



**The Tool Box v. Ogden City Corp., No. 01-4134 (10th Cir. Jan. 22, 2003)**

**A City's use of restrictive covenants in an industrial park to restrict the location of a sexually oriented business is subject to First Amendment prior restraint analysis where the covenants afford unbridled discretion to city officials responsible for their administration.**

Tool Box, Inc. challenged the city's use of industrial park restrictive covenants to restrict the location of its nude dancing establishment. Tool Box leased the property in question which was located in an industrial park area that was zoned to allow SOBs. The city retained control over certain restrictive covenants associated with the industrial park for purposes of fulfilling park's mission which is to ensure: "a wholesome environment for selective manufacturing, fabrication and other allowed uses."

An Industrial Park Review Board administered by the city is responsible for oversight of the covenants. Before leasing the property Tool Box received assurances from the city's legal counsel that the restrictive covenants did not prohibit the nude dancing at the location in question. Tool Box then proceeded to build on the property and applied for a building permit. Citing the restrictive covenants, the Industrial Review Board denied the permit and its decision was affirmed by the mayor on appeal. Tool Box then filed suit, pursuant to 42 U.S.C. § 1983, alleging that the covenants were an unconstitutional prior restraint lacking adequate procedural safeguards. Applying the *O'Brien* test, the district court dismissed the suit and this appeal ensued.

On appeal, the first amendment issue in contention was whether prior restraint analysis governed the case. The court of appeals held that it does and ruled in favor of Tool Box on vagueness grounds:

Because the protective covenants in the case at bar provide unbridled discretion to the Review Board in determining whether a lawful business may open up shop in the industrial park, the district court erred by failing to apply the prior

restraint approach delineated in *Freedman* as filtered through *FW/PBS*. That the Mayor may use his standardless "discretion" to affirm the Review Board's equally standardless decision only underscores the propriety of the prior restraint analysis.

Dissenting, Judge Hart argued that it was inappropriate to review for vagueness. Such review, he argued is only suitable for laws have a particular nexus to speech as set forth in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 761 (1988):

In contrast to the type of law at issue in this case, laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship...

For example, a law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse. And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision.



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**A municipality may restrict the sale or consumption of alcohol on the premises of businesses that serve as venues for adult entertainment without violating the First Amendment.**

Ben's Bar, Inc. a nude dancing tavern brought suit against the Village of Somerset challenging the Village's ordinance which prohibits the consumption of alcoholic beverages on the premises of sexually oriented businesses. The district court ruled in favor of the Village on all claims.

On appeal, the issue for determination was whether a municipality may restrict the sale or consumption of alcohol on the premises of businesses that serve as venues for adult entertainment without violating the First Amendment. Upholding the district court, the court of appeals answered in the affirmative.

The court engaged in a lengthy review of Supreme Court precedent regarding the regulation of sexually oriented businesses. It noted that the U.S. Supreme Court had explicitly held in *California v. LaRue*, 409 U.S. 109 (1972) that governmental entities can regulate the presence of alcohol in SOB's under the Twenty First Amendment of the U.S. Constitution. However, *LaRue* was overruled by *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) where the Supreme Court held that the Twenty First Amendment does not serve as an independent basis for regulation, but the states retain general police power to regulate the presence of alcoholic beverages in SOB's.

In conclusion, the Seventh Circuit held that:

[I]ike the Fourth and Eleventh Circuits, we conclude that after *44 Liquormart* state regulations prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishment must be analyzed in light of *American Mini Theatres* and *Barnes*, as modified by their respective progeny. . .

[W]e conclude that a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if (1) the State is regulating pursuant to a legitimate governmental power, *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673; (2) the regulation does not completely prohibit adult entertainment, *Renton*, 475 U.S. at 46, 106 S.Ct. 925; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments, *Pap's A.M.*, 529 U.S. at 289-91, 120 S.Ct. 1382 . . . and (4) the regulation is designed to serve a substantial government interest, narrowly

tailored, and reasonable alternative avenues of communication remain available. [citing *Alameda Books*, 122 S.Ct. at 1734 and *Pap's A.M.*].

The court found that the Village's ordinance satisfied this test. It also held that the city need not produce specific evidence demonstrating that its ordinance would counter adverse secondary effects. Rather, it need merely demonstrate rational basis to believe that the ordinance would counter the undesired effects.

The court also rejected the Ben's Bar's argument that the ordinance is not narrowly tailored because the Village offered no evidence that "incidental restrictions placed on Ben's [Bar], over and above the pasties and G-strings requirement, ameliorate any purported secondary effects." The court noted that 1) the ordinance imposes no restrictions on a dancer's ability to convey their message, it simply limits consumption of alcohol; 2) the ordinance is limited to carefully defined adult entertainment establishments; and 3) the prohibition is no greater than is essential to combat the adverse secondary effects resulting from the combination of nude and semi-nude dancing and alcohol, because as a practical matter, a complete ban is the only way the Village can advance its interests.

**Karen Weiss, Note, "But She Was Only A Child. That is Obscene!" The Unconstitutionality of Past and Present Attempts to Ban Virtual Child Pornography and the Obscenity Alternative, 70 Geo. Wash. L. Rev. 228 (2002)**

This article reviews *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) which struck down the ban on virtual child pornography in the Child Pornography Prevention Act of 1996 (CPPA). It also reviews CPPA's successor, the Child Obscenity and Pornography Prevention Act of 2002 (COPPA) and predicts that COPPA will be held unconstitutional on grounds similar to CPPA. The article contends that the government should rely on enforcement of existing obscenity laws to combat child pornography and virtual pornography. It notes that obscenity prosecutions are likely to be more successful against child pornography than they are against adult pornography. Finally, it suggests that active enforcement of obscenity laws will yield greater long term dividends than additional Congressional enactments which violate free speech.

**Craig L. Leis, Note, *United States v. Playboy Entertainment Group, Inc. -- Sexually Explicit Signal Bleed and | 505 Of the CDA: Unable to Overcome Strict Scrutiny ... But Will Strict Scrutiny Be Able to Overcome the Future?.*, 30 Cap. U. L. Rev. 861 (2002)**

This article reviews *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), which struck down portions of the Communications Decency Act (47 U.S.C. § 561). The act mandated that cable television providers completely scramble signal bleed of "sexually explicit" or indecent "adult" programming or limit the hours of transmission of such programming. This article argues that: 1) the Supreme Court correctly determined that relevant portions of the act were content based and subject to strict scrutiny analysis 2)

the government failed to demonstrate a compelling interest; and 3) that less restrictive means were available to the government as evidenced in other portions of the act.