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1-1-1986

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Recommended Citation

Linda Kimbell, *First Amendment: Zoning of Adult Business No Cure-All*, 6 Loy. L.A. Ent. L. Rev. 183 (1986).
Available at: http://digitalcommons.lmu.edu/elr/vol6/iss1/14

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FIRST AMENDMENT: ZONING OF ADULT BUSINESS NO CURE-ALL

Zoning ordinances, although non-discriminatory on their face, will be given close scrutiny by the courts to determine if their impact on constitutionally protected rights is justified. In *Ebel v. City of Corona,*[1] the Ninth Circuit held that the owner of an adult bookstore was entitled to a preliminary injunction to restrain the city from enforcing allegedly non-discriminatory zoning ordinances which restricted adult-oriented businesses to certain areas and which, if enforced, would have meant closing down her business.[2]

Helen Ebel, plaintiff and appellant, opened an adult bookstore arcade in Corona, California, in July, 1981. At the time, hers was the only adult bookstore in the city. Two months later, on September 16, 1981, the city council of Corona adopted zoning ordinances regulating the selling of sex-oriented materials and the location of sex-oriented businesses. The restrictions on location were designed to keep such businesses away from facilities frequented by minors, such as schools, recreation centers, churches, and parks.[3] In addition, the ordinances granted the owners of non-conforming businesses time to relocate.

On September 30, 1981, the city manager of Corona informed Ebel that she would have to relocate her adult bookstore. Ebel filed a complaint against the city and other parties on December 14, 1981. In her complaint, she alleged that the zoning ordinances violated her rights under the first and fourteenth amendments of the United States Constitution.[4] Ebel sought a preliminary injunction to prevent the city from forcing her to relocate during the disposition of the suit.[5]

The district court denied the motion for a preliminary injunction. The court ruled that Ebel had failed to prove a substantial likelihood of success on the merits and had not shown that she would suffer irreparable harm if the motion were denied. The court found that there were

1. 698 F.2d 390 (9th Cir. 1983).

2. *Id.* at 393.

3. *Id.* at 391 nn.1 & 2.

4. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." Section 1 of the fourteenth amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. *Ebel,* 698 F.2d at 391.

alternative sites available for Ebel's business (the zoning ordinances did not prohibit adult bookstores outright); that Ebel had not proved that the ordinances restricted the availability of adult material in Corona; and finally that Ebel had not demonstrated that the ordinances constituted a ban on adult bookstores there.[6]

On February 25, 1982, the motions panel of the Ninth Circuit granted Ebel a temporary injunction restraining the city from enforcing its ordinance, pending appeal. The city moved to vacate Ebel's temporary injunction. The city's motion was denied on May 3, 1982.[7] On February 1, 1983, the Ninth Circuit vacated the district court order and directed it to issue a preliminary injunction, pending trial on the merits, and remanded the case for trial.[8]

The test for issuance of a preliminary injunction adopted by the Ninth Circuit is contained in *Aguirre v. Chula Vista Sanitary Service and Sani-Tainer, Inc.:*

> [A] preliminary injunction should issue upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief.[9]

In denying the preliminary injunction, the district court applied the first alternative of this either/or test, that is, probable success on the merits and possible irreparable injury. The Ninth Circuit, however, applied the second alternative and determined that there were serious questions concerning the merits of Ebel's claim which presented fair grounds for litigation.[10]

The court looked first at the alleged violation of Ebel's constitutionally protected right to free speech. Writing for the court, Judge Goodwin stated two basic tenets upon which decisions are based when the constitutionality of legislation is questioned. The first is that the courts apply

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6. *Id.*

7. *Id.* at 392.

8. *Id.* at 393.

9. Aguirre v. Chula Vista Sanitary Service and Sani-Tainer, Inc., 542 F.2d 779, 781 (9th Cir. 1976) (emphasis in original) (employment discrimination action against garbage disposal company by Spanish-surnamed employees). This test was quoted from Gresham v. Chambers, 501 F.2d 687, 691 (2d Cir. 1974) (civil rights suit brought by community college faculty member against college president and chairman of board of trustees to enjoin appointment of associate dean; denial of preliminary injunction upheld).

10. *Ebel*, 698 F.2d at 392.

"strict scrutiny to statutes that impinge on first amendment rights."[11] The second is that a state or local legislative body must have compelling state interests in order to justify laws that regulate an unprotected activity but which also incidentally limit free expression.[12]

Judge Goodwin compared the situation in Corona to that in the city of Detroit, presented in *Young v. American Mini Theatres, Inc.*, the leading case concerning the regulation of adult businesses through zoning.[13] Ordinances adopted by the city of Detroit in 1962 and 1972 classified theaters as "adult" and made them subject to zoning restrictions based on the content of the movies they featured. The issue in *Mini Theatres* was whether this content-based classification was unconstitutional.[14] The United States Supreme Court stated that such a classification would not always be held to violate the first amendment.[15] There would be no violation so long as, in passing the ordinances, "the need for absolute neutrality by the government was met."[16] Additionally, the ordinances could not have the effect of totally suppressing communication in this area. However, proof of government neutrality alone would not be sufficient to establish constitutionality of the ordinances. The scrutiny would also have to reveal that the ordinances were justified by compelling state interests.[17]

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11. *Id.* The court cited Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (per Douglas, J.) (holding a fee or poll tax violated the equal protection clause of the fourteenth amendment). The *Virginia Board* court stated: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."

12. *Ebel*, 698 F.2d at 392. Activities which do not in themselves involve the exercise of rights guaranteed in the United States Constitution, for example, the right of assembly or the right to practice the religion of one's choice (amend. I), are considered unprotected activities. In Ebel's case, the operation of her business at a particular location was not a constitutionally protected activity. However, her constitutionally protected freedom of expression became involved because the zoning ordinances regulated businesses based on the type of material they sold or displayed.

13. 427 U.S. 50, 56 (1976) (Stevens, J.) (holding zoning ordinances valid and appropriate locational restrictions despite their impact on free expression).

14. *Id.* at 52.

15. *Id.* at 71, 72. The Court outlined other areas in which classification of speech by content with ensuing restrictions has been upheld as non-violative of first amendment rights. Among these were different standards of proof in libel cases, depending on the status of the person libeled, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); state restictions on highway billboards, Markham Advertising Co. v. Washington, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969); and FTC regulation of advertising, FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975).

16. *Mini Theatres*, 427 U.S. at 67. Justice Stevens further wrote that, "[a] government's regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."

17. *Id.* at 70-71. The Detroit Council was concerned about the effect of a concentration of

The situation in Corona was quite different from that in Detroit. There were at least forty adult theatres in Detroit that were affected by the ordinances, while Ebel's was the only adult bookstore in Corona. The Detroit ordinances contained a grandfather clause which permitted existing businesses to continue operating, but Corona's did not. The Detroit ordinances were designed to disperse adult businesses, not to suppress them. However, because Ebel's was the only adult bookstore in Corona, the effect of the ordinances was suppression or restriction of access to adult fare.[18]

Judge Goodwin stated that, at the trial on the merits, Corona's case would hinge upon proof of some compelling state interest that would justify this infringement on Ebel's rights. Ultimately, the city would have to prove that the ordinances were designed to prevent some specific harm and the likelihood of such harm occurring.[19]

The Ninth Circuit then addressed Ebel's contention that the city's procedure in enacting the ordinances violated her due process rights. Her primary argument was that the city did not have adequate factual justification to enact the ordinances.[20] The court, rather summarily, dismissed this argument, stating that enactment of a zoning ordinance is a legislative act. Legislative bodies have great latitude in this area, and the Ninth Circuit found no error in the trial court's holding.[21]

Turning to the fourteenth amendment issue, the Ninth Circuit examined the district court record and found sufficient evidence to raise the question whether the city had violated Ebel's right to equal protection. Ebel had contended that the sole and specific purpose of the Corona zoning ordinances was to harass her and prevent her from exercising her first amendment right to freedom of speech. Among the evidence in support of this claim were public hearings on the ordinances at which testimony directly concerned Ebel's bookstore, the preamble to the ordinances which specifically mentioned the bookstore, a statement by the planning commissioner that he would like to see the bookstore out of Corona, and

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adult businesses on a neighborhood's property values, crime rate, and on relocation of other businesses out of the area. The desire to preserve neighborhoods from urban blight was considered a compelling state interest.

18. *Ebel*, 698 F.2d at 392.

19. *Id.* at 393.

20. *Id.* at 392. Since hers was the only adult bookstore, if not the only adult-oriented business, in Corona, Ebel seems to have had reason to argue that the city lacked sufficient first-hand evidence of the harm caused by such businesses.

21. *Id.* at 393. For this proposition, the court cited Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 673 (1976) (Burger, C.J.) (holding that a city charter amendment requiring land use changes to be approved by a referendum did not violate a landowner's due process rights), *remanded*, 48 Ohio St. 2d 47, 356 N.E.2d 499 (1976).

the fact that Ebel's was the only adult bookstore in Corona. Based on this evidence, the city's absolute neutrality in enacting the ordinances was made suspect. The Ninth Circuit determined that the claim presented fair ground for litigation.[22]

Finally, the court considered the hardships that Ebel would face if the preliminary injunction were denied. These were of two types. First there was the economic hardship she would face if she were forced to shut down, either temporarily while she relocated, or permanently if she could not find a new site for her business. Second, and even more serious, there was the harm to Ebel's freedom of expression which the United States Supreme Court had held to constitute irreparable injury.[23]

The city had failed to point out any harm that it would suffer if the bookstore stayed open during the trial on the merits. So, the balance of hardships weighed decidedly in Ebel's favor.[24]

In order to sustain her claim at the trial, Judge Goodwin wrote that Ebel would have to demonstrate that the real purpose of the ordinances was to run her bookstore out of Corona. This would establish that the ordinances were aimed at her, thereby violating her right to equal protection of the laws, and were a deliberate attempt to limit her freedom of expression, thus violating her first amendment rights. The district court was directed to carefully scrutinize the ordinances and the city's assertions of harm.[25]

In his dissenting opinion in *Mini Theatres,* Justice Stewart expressed his concern that with its decision, the Court had "shied from its responsibility to protect offensive speech from governmental interference."[26] The *Ebel* decision indicates that the *Mini Theatres* holding was not the open door to censorship that Justice Stewart may have feared.

Although zoning ordinances may be upheld as legitimate regula-

22. *Ebel*, 698 F.2d at 392.

23. *Id.* The court cited Elrod v. Burns, 427 U.S. 347 (1976) (Brennan, J.) (affirming a court of appeals judgment granting a preliminary injunction to Republican non-civil service employees threatened with discharge when a Democratic sheriff took office). Brennan wrote, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

24. *Ebel*, 698 F.2d at 392.

25. *Id.* "The district court should make findings on the validity of the city's assertions and then closely scrutinize the Corona ordinance's relationship to prevention of the alleged harms." What the district court would look for was "some rational relationship between the objective of the Ordinance and the methods adopted" to achieve this objective. *Mini Theatres*, 427 U.S. at 56 n.11.

26. *Mini Theatres*, 427 U.S. at 87. Justice Stewart wrote that the Court had not shied from its responsibility heretofore, thus implying that with the *Mini Theatres* decision he felt it had.

tions of the time, place, and manner of doing business, *Ebel* makes it clear that such ordinances must be free of any taint of discrimination. This purity must be more than merely visible on the surface. The ordinances enacted in Corona were quite similar to those Detroit had enacted. But this facial similarity was insufficient in itself to establish the constitutionality of the ordinances. *Ebel* reaffirms that any government body which enacts legislation to regulate adult businesses must have ample factual proof of the harm these businesses cause and the appropriateness of the legislation as a means of preventing that harm.

A similar Ninth Circuit case, *Kuzinich v. County of Santa Clara,*[27] decided just prior to *Ebel*, lends further support to this thesis. In that case, the Ninth Circuit held that a grant of summary judgment to the defendant county as to the validity of its zoning ordinances was improper.[28] In reaching its decision, the court applied the four-part test of *United States v. O'Brien.*[29] The court focused specifically on the third part of the test, which required that the governmental interest which compelled the legislation be "unrelated to the suppression of free expression."[30] The court determined that although there was evidence to show the ordinance was passed as a litter and traffic-control measure, there was also evidence to indicate that its real purpose was to control pornography.[31]

The Ninth Circuit departed somewhat from the "real purpose" test of *Ebel* in *Tovar v. Billmeyer.*[32] There the Ninth Circuit stated that to prove zoning ordinances discriminatory, the plaintiff would have to show that a desire to restrict its first amendment rights was "a motivating factor" in the zoning decision.[33] Judge Reinhardt, writing for the court, explained that the change in the test was necessary because *Tovar*

27. 689 F.2d 1345 (9th Cir. 1982) (amended January 1983).

28. *Id.* at 1348, 1349.

29. 391 U.S. 367 (1968) (Warren, C.J.) (upholding the conviction of a draft card burner). Justice Powell used this test to analyze the Detroit ordinances in his concurring opinion in *Mini Theatres.*

30. *O'Brien*, 391 U.S. at 377. The test as stated in *O'Brien* reads:

> [A] governmental regulation is sufficiently justified despite its incidental impact on First Amendment interests, if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

31. *Kuzinich*, 689 F.2d at 1348.

32. 721 F.2d 1260 (9th Cir. 1983). Plaintiffs owned an adult theater and bookstore in Pocatello, Idaho. They had operated the business for three years when they relocated. They were denied city permits and licenses for their new location.

33. *Id.* at 1266.

presented a "more complicated question of the mixed motives that are frequently present in First Amendment cases," while *Ebel* presented the simpler situation where "there [was] clearly only a single purpose motivating the legislative action" and the real purpose test was therefore inadequate.[34]

Judge Wallace, in his concurring opinion, criticized this change in the *Ebel* test because legislative actions are rarely motivated by a single purpose, making the *Ebel* test rarely applicable.[35] He foresaw confusion as courts grappled with the question of which test to apply in future cases.[36]

Judge Wallace's prophecy might have been more complete if he had predicted an increase in litigation as well as confusion resulting from the *Tovar* decision. In *City of Las Vegas v. Foley,*[37] Lydo Enterprises, a respondent, claimed that *Tovar* allowed it to depose city officials to discover their subjective motivations for enacting zoning ordinances which Lydo claimed were discriminatory.[38] In granting the city a protective order, the court stated that determining the motivating factor behind a particular piece of legislation does not require looking beyond the "objective manifestations of legislative purpose to the subjective motivations of individual legislators."[39]

Whether one applies the real purpose test of *Ebel* or the motivating factor test of *Tovar*, cases of this type should be a yellow caution light to legislative bodies to proceed carefully in enacting zoning ordinances which infringe on first amendment rights. The justification for such ordinances and the purpose they are designed to fulfill will have to be carefully documented to withstand challenges to their constitutionality. It will not be enough that ordinances seem similar in content and purpose to those, such as the Detroit ordinances, which have been upheld as con-

34. *Id.* at 1267 n.7.

35. *Id.* at 1268.

36. *Id.*

37. 747 F.2d 1294 (9th Cir. 1984). Lydo Enterprises, Ltd. challenged city zoning ordinances on constitutional grounds. After discovery was complete, Lydo moved to reopen, based on *Tovar*. The city moved for a protective order which was denied by the magistrate and affirmed by the district court. The city then applied to the court of appeal for a writ of prohibition and/or mandamus to order Judge Foley of the Nevada district court to grant a protective order.

38. *Id.* at 1298.

39. *Id.* Because the objective manifestations of the council's intention to force the plaintiff's business out of the city were so blatant, the court stated that *Tovar* could hardly be held to authorize inquiry into a lawmaking body's subjective motivations.

stitutional. Given the delicate nature of the area, it appears likely that the future holds a case-by-case testing of this type of zoning ordinance.

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