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Opinion No. 07-80

Constitutionality of 1000 Foot Buffer for Adult-Oriented Establishments

QUESTIONS

1. Do the cases cited in the Preamble to SB 1263/HB 1678 support a finding by the General Assembly that adult-oriented establishments, as a category of commercial uses, are associated with a wide variety of adverse secondary effects?

2. Is it constitutional to set a 1,000 foot buffer for the location of adult-oriented establishments from a child care facility, a private, public, or charter school, a public park, a residence, or a place of worship?

OPINION

1. Yes. The cases as well as other information cited in the Preamble to SB 1263/HB 1678 support the General Assembly's finding that adult-oriented establishments are commonly associated with a wide variety of adverse secondary effects.

2. Yes. Legislation setting a 1,000 foot buffer between the location of adult-oriented establishments and a child care facility, a private, a public, or charter school, a public park, a residence, or a place of worship is facially constitutional.

ANALYSIS

Tennessee's Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, would be amended by SB 1263/HB 1678 to create Tenn. Code Ann. § 7-51-1407, which sets forth a state-wide zoning restriction for adult-oriented establishments. Section 1 of SB 1263/HB 1678 amends Title 7, Chapter 51, Part 14, by adding:

> **Section 7-51-1407.**
>
> An adult-oriented establishment shall not locate within one thousand feet (1000') of a child care facility, a private, public, or charter school, a public park, a residence,

> or a place of worship. For the purposes of this section, measurements shall be made in a straight line in all directions, without regard to intervening structures or objects, from the nearest point on the property line of a parcel containing an adult-oriented establishment to the nearest point on the property line of a parcel containing a child care facility, a private, public, or charter school, a public park, a residence, or a place of worship.

The extensive Preamble to SB 1263/HB 1678 ("Preamble") specifies the General Assembly's intent to control secondary effects of adult-oriented establishments, rather than "to suppress any speech activities protected by the United States or Tennessee Constitutions." The Preamble also references a multitude of federal district, circuit, and Supreme Court cases, as well as Tennessee cases, in which courts have found reasonable legislative determinations that adult-oriented establishments are commonly associated with adverse secondary effects, which need to be addressed by government regulations. Deleterious secondary effects of adult-oriented establishments commonly include, but are not limited to, illicit sexual activities, crime, health risks, as well as adverse effects on surrounding properties and property values. The Preamble also references reports and other information from other jurisdictions related to the deleterious secondary effects of adult-oriented establishments on the community.

The cases referenced in the Preamble establish that, when legislation is targeting the deleterious "secondary effects" commonly associated with adult-oriented establishments, it is appropriate to treat that legislation as being unrelated to the suppression of speech and to analyze its validity under an intermediate scrutiny test. Laws such as the zoning restriction set forth in SB 1263/HB 1678 have regularly been found to be constitutionally valid time, place, or manner regulations.

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976)(cited in the Preamble), certain motion picture theaters, which exhibited sexually explicit "adult" movies, challenged as unconstitutional a statutory classification in a zoning ordinance that excluded other types of movie theaters. The zoning ordinance prohibited adult-oriented establishments from locating within 1,000 feet of any two "regulated" adult uses or within 500 feet of a residential area. The challengers alleged that the zoning ordinance was constitutionally invalid, "because it is based on the content of communication protected by the First Amendment." *Id.* at 52. The Court rejected the challengers' complaint and concluded that subjecting the commercial exploitation of sexually-oriented material to zoning and other licensing requirements would be constitutionally valid time, place, and manner regulations under the First Amendment. *Id*. at 62-63.

In finding that "the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods," the Court in *Young* explained:

> Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly

> different, and lesser, magnitude than the interest in untrampled political debate . . .. Even though the First Amendment protects communication in this area from total suppression, we hold that the state may legitimately use the content of these materials as a basis for placing them in a different classification from other motion pictures.

Id. at 70-71. The Court further explained that the motivation for the zoning ordinance was to prevent a concentration of "adult" movie theaters, which the council reasonably determined caused an area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. "It is this secondary effect which the zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech." *Id.* at 71 n. 34.

> It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 72.

The control of adverse "secondary effects" was cited again by the United States Supreme Court as a justification for upholding another zoning ordinance restricting the location of adult-oriented movie theaters. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 44 (1986)(cited in the Preamble), "[t]he ordinance prohibited any 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school." The Court concluded that the ordinance "is completely consistent with our definition of 'content-neutral' speech regulations as those that are 'justified without reference to the content of the regulated speech.'" *Id.* at 48, *quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). As the ordinance was aimed at the "secondary effects" of adult-oriented theaters on the surrounding community, rather than the content of the films shown at those establishments, the Court concluded that it was not intended to suppress speech. In assessing the constitutional validity of such an ordinance under the First Amendment, the appropriate inquiry is whether it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." 475 U.S. at 49-50. Application of this intermediate scrutiny standard led to the conclusion that the zoning ordinance was constitutionally valid. *Id.* at 50-52.

The legislative body is under no requirement to conduct new studies in an attempt to establish "secondary effects" prior to passing a reasonable regulation. The legislative body may rely on court decisions from other jurisdictions. Evidence relied upon by the legislature may be nothing more than a reference to "detailed findings" summarized in a legal opinion involving a similar regulation. *Id.* at 50-52. "[T]he First Amendment does not require a [legislative body], before enacting such an ordinance [regarding adult-oriented establishments], to conduct new studies

or produce evidence independent of that already generated by other [jurisdictions], so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem the [legislative body] addresses." *Renton,* 475 U.S. at 51-52, *cited in City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002)(an adult-oriented establishment zoning case in which the Court reaffirmed the *Renton* intermediate scrutiny test). Common sense and logic may also support such regulations. The government is not required "to demonstrate with empirical data [ ] that its [regulation] will successfully reduce crime." *Alameda Books*, 535 U.S. at 439.

In upholding a City of Cleveland zoning ordinance prohibiting "sex outlets" within 750 feet of a residential district, the Tennessee Court of Appeals applied the "secondary effects" doctrine in a challenge under both the First Amendment and Article I, Section 19 of the Tennessee Constitution. *City of Cleveland v. Wade*, 206 S.W.3d 51, 56-58 (Tenn. App. 2006), *perm. app. denied* (the ordinance was found to be directed at the "well-documented adverse" secondary effects associated with adult businesses).

As set forth in other cases referenced in the Preamble, courts regularly find that the government's substantial interest in combating the adverse secondary effects commonly associated with adult-oriented establishments satisfies the intermediate scrutiny test for constitutional validity of laws besides zoning distance requirements. Public indecency laws, including Tennessee's, which have the effect of requiring dancers at adult-oriented entertainment establishments to wear pasties and a g-string, are regulations reasonably enacted to combat deleterious secondary effects. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-302 (2000); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 582 (1991)(Souter, J., concurring); *In re: State of Tennessee Public Indecency Statute*, Slip Op. at pp.4-5, Nos. 96-6512, 96-6573, 97-5924, 97-5938 (6th Cir., Jan. 13, 1999), *not recommended for full text publication, cert. denied* (2000)(all cited in the Preamble). Similarly, hours of operation restrictions in Tennessee's Adult-Oriented Establishment Act and similar laws have been found to be constitutionally valid regulations to address deleterious secondary effects of adult-oriented establishments. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440-441 (6th Cir. 1998), *cert. denied*, 537 U.S. 823 (2002); *Silver Video USA, Inc., v. Summers*, 206 WL 3114220 (Tenn. App. 2006), *perm. app. denied; Center for Fair Public Policy v. Maricopa County, Az.*, 336 F.3d 1153 (9th Cir. 2003); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363-65 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000)(all cases cited in Preamble). Through application of the "secondary effects" intermediate scrutiny test, Tennessee courts have upheld the constitutionality of Tennessee's Adult-Oriented Establishment Registration Act, Tenn. Code Ann. §7-51-1101, *et seq*., under both the First Amendment and the free speech provisions of the Tennessee Constitution. *American Show Bar Series, Inc., d/b/a Show Palace v. Sullivan County and State of Tennessee Attorney General* (intervenor), 30 S.W.3d 324 (Tenn. App. 2000), *perm. app. denied*.

The General Assembly may reasonably rely upon judicial findings regarding experiences with adult-oriented establishments in Tennessee, including, but not limited to, Chattanooga, Metropolitan Nashville and Davidson County, and Sullivan County. *See, e.g., Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davidson Co.*, 274 F.3d 377, 392 (6th Cir. 2001), *rehearing and suggestion for rehearing en banc denied, cert denied,* 535 U.S. 1073

(2002)(Metropolitan Nashville's licensing ordinance was validly enacted to address the substantial governmental interests of "reducing crime, open sex, and the solicitation of sex . . . , [which are] secondary effects of the sex industry"); *DLS, Inc. v. City of Chattanooga,* 894 F.Supp. 1140, 1145-46 (E.D. Tenn. 1995)(in challenge to Chattanooga's adult-oriented establishment ordinance, evidence showed adult cabarets were associated with crime and health problems and that "contact titillation at adult cabarets is tantamount to prostitution"), *aff'd in DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 410 (6th Cir. 1997), *rehearing and suggestion for rehearing en banc denied* (all cases cited in the Preamble); *see also, e.g., Ellwest Stereo Theater v. Boner,* 718 F. Supp. 1533, 1562-64 & 1577 (M.D. Tenn. 1989); *Broadway Books, Inc. v. Roberts,* 642 F. Supp. 486, 491 (E.D. Tenn. 1986)(both cases describe increased crime and health risks and are cited in the Preamble).

In summary, the General Assembly reasonably may believe that the cases, experiences, and other information cited in the Preamble to SB 1263/HB 1678 are relevant evidence of deleterious secondary effects commonly associated with adult-oriented establishments. Guided by the principle of *Renton* that "content neutral" regulations should receive only intermediate scrutiny, the United States Supreme Court's "cases require only that [governmental entities] rely upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address." *Alameda Books,* 535 U.S. at 441-42. Legislative bodies are "in a better position than the Judiciary to gather and evaluate data on local problems." *Id.* at 440, *citing Erie v. Pap's A.M.,* 529 U.S. at 297-98. "As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of [legislative bodies]." *Alameda Books,* 535 U.S. at 451-52 (Kennedy, J., concurring); *see Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davidson Co.,* 466 F.3d 391, 398 (6th Cir. 2006), *rehearing denied, cert denied,* ___ U.S. ___, 2007 WL 1109066 (2007)(when affirming the dissolution of an injunction prohibiting enforcement of Nashville's adult entertainment ordinance, the court also affirmed the denial of plaintiffs' requested discovery regarding secondary effects with the court "deferring to the local governments' conclusions regarding whether and how their ordinances address deleterious secondary effects of adult-oriented establishments").

On its face, the proposed zoning restriction is intended to address deleterious secondary effects of adult-oriented establishments and not to suppress constitutionally protected speech activities. As set forth in the foregoing cases, under the "secondary effects" intermediate scrutiny test, such zoning restrictions are deemed constitutionally valid if they allow adequate alternative avenues of communication. On its face, the proposed state-wide zoning restriction appears to leave available constitutionally adequate locations for adult-oriented establishments.

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