential nature has not changed—the Court ruled that the city will have satisfied its burden to justify strengthening the original ordinance by enacting the 2001 amendments, and will be entitled to judgment in its favor. If not, plaintiffs will prevail on their claim that the amendments were insufficiently narrow and therefore violated their free speech rights. In that event, plaintiffs would be entitled to judgment and a declaration that the amendments were unconstitutional.

## Conclusion

Local governments seeking to regulate adult uses within their jurisdictions would do well to follow New York City's lead. From the importance of a study demonstrating the negative effects adult uses have on a community to the zoning ordinance's provisions—as modified by the amendments—and the roadmap set forth by the Court as to the amount and quality of proof that needs to be produced, the Court's ruling in *For the People Theatres* is destined to become a landmark in the zoning area.

1. 6 N.Y.3d 63 (2005).
2. 91 N.Y.2d 382 390 (1998).
3. The ordinance also surmounted facial First Amendment challenges in federal court. *Buzzetti v. City of New York*, 140 F.3d 134 (1998).
4. *City of New York v. Les Hommes*, 94 N.Y.2d 267 (1999).