Coates' Canons Blog: A Topless Bar in Our Fair Town?

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Paul Proteus, the town manager of Maycomb, leaned back in his chair with a deep sigh. It was a quiet Friday afternoon. All of the week's crises had passed. The parks staff and chamber of commerce folks just reported that final arrangements for the weekend BBQ festival were complete. The weekend weather forecast was great. The pig cooking was about to commence. All was well with Paul's world.

His reverie was rudely interrupted by a frantic call from the Mayor. "Paul, I just ran into Malcolm Tucker as he was driving out of town for a meeting in Charlotte. He had some disturbing news. He says he is going to open another one of his topless bars, this time in Maycomb. He drove off before I could get any details. Times may be hard, but we don't need that kind of business here. Charlotte is one thing, but Maycomb is altogether different. I want an ordinance that keeps these places out of Maycomb and I want it on the books before Malcolm applies for a permit for his sleazy bar. Pull together some material on this and I'll be in your office first thing Monday morning for your report. Sorry to dump this on you, but we need to hustle on this."

As Paul senses his weekend of BBQ bliss quickly slipping away, his first thought is a simple one. Can we solve this by simply banning adult entertainment bars altogether? That is certainly what the Mayor wants to do. But Malcolm has sued the town before and surely won't hesitate to sue again. Would a ban hold up in court?

No. While a small town may be able to **ban a particular land use** that is incompatible with all of its potential neighbors, adult businesses present an additional legal issue that prevents the town from adopting a total ban. The First Amendment protects the freedom of speech. Sexually explicit but non-obscene books, magazines, and films fall into the category of protected speech. Dance is a form of expressive speech. The Supreme Court has held that performers of erotic dances in adult establishments have some modest degree of First Amendment protection – less than other types of speech, but some protection nonetheless.

How much protection do they have? Enough to prohibit the town from enacting a total ban. A regulation may not totally preclude location of a business offering constitutionally protected speech from the entire jurisdiction. The question of just how close a jurisdiction can get to a ban without crossing the constitutional line has, not surprisingly, been frequently litigated.

The initial question for a court reviewing these restrictions is what standard of judicial review should be applied. If a restriction is based on the content of the speech, it must be narrowly drawn to accomplish a compelling governmental interest. This is a very difficult burden that is met only in extraordinary situations and a typical land use regulation of adult businesses will fail to meet that burden. On the other hand, an ordinance that is "content neutral" can regulate the time, place, and manner of speech.

Two Supreme Court cases allow most land use regulations of adult businesses to be reviewed under this "content neutral" standard. In *Young v. American Mini-Theatres, Inc*., 427 U.S. 50 (1976), the Court upheld a Detroit ordinance that required adult theaters to be located at least 1,000 feet from any two other regulated uses and 500 feet from residential zoning districts. The city based this requirement on preventing adverse effects on property values, increases in crime, and locations of these theaters that would encourage residents and business to move elsewhere. The Court held that the city's interest in preventing the deterioration of urban neighborhoods justified the restriction on location of adult uses. In *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), the Court further refined this standard. Renton, a town near Seattle, required adult theaters to be located at least 1,000 feet from any residential zone, residence, church, park, or school. The Court held the ordinance was "content-neutral," reasoning that the content of the films was not the basis of the ordinance since the city's "predominate concern" in adopting it was prevention of adverse secondary effects of adult theaters on the surrounding neighborhoods. In three cases dealing with regulation of nude and semi-nude dancing, the

Court applied very similar standards for review of regulations of these businesses. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theater, Inc*., 501 U.S. 560 (1991); and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

These decisions establish a rule, among others, that the regulation must not totally ban protected speech. It must allow for "reasonable alternative avenues of communication" of protected speech. Most larger North Carolina jurisdictions limit adult businesses to a small number of zoning districts (such as industrial districts) and require substantial setbacks from sensitive land uses (such as schools, places of worship, and residential zoning districts). Since many jurisdictions try to get as close to a ban as possible without crossing the constitutional line, these restrictions frequently leave a very limited "alternative avenue" available for adult businesses.

So how much of an "alternative avenue" is enough to pass constitutional muster? Rather than a set number, the answer has to be jurisdiction-specific. The tests that have emerged to determine if the sites potentially available under the regulation are "adequate" require an analysis of the detailed facts of each situation. Several dozen court cases indicate the following factors need to be considered in this analysis:

1) Do the sites suit some generic commercial venture? Can the public get to the sites? There is not a need to show that adult uses could be profitably operated at the sites, but some commercial use should be realistic.

2) Are the sites at least potentially developable for private commercial use? Do they have access to necessary infrastructure, especially if restricted to industrial areas?

3) Is it reasonable to believe the property would ever become available for any commercial use? If the land is permanently dedicated to other uses (such as a municipal airport or landfill), the fact that it is technically "available" under the ordinance is irrelevant. There is no need, however, to show that the sites are actually currently available to an adult business proprietor.

4) Is the number of potential sites is reasonably related to the history of demand in the particular locality. For example, a handful of potential sites would suffice for a small town that has not previously had an adult business, but a larger city with a history of these uses would need to identify a larger supply of potential sites. The number of past and current adult businesses, as well as the number of past applications, should be considered in this supply-demand analysis.

5) The local government adopting the restrictions has an obligation to conduct this site availability analysis prior to adoption of the restrictions.

So what can Paul tell the Mayor on Monday?

Maycomb cannot totally ban adult establishments. If the town adopts a total ban and denies Mr. Tucker's permit application for a topless bar, a court would likely not only invalidate the ban and order the permit issued, it would probably require the town to pay for Mr. Tucker's lawyer. The town can adopt very restrictive location limits to prevent harm to adjacent neighborhoods. It will be important that the council and staff consider what harms need to be prevented, how restrictive the rules need to be to address those harms, and what locations would be left in town once the rules are applied. Careful advice from the city attorney and some background planning analysis is needed before the council acts. Only by doing this essential preparation can the town be assured of getting a regulation that meets its needs in a constitutionally acceptable way.