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Appellate Division, First Department, For the People Theatres of New York, Inc. v. City of New York

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SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

For the People Theatres of New York, Inc. v. City of New York[1]
(decided April 12, 2005)

In 1995, New York City enacted the 1995 Adult Use Zoning Ordinance[2] to combat negative secondary impacts of the adult entertainment industry. In 2001, in response to a series of court rulings that resulted in a narrowed scope and application of the 1995 Ordinance, the City enacted the 2001 Adult Use Amendments. For the People Theatres of N.Y., Inc., JGJ Merchandise Corp., Ten's Cabaret, Ltd., and Pussycat Lounge (collectively, the "Plaintiffs") commenced a declaratory judgment action challenging the constitutionality of the 2001 Adult Use Amendments to the 1995 Adult Use Zoning Ordinance under the First Amendment[3] and the New York Constitution.[4] The plaintiffs, various "adult

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[1] 793 N.Y.S.2d 356 (App. Div. 1st Dep't 2005).

[2] New York City Zoning Resolution §§ 32-01 and 42-01 include site limitations and anti-clustering provisions directed at "adult establishments," such as: 1) the banning of such establishments from certain districts, including residential districts and districts zoned for manufacturing and commercial use, but which also permit residential development, and 2) a requirement that in districts where adult establishments are authorized that such establishments be located at least five hundred feet from churches, schools, day care centers, other "adult establishments", and zoning districts which permit residential development.

[3] U.S. CONST. amend. I, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[4] N.Y. CONST. art. I, § 8, states in pertinent part, "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

establishments"[5] situated in New York City, alleged that the 2001 Adult Use Amendments ("2001 Amendments") restricted their right of expression.[6] The plaintiffs advanced several arguments in support of their claim.[7] First, they contended that the 2001 Amendments were unsupported by new empirical data, and that the City therefore lacked a rational basis for their adoption.[8] Next, they argued that the 2001 Amendments constituted an unwarranted expansion of the 1995 Adult Use Zoning Ordinance, "which would terminate the ability of [the plaintiffs] to remain in business and display their constitutionally protected expression."[9] The plaintiffs also claimed that the 2001 Amendments were unconstitutionally vague[10] and "that the one-year amortization period constituted a taking."[11] Finally, they contended that statistical reports prepared by the City Police Department failed to link higher neighborhood crime rates with "60/40" adult use establishments.[12]

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[5] *For the People Theatres*, 793 N.Y.S.2d at 359. New York City Zoning Resolution §12-10 defines "adult establishment" as: "a commercial enterprise in which a 'substantial portion' of the premises is used as an 'adult book store,' an 'adult eating or drinking establishment,' an 'adult theatre,' or 'other adult commercial establishment,'" and it provides that factors to be considered in determining whether a facility falls within the zoning restrictions are: "1) the amount of floor area and cellar space accessible to customers and allocated to [adult] uses; and 2) the amount of floor area and cellar space accessible to customers and allocated to [adult] uses as compared to the total floor area and cellar space accessible to customers in the establishment." *Id.*

[6] *For the People Theatres*, 793 N.Y.S.2d at 364.

[7] *Id.* at 364-65.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 370.

[11] *For the People Theatres*, 793 N.Y.S.2d at 370.

[12] *Id.* at 364. *See* City of New York v. Les Hommes, 724 N.E.2d 368, 370 (N.Y. 1999) ("In response to an inquiry as to what constitutes a 'substantial portion,' [with reference to the 1995 Adult Use Zoning Ordinance] the City Department of Buildings issued Operations Policy and Procedure Notice (OPPN) No. 4/98, and several weeks later superseded it with OPPN No. 6/98. Both imposed similar guidelines 'to clarify the meaning of the phrase

The New York Supreme Court declared the 2001 Amendments unconstitutional, finding that the City failed to make an evidentiary showing that there was a rational basis for their adoption, and permanently enjoined their enforcement.[13] On appeal, the Appellate Division stated that ordinances restricting the use of real property as a means of combating the adverse consequences of urbanization on the quality of life are a "proper exercise of the police power to advance the public health, safety, and welfare, . . . and, as legislative enactments, enjoy a strong presumption of constitutionality and will be upheld if there is a reasonable relationship between the end sought to be achieved and the means adopted to achieve it."[14] The court explained that in order for a zoning ordinance regulating adult use establishments to comport with federal and state constitutional standards, it must serve a substantial state interest unrelated to the suppression of speech and leave open reasonable alternative avenues of expression.[15] Accordingly, the Appellate Division reversed, holding that the City was not required "to distinguish between different types of adult uses, or a new type of adult use, so long as the evidence" on which it relied in enacting the 2001 Amendments was "reasonably believed to be relevant to the

'substantial portion'' (Dept of Buildings, Operations Policy and Procedure Notice No. 6/98, Aug. 13, 1998). With respect to 'adult establishments' generally, if 'at least 40 percent of the floor and cellar area that is accessible to customers [is] available for adult' use, then a 'substantial portion' of the business is devoted to adult use within the zoning resolution. In any event, if '10,000 or more square feet of a commercial establishment ... is occupied by an adult use, the commercial establishment is deemed to be an 'adult establishment' regardless of the overall size of the establishment.").

[13] *For the People Theatres*, 793 N.Y.S.2d at 357.

[14] *Id.* at 366.

[15] *Id.* at 368-69, 370-71.

problems addressed by the ordinance."[16] Additionally, the Appellate Division rejected the plaintiffs' claims that the 2001 Amendments were unconstitutionally vague and that the one-year amortization period constituted a taking.[17]

In 1993, in response to the rapid expansion of the adult entertainment industry,[18] the New York City Department of City Planning ("DCP") undertook an evaluation (the "DCP Study") of the impact of such establishments on the quality of urban life.[19] The DCP Study examined similar studies conducted in nine other cities, and concluded that adult entertainment businesses have "negative secondary impacts, including increased crime rates, depreciation of property values, and the deterioration of community character and the quality of urban life."[20] The DCP Study also reviewed numerous earlier studies of adult establishments conducted in New York City, and performed its own analysis of adult establishments in targeted areas of the city.[21] The DCP concluded, on the totality of the evidence before it, that "adult entertainment establishments, especially in areas marked by high concentrations of those businesses, produce negative secondary impacts, including increased crime rates, property value depreciation, deterioration of community character and quality of life, and a reduction in commercial

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[16] *Id.* at 368, 371.

[17] *For the People Theatres*, 793 N.Y.S.2d at 370.

[18] *Id.* at 358. The number of adult entertainment establishments within the five boroughs of New York City increased from nine in 1965 to 177 in 1993.

[19] *Id.*

[20] *Id.*

[21] *Id.*

activity."[22] Prompted by the findings of the DCP Study, the New York City Council adopted the 1995 Adult Use Zoning Ordinance.[23] The ordinance, rather than barring the "operation of any specific classification of establishment," included a number of site limitations and anti-concentration provisions.[24] Commercial establishments that devoted a "substantial portion" of their business "to entertainment or material that was 'characterized by an emphasis on' 'specified anatomical areas' or 'specified sexual activities' [were] barred from certain districts including residential districts and districts zoned for manufacturing and commercial use, but which also permitted residential development."[25] Further, "the adult establishments had to be located at least 500 feet from churches, schools, day care centers, other adult uses, and zoning districts which permitted residential development."[26]

New York City's "comprehensive enforcement initiative" of the 1995 Zoning Resolution spawned a series of litigation that resulted in a narrowed scope and application of the ordinance.[27] As a result, in 2001, the DCP proposed the 2001 Amendments in order to "address attempts by adult establishments to remain in operation through superficial measures which [did] not alter the character of the

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[22] *For the People Theatres*, 793 N.Y.S.2d at 358.

[23] *Id.* at 359.

[24] *Id.*

[25] *Id.* at 359-60.

[26] *Id.* at 360.

[27] *For the People Theatres*, 793 N.Y.S.2d at 360. *See* City of New York v. Les Hommes, 724 N.E.2d 368, 371 (N.Y. 1999) (holding that the focus of the 1995 Adult Use Ordinance is "solely on the appropriate percentages of stock and floor and cellar space," and does not permit an inquiry into the essential nature of the business); City of New York v. Dezer Properties, Inc., 732 N.E.2d 943 (N.Y. 2000) (holding that the "substantial portion" analysis of the 1995 Adult Use Ordinance applies to eating and drinking establishments).

establishments with a 'predominant on-going focus on sexually explicit materials or activities,' " and to elucidate misconceptions of the ordinance.[28] The 2001 Amendments removed the "substantial portion" qualification contained in the 1995 regulations,[29] clarifying that any eating and drinking establishments or theaters that regularly featured adult entertainment were "adult establishments" for the purpose of the ordinance, "notwithstanding the portion of the floor area devoted to adult entertainment."[30] Though the 2001 Amendments retained the "substantial portion" restriction for adult video and bookstores, they set forth additional criteria pertaining to store configuration and non-adult material designed to effectuate the intent of the 1995 Adult Use Ordinance.[31]

In examining whether the 2001 Amendments impermissibly suppressed the plaintiffs' freedom of expression, the court noted that "municipalities are vested with broad power to implement land use controls . . . in order to confront the increasing encroachments of urbanization on the quality of life."[32] This zoning power "must be exercised in accordance with a 'well considered plan.' "[33] The court

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[28] *For the People Theatres*, 793 N.Y.S.2d at 361.

[29] New York City Zoning Resolution §12-10, *supra* note 5.

[30] *For the People Theatres*, 793 N.Y.S.2d at 362.

[31] *Id.* at 362-63.

[32] *Id.* at 366.

[33] *Id.* at 367. *See* N.Y. GEN. CITY LAW § 20(25) (McKinney 2001) stating, in pertinent part,

> Subject to the constitution and general laws of this state, every city is empowered . . . [t]o regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purposes to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public

rejected the plaintiffs' argument that "because their businesses ha[d] adopted the 60/40 format, in compliance with the 1995 Ordinance, and no studies [had] been conducted which address this particular retail scheme, [that the City's] reliance on . . . earlier studies to demonstrate negative secondary impact [was] improper."[34] Rather, the court found that the City "reasonably believed that the nature of the 60/40 establishments, with a predominant focus on sexually explicit materials and . . . nude women remained unchanged, and that the 2001 amendments were necessary to effectuate the original legislative purpose [of the 1995 Adult Use Ordinance]."[35] With respect to whether the amendments allowed for "reasonable alternative avenues of communication," the court found that a sufficient area remained available "so that the amendments do not have the effect of suppressing, or greatly restricting access to, lawful speech."[36] Accordingly, the court held that the 2001 Amendments comported with state constitutional standards, which are similar to federal standards.[37]

In *City of Renton v. Playtime Theatres, Inc.*, the Supreme Court upheld the validity of a municipal zoning ordinance that prohibited adult movie theaters from "locating within 1,000 feet of

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health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, in accord with a well considered plan.

[34] *For the People Theatres*, N.Y.S.2d at 368.

[35] *Id.*

[36] *Id.* at 371.

[37] *Id.* at 368, 371 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 54 (1986)).

any residential zone, single- or multiple-family dwelling, church, park, or school."[38] The owners of two adult theaters argued that the ordinance restricted their First Amendment interests and sought to declare the ordinance unconstitutional.[39] After acknowledging that the ordinance implicated the First Amendment, the Supreme Court established a three-part test for determining whether a zoning ordinance impermissibly infringed on the right of expression.[40] To comport with the First Amendment, an ordinance affecting the right of expression must 1) be a content-neutral time, place and manner regulation, 2) be "designed to serve a substantial government interest," and 3) leave open "reasonable alternative avenues of communication."[41] The Court first found that because the ordinance did not ban adult theatres altogether, but merely implemented location sensitive distance controls, that it should be analyzed as a time, place, and manner regulation.[42] Next, the Court determined that the ordinance was "content-neutral" because it was aimed at the secondary effects of adult theaters, namely crime rates, property values, and the quality of life of the affected neighborhoods, rather than at the content of the films shown therein.[43] Given its finding that the ordinance was "content-neutral," the Court stated that the ordinance would be upheld if the City established that the "ordinance [was] designed to serve a substantial government interest" and that

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[38] 475 U.S. 41, 43 (1986).
[39] *Id.* at 45.
[40] *Id.* at 46-50.
[41] *Id.*
[42] *Id.* at 46.
[43] *City of Renton*, 475 U.S. at 47-49.

"reasonable alternative avenues of communication" remained available.[44] In concluding that Renton had met this burden, the Court recognized that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' "[45] To that end, the Court held that:

> Renton was entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. [46]

The Court also stated it was not its "function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas."[47] Thus, because the secondary effects associated with concentrations of adult businesses were an "admittedly serious problem," the Court found that the "city must be allowed a reasonable opportunity to experiment with solutions."[48]

The Supreme Court clarified the evidentiary requirements of an enacting municipality under the *Renton* test in *City of Los Angeles v. Alameda Books, Inc.*[49] A 1977 study conducted by the city of Los

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[44] *Id.* at 50.
[45] *Id.* at 50 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).
[46] *Id.* at 51-52.
[47] *Id.* at 52 (quoting *Young*, 427 U.S. at 71).
[48] *City of Renton*, 475 U.S. at 52 (quoting *Young*, 427 U.S. at 71).
[49] 535 U.S. 425 (2002) (plurality opinion).

Angeles revealed that concentrations of adult establishments were "associated with higher rates of prostitution, robbery, assaults, and thefts."[50] To combat these secondary effects, the city enacted a zoning ordinance which included site limitations and anti-clustering provisions.[51] In 1983, in response to a "loophole permitting the concentration of multiple adult enterprises in a single structure," the city amended the ordinance to prohibit "more than one adult entertainment business in the same building."[52] Two adult establishments operating in violation of the amended ordinance alleged that the amendments constituted a violation of the First Amendment.[53]

The Supreme Court upheld the amendment's constitutionality under the standards established in *Renton*.[54] In examining whether the ordinance was designed to serve a substantial government interest, the Court stated that the "municipality's evidence must fairly support the municipality's rationale for its ordinance."[55] To that end, the Court acknowledged that a municipality "is in a better position than the Judiciary to gather and evaluate data on local problems."[56] Therefore, the Court instituted a burden-shifting analysis, whereby the complainant must establish that the "municipality's evidence does not support its rationale," or must furnish "evidence that disputes the municipality's factual findings;" the municipality then must

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[50] *Id.* at 430.
[51] *Id.*
[52] *Id.* at 431.
[53] *Id.* at 432.
[54] *Alameda Books*, 535 U.S. at 439.
[55] *Id.* at 438.

"supplement the record with evidence renewing support for a theory that justifies its ordinance."[57] If the complainant fails to "cast direct doubt" on the municipality's evidence that the ordinance was designed to serve a substantial government interest, the ordinance will be upheld as long as the municipality's evidence is "reasonably believed to be relevant to the secondary effects that they seek to address."[58]

The New York courts have followed the same standards as the United States Supreme Court when analyzing whether a zoning ordinance violates the freedom of expression. In *Town of Islip v. Caviglia*, the New York Court of Appeals upheld a zoning ordinance adopted by the Town of Islip that placed restrictions on adult uses.[59] The regulation restricted adult uses to industrial-zoned districts, and required that "nonconforming adult uses . . . be amortized on a graduated scale of investment in the business."[60] The owner of an adult bookstore located in a prohibited zone claimed that the ordinance deprived him of the freedom of expression ensured by the federal and state constitutions.[61]

The Court of Appeals recognized that the ordinance implicated the First Amendment, but held that it met both federal and

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[56] *Id.* at 440.

[57] *Id.* at 438-39. Notably, "the limitations placed on the plurality are subtle, and concern 'the importance of determining and evaluating a city's rationale behind a particular ordinance.' " *For the People Theatres*, 793 N.Y.S.2d at 370.

[58] *Alameda Books*, 535 U.S. at 439-40, 442.

[59] 540 N.E.2d 215, 216 (N.Y. 1989).

[60] *Id.* at 216.

[61] *Id.* at 217.

state constitutional standards in that regard.[62] First, the Court of Appeals concluded that the ordinance met the "federal constitutional requirements under the *Renton* test."[63] The court found that the ordinance was a time, place, and manner regulation that was content neutral, and stated that the " 'predominant purpose' of the . . . ordinance was to eliminate the secondary effects of adult uses and . . . not to regulate expression."[64] The Court of Appeals then found that the evidence underlying Islip's conclusion that its goals of eliminating the effects of urban blight could be furthered by restrictions on adult uses was sufficient.[65] Finally, the court noted that the Islip ordinance was "narrowly tailored to affect only those uses shown to produce the unwanted secondary effects," and that it provided over 6,000 acres of alternative sites within the Town for adult business.[66]

After determining that the Islip adult use ordinance was valid under the Federal Constitution, the Court of Appeals concluded that it was also valid under the New York State Constitution.[67] Under state law, a content-neutral regulation will be upheld if it is "designed to carry out legitimate and important governmental objectives" and "is no broader than needed to achieve its purpose."[68] The court found that the zoning ordinance was designed to carry out the legitimate

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[62] *Id.* at 218, 221.
[63] *Id.* at 218.
[64] *Caviglia*, 540 N.E.2d at 218.
[65] *Id.* at 219. Islip had performed its own study of the secondary effects of adult uses and had considered studies performed by other municipalities. *Id.*
[66] *Id.* at 220.
[67] *Id.* at 223-24.
[68] *Id.* at 223.

government objective of safeguarding the quality of life of the Town's residents, and that "the Town's use of its zoning powers was the most appropriate means to address its substantive problems."[69]

The New York Court of Appeals addressed challenges to the constitutionality of the 1995 Adult Use Ordinance in *Stringfellow's of New York, Ltd. v. City of New York.*[70] In 1996, a group of owners and operators of adult establishments sought to declare the ordinance unconstitutional, alleging that it "deprived them of their right to free expression protected by" the state and federal constitutions.[71] The Court of Appeals upheld the ordinance, determining that it satisfied the federal constitutional standards set forth by the United States Supreme Court in *Renton v. Playtime Theatres* and the state constitutional standards pronounced in *Town of Islip v. Caviglia.*[72]

Initially, the court examined the legislative history of the ordinance and the evidence relied upon by the City and found that the purpose of the ordinance was unrelated to speech, "but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose."[73] Next, the court found that the ordinance was no broader than necessary to combat the secondary effects of adult establishments because it "represent[ed] a coherent regulatory scheme designed to attack the problems associated with adult establishments."[74] Finally, the court determined that reasonable

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[69] *Caviglia*, 540 N.E.2d at 223.
[70] 694 N.E.2d 407 (N.Y. 1998).
[71] *Id.* at 413.
[72] *Caviglia*, 540 N.E.2d at 223.
[73] *Id.* at 415-16.
[74] *Id.* at 417.

alternative avenues of communication existed.[75] The court noted, on the facts before it, the "difference in verbiage" between the federal and state constitutional inquiries did not "significantly affect the outcome."[76]

In conclusion, New York follows substantially the same analysis as the United States Supreme Court when determining whether a zoning ordinance violates freedom of expression. Both the federal and state constitutional inquiries recognize that adult entertainment is a constitutionally protected form of expression that may not be completely suppressed. Therefore, the first step of either analysis is to determine whether the ordinance is aimed at regulating speech. Upon a determination that the ordinance is content-neutral, it is presumptively constitutional. The federal constitutional inquiry turns to whether the ordinance serves a substantial government interest and whether reasonable alternative avenues of communication remain available. An ordinance will be upheld if the complainant fails to cast reasonable doubt on the municipality's evidence, and if the evidence relied upon by the municipality is "reasonably believed to be relevant to the secondary effects that they seek to address."[77] Similarly, the state constitutional inquiry questions whether the municipality's evidence is "reasonably believed to be relevant to the problem that the city addresses by the ordinance,"[78] whether the ordinance is broader than necessary, and if

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[75] *Id.* at 418, 419.
[76] *Id.* at 415.
[77] *Alameda Books*, 535 U.S. at 442.
[78] *For the People Theatres*, 793 N.Y.S.2d at 368.

it allows for alternative avenues of expression. Both the federal and state courts defer to the municipality's judgment on the necessity of such zoning regulations as a means of combating the secondary effects of adult establishments on the quality of life. In *For the People Theatres*, the court found that the City Council "reasonably believed that the nature of the 60/40 establishments . . . remained unchanged, and that the 2001 amendments were necessary to effectuate the original legislative purpose" of combating the negative secondary effects of adult use establishments.[79] Turning to the issue of the availability of reasonable alternative avenues of communication, the court concluded that "sufficient area is available so that the amendments do not have the effect of suppressing, or greatly restricting access to, lawful speech."[80]

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[79] *Id.*
[80] *Id.* at 80.