Municipal Regulation of Adult-Oriented Businesses

Public officials are sometimes faced with the prospect of adult-oriented businesses (AOBs) locating in a community and the resultant outcry of constituents. These businesses often target communities that have little or no municipal AOB regulation. Citizens may, nevertheless, want to know what tools are available to municipalities to minimize the real or perceived effects[1] such businesses may have on the community. Below is an abbreviated list of some methods by which AOBs may be regulated. As the discussions below indicate, each of these regulatory methods presents certain legal challenges[2] that require research and, in all cases, careful drafting and review by a municipality's solicitor.

Regulation of AOBs through Zoning[3]

Zoning is arguably the most prevalent means of controlling AOBs. Zoning that distinguishes AOBs from other commercial uses has consistently been upheld by courts provided it is done within certain constitutional constraints.[4] There are two primary methods of zoning AOBs: "dis-

[1] These effects, known in the legal parlance as the "secondary effects" of adult uses, relate to statistically-supported increases in crime and nuisances and are important factors in establishing the legal justification for regulating AOBs.

[2] Often, when methods of municipal regulation of AOBs are challenged, it is on the basis that they impinge on "speech" entitled to protection under the First Amendment to the United States Constitution, and the analogous provision of the Pennsylvania Constitution, Article 1, Section 7. For example, in the case of "nude dancing," both Pennsylvania courts and the United States Supreme Court have noted that such activity constitutes "expressive conduct" entitled to some protection under the state and federal constitutions. *See City of Erie v. Pap's A.M.,* 529 U.S. 277, 284-285 (2000). In cases involving adult book stores and AOBs that sell or rent adult videos or other printed materials, the "speech" aspects of the business are more readily apparent. *See generally Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Miller v. California,* 413 U.S. 15 (1976) ("The States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Id.* at 26, n.8, *citing United States v. O'Brien,* 391 U.S. 367 (1968)). An important legal distinction must be made, however, between sexually explicit or "pornographic" speech and "obscenity." As a matter of constitutional law, the former is entitled to First Amendment protection, while the latter, like "fighting words" or speech designed to incite immediate violence, is not. *See, e.g., Virginia v. Black,* 538 U.S. 343 (2003); *Miller v. California,* 413 U.S. 15 (1976). The United States Supreme Court has determined that the proper test for whether speech is obscene is "(a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (citations omitted). This definition has been codified within the Pennsylvania obscenity law, which criminalizes creation, possession, display and distribution of obscene materials. *See* 18 Pa.C.S. § 5903 (relating to obscene and other sexual materials and performances).

[3] In Pennsylvania, zoning, as discussed *infra,* primarily dictates the *location* of defined uses of property. Subdivision and land development ordinances (SLDOs) essentially regulate the manner in which property is used. SLDO provisions, often in concert with zoning ordinances, can provide for screening and window and sign restrictions that minimize the impact of the AOB on the appearance of the community without running afoul of constitutional limitations. *See also, infra,* text accompanying notes 17 and 18.

[4] *See, e.g., City of Renton v. Playtime Theatres,* 475 U.S. 41 (1986), *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976).

persion zoning," otherwise known as "anti-skid row" regulation, whereby, for example, the operation of an AOB is prohibited "within 1000 feet of any other such establishment or within 500 feet of a residential area;"[5] alternatively, "concentration zoning," also known as "red light district" regulations, whereby a particular use is prohibited from locating anywhere except in a specific portion of the municipality. Both methods have been held to be constitutionally permissible as legitimate "time, place, and manner" restrictions of protected speech.[6] It is also true, however, that in distinguishing AOBs for zoning purposes, both "dispersion zoning" and "red light district" regulations are subject to a three-prong constitutional test. Under this test, a regulation must: (1) be unrelated to suppressing speech; (2) be narrowly tailored to serve a substantial governmental interest; and (3) permit reasonable alternative channels of communication.[7] The nuances of each prong of this test are complex. It is, however, useful to know what zoning *cannot* do:

- Zoning cannot completely eliminate AOBs from the municipal or jointly zoned area.[8]
- Zoning cannot exclusively permit AOBs in an area that is "commercially unavailable."[9]
- Zoning cannot force preexisting AOBs to cease operation and relocate.[10]

Municipal Licensing of AOBs

Subject to certain constitutional and statutory restraints,[11] Pennsylvania courts have upheld a municipality's ability to enact and enforce licensing requirements for AOBs and their employees.[12]

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[5] *See* 427 U.S. at 53.

[6] *See City of Renton,* 475 U.S. at 52. *See also,* 427 U.S. at 63, n.18 ("Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment.") *citing Kovacs v. Cooper,* 336 U.S. 77 (1949) (limitation on use of sound trucks); *Cox v. Louisiana,* 379 U.S. 559 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); *Grayned v. City of Rockford,* 408 U.S. 104 (1972) (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

[7] *See* 475 U.S. at 49-51.

[8] *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981).

[9] There is little Pennsylvania state or Third Circuit federal court authority analyzing this specific issue in the context of the "time, place and manner" test for siting AOBs. Other federal appellate courts use tests that suggest that sites for AOBs must be both physically available (appropriate for development) and legally available (not excluding adult uses). *See, e.g., Diamond v. City of Taft,* 215 F.3d 1052 (9th Cir. 2000), *citing Topanga Press v. City of Los Angeles,* 989 F.2d 1524, 1530 (9th Cir. 1993).

[10] *See Northwestern Distributors, Inc. v. ZHB (Tp. of Moon),* 584 A.2d 1372 (Pa. 1991). In this case, the Pennsylvania Supreme Court held that this practice, called "amortization of a nonconforming use," amounted to a confiscation of property without compensation and thus violated Article I, Section 1, of the Pennsylvania Constitution.

[11] Some questions may be raised as to whether particular types of municipalities, i.e., boroughs, townships, towns or cities, may have proper statutory authorization to license AOBs. For example, in *Pennsylvania Pride, Inc. v. Southampton Township,* 78 F.Supp.2d 359 (M.D. Pa. 1999), the federal district court found that a township of the second class had implied power to license adult bookstores despite the fact that the explicit business licensing provision of the Second Class Township Code, Section 1532, does not enumerate AOBs within those businesses that may be licensed.

[12] *See, e.g., Piatek v. Pulaski Township,* 828 A.2d 1164 (Pa. Cmwlth. 2003); 78 F.Supp.2d 359.

These regulations have involved hours of operation, imposed a minimal distance between exotic dancers and patrons, required employee background checks, and provided for warrantless inspections of AOBs during business hours as well as reasonable administrative fees.[13] It is important for licensing regulations to provide clear and explicit standards and a ready means for court review. These requirements are necessary because these types of regulations involve obtaining governmental approval prior to engaging in "protected speech" and thus are typically considered "prior restraint" regulations. As such, there is a rebuttable presumption that the regulations are unconstitutional.[14] This presumption is overcome when the regulation is determined to provide clear standards to guide the decision-making official, and prompt judicial review of the decision during which time the status quo must be maintained.[15] As with zoning regulation of AOBs, courts will require that any given licensing requirement have a reasonable correlation to preventing an "adverse secondary effect" of the AOB, rather than be based on the content of the "speech" being regulated.[16]

State Regulations and Municipal Nuisance Ordinances

In 1996, the General Assembly passed Act 120, which added Chapter 55 (Adult-Oriented Establishments) to Title 68 (Real Property) of the Pennsylvania Consolidated Statutes. In the legislative intent provisions of this statute, the General Assembly recognized the evidence of a "number of adult-oriented establishments which require special regulation by law and supervision by public safety agencies in order to protect and preserve the health, safety and welfare of patrons of these establishments, as well as the health, safety and welfare of the citizens of this Commonwealth."[17] The law provides standards for the illumination, physical configuration, restriction on the presence of minors, and ownership liability for the conduct of employees of defined "adult-oriented establishments." Furthermore, the act provides civil remedies and penalties that may be pursued by municipalities, the county district attorney or the Attorney General.[18] Municipalities facing the prospect of an incoming or existing AOB should familiarize themselves with these provisions.

As discussed elsewhere in this publication,[19] municipalities may prohibit the unreasonable interference with the public health, safety, peace, comfort or convenience. Many municipalities have nuisance ordinances that, under certain circumstances, could possibly be used to shut down AOBs, or force them to abate any conduct or condition that constitutes the nuisance. Furthermore, the

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[13] *See* 828 A.2d at 1167.

[14] *See Southeastern Promotions, Ltd .v. Conrad,* 420 U.S. 546 (1975).

[15] "[A system of prior restraint] avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 559, *quoting Freedman v. Maryland*, 380 U.S. 51, 53 (1965).

[16] *See* 828 A.2d at 1173-74.

[17] 68 Pa.C.S. § 5501(a).

[18] *See* 68 Pa.C.S. § 5506 (relating to adult-oriented establishments, civil action to enjoin or abate violations).

[19] *See* related *Deskbook* article entitled "Public Nuisances."

Pennsylvania "Use of Property Act"[20] provides that the use of a building for the purpose of "fornication, lewdness, assignation, and/or prostitution is . . . declared to be a common nuisance."[21] The district attorney of any county wherein the nuisance lies may bring an action to abate the nuisance or prosecute under the act.[22] It is important to note that *the content* of any adult materials or pornographic speech cannot constitute a nuisance in and of itself.[23] In essence, it is the "secondary effects" of the AOBs, i.e., sexual activity, indecent exposure, noise, drug activity, etc., that establish the nuisance for purposes of municipal ordinances or, where appropriate, state law.

Specific Issues

(1) Difficulties Regulating Nude Dancing in Pennsylvania

As previously discussed, municipal regulation through zoning of the location of businesses featuring nude dancing often withstands constitutional challenges. In light of recent case law, however, it may prove significantly more difficult for a municipality in Pennsylvania to totally prohibit nude dancing in "public places" through operation of "public indecency" ordinances. In *Pap's A.M. v. The City of Erie,*[24] the Pennsylvania Supreme Court held that Article 1, Section 7, of the Pennsylvania Constitution provides greater protection to speech than the First Amendment to the United States Constitution, and therefore, a total ban on "expressive conduct," such as nude dancing, must satisfy a "less intrusive means" test.[25]

Where municipalities seek to ban expressive conduct, they must prove not only that there is a compelling governmental interest in doing so, but also that governmental goals may not be accomplished by "a narrower, less intrusive method than the total ban on expression."[26]

An ordinance having the effect of totally barring nude dancing faces invalidation under the Pennsylvania Constitution because the goals of combating the "secondary effects" of nude dancing may be accomplished, in the Pennsylvania Supreme Court's opinion, by methods such as zoning,

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[20] Act 319 of 1931 (68 P.S. § 467 et seq.).

[21] *Id.* § 1.

[22] For the use of this statute in the abatement of nuisances, *see Commonwealth ex rel. Preate v. Danny's New Adam & Eve Bookstore,* 625 A.2d 119 (Pa. Cmwlth. 1993); *Commonwealth ex rel. Lewis v. Allouwill Realty Corp.,* 478 A.2d 1334 (Pa. Super. 1984).

[23] "It has been held that obscenity cannot at once be defined and enjoined under the common law of public nuisance, because nuisance law provides too vague a standard for determining the line between protected and unprotected speech." *Ranck v. Bonal Enterprises, Inc.,* 467 Pa. 569 (1976).

[24] 571 Pa. 375 (2002). This case was the Pennsylvania Supreme Court decision issued after remand from the United States Supreme Court decision *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000). While the United States Supreme Court upheld the constitutionality of relevant provisions of the City of Erie's public decency ordinance under federal law, the Pennsylvania Supreme Court, on remand, found that the ordinance violated a heightened protection for speech contained in Article 1, Section 7, of the Pennsylvania Constitution.

[25] *See* 571 Pa. at 410.

[26] *Id.*

more stringent civil and criminal enforcement mechanisms, and hours-of-operation restrictions. Municipalities seeking to restrict nude dancing by way of public indecency or nudity ordinances should be very aware of the *Pap's A.M.* case and the fact that the Pennsylvania Supreme Court has articulated an extremely strict test for the legitimacy of regulations that regulate "expressive conduct" based on the message the conduct conveys.

(2) Sexually-Oriented Conduct in Establishments with Liquor Licenses

The language in the Pennsylvania Liquor Code prohibits licensed establishments from permitting any "lewd, immoral or improper entertainment" on the premises.[27] Two federal court decisions, however, have rendered this phrase unconstitutional, thus effectively prohibiting any enforcement of the provision.[28] Prior to these decisions, Pennsylvania case law provided that nude dancing in public bars constituted a violation of this provision.[29] In the Third Circuit decision interpreting this provision, *Conchatta v. Miller,*[30] the court held that the term "lewd" as used in Section 4-493(10) of the Liquor Code is unconstitutionally overbroad.[31] The court noted that "[t]he statutory language clearly could have been drafted more narrowly to specifically target secondary effects associated with nude or topless dancing."[32] The court's language appears to indicate the overbreadth issue could be alleviated by an appropriate revision of the Liquor Code.

The Pennsylvania State Police through its Bureau of Liquor Control Enforcement has a "nuisance bar" program that targets bars that disrupt the community or, until the recent court decisions, violated the decency provisions of the Liquor Code. Citizens can file complaints with either the Bureau or their local police if they have reason to believe the Liquor Code is being or has been

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[27] *See* Act 21 of 1951, § 493(10) (47 P.S. § 4-493(10)). Section 7329 of the Pennsylvania Crimes Code (18 Pa.C.S. § 7329) uses the same language as Section 4-493(10) of the Liquor Code, i.e., "lewd, immoral or improper entertainment," but applies only in the context of "bottle clubs" rather than licensed establishments.

[28] The federal district court for the Eastern District of Pennsylvania, in *Conchatta, Inc. v. Evanko,* 2005 U.S. Dist. LEXIS 2638 (E.D. Pa. 2005), held that the terms "immoral or improper" were unconstitutionally vague as used in the Liquor Code. A subsequent decision of the Third Circuit in the same matter, *Conchatta, Inc. v. Miller,* 458 F.3d 258 (3d Cir. 2006), held that the term "lewd" as used in the Liquor Code is unconstitutionally overbroad.

[29] *See, e.g., Purple Orchid, Inc. v. Pennsylvania State Police, Bureau of Liquor Control Enforcement,* 572 Pa. 171 (2002); *Rising Sun Entertainment, Inc. v. Commonwealth,* 829 A.2d 1214 (Pa. Cmwlth. 2003).

[30] 458 F.3d 258 (3d Cir. 2006).

[31] *See id.* at 268. The court applied the test elucidated in the United States Supreme Court case *United States v. O'Brien,* 391 U.S. 367 (1968), and determined that the use of the term "lewd" failed the fourth prong of the test because the asserted governmental interest of limiting negative secondary effects is not applicable to a large number of establishments affected by the Liquor Code and its accompanying regulations. The *O'Brien* test provides that a regulation is considered constitutional provided that: (1) "it is within the constitutional power of the Government"; (2) it "furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.

[32] 458 F.3d at 268.

violated.[33] It is important to note that the provisions relating to the nuisance bar program would not apply to "bottle clubs," i.e., establishments where alcohol is not sold, but where patrons may bring their own alcohol.

Use of Restrictive Covenants: Community Involvement

A property owner whose property could possibly be used for an AOB has been an often overlooked method of combating AOBs. With the advice of legal counsel, a property owner could explore imposing conditions on leases and deeds, known as restrictive covenants that would limit or restrict the use of property for AOBs. Furthermore, citizens should become familiar with the appropriate state and local enactments that regulate businesses, nuisances and obscenity, and participate in local government if they feel their community is inadequately protected.

[33] *See* separately "Nuisance Bar Program," Pennsylvania Liquor Control Board, 2014, http://www.lcb.pa.gov/ Licensing/Topics-of-Interest/Pages/Nuisance-Bar-Program.aspx (September 11, 2020).