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### **New York City Zoning Law Relating to Adult Business Upheld**

On April 8, 1997, the United States District Court, Southern District of New York, rejected Cozy Cabin's, motion for a preliminary injunction to bar New York City from enforcing a zoning law pertaining to adult establishments. (*Cozy Cabin v. The City of New York*).

In upholding the 1995 zoning law as constitutionally valid, federal court judge, John Martin dismissed arguments (1) that the law was a viewpoint-based restraint on protected expression in violation of the First Amendment and (2) that the law violated equal protection because it impermissibly restricted the zoning of establishments based on gender classification. (The law applies to establishments that feature female topless dancers, but not those featuring male topless dancers).

Plaintiffs' argument on First Amendment grounds failed because the court found that the City was not aiming to suppress expression, or disadvantage women who want to perform barechested, as opposed to similarly situated men. Rather, the court held that the City adequately demonstrated that the zoning law was enacted to counter the negative secondary effects it believed were caused by adult establishments in New York City. Such effects include increased crime, reduced property values, and a perceived decline in community character.

The district court looked to the seminal case of *Renton v. Playtime Theaters*, 475 U.S. 41 (1986), where that court held an ordinance not aimed at the content of adult films, but rather at the secondary effects on the surrounding community was a valid time, place, and manner regulation. As in *Renton*, the New York City zoning law was found to be a content-neutral time, place, and manner regulation since it was designed to serve a substantial governmental interest and it did not

unreasonably limit alternative avenues of communication. The law did not ban adult establishments outright, it just limited them to specific areas.

The court denied plaintiffs' argument that the zoning law violated equal protection by treating female breasts differently from male breasts. The court stated that even assuming male and female breasts are equally erotic, it would not change the fact that in our culture the public display of female breasts has far different secondary effects than the public display of male breasts. The court held that the statute simply recognizes the anatomical differences between males and females, which in our society elicit different reactions. Including bare female, but not male, breasts in the definition of "specified anatomical areas" does not support the conclusion that the zoning ordinance has a gender-based anti-female intent since the inclusion of "human male genitals in a discernably turgid state" does not support a conclusion that the ordinance has an anti-male bias.

Plaintiffs' request for a preliminary injunction to stay the enforcement of the zoning law against adult establishments was denied since Cozy Cabin did not establish a likelihood of success on the merits.

### **Law Labeling Peep Show Booths as Nuisance Upheld**

Retail book and video stores, which provide private viewing booths for "adult" materials, challenged the New Jersey booth statute claiming it to be unconstitutional in violation of the First Amendment. The Law Division Judge agreed with plaintiffs, holding the statute to be a content-based restriction on free expression because it only applied to "sexually oriented businesses". The lower court went on to apply strict scrutiny and concluded that despite there being a significant governmental interest in reducing the spread of sexually

transmitted diseases, the statute did not provide the least restrictive means of achieving that goal. (*Chez Sez VIII, Inc., et. al. v. Deborah Poritz*).

The Appellate Division reversed, disagreeing with the lower court's holding that the statute was a form of viewpoint discrimination, since the statute's overall purpose was aimed at the secondary effects of speech. As such, the Appellate Division held the statute to be content neutral and applied the time, place, and manner standard found in *Renton v. Playtime Theaters*, 475 U.S. 41 (1986). Under *Renton*, content neutral regulations are valid where they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication.

The statute in question, prohibited commercial establishments from providing "booths, screens, enclosures or other devices which facilitate sexual activity". In determining that there was a significant government interest, the Appellate Division looked to the Senate Judiciary Committee which considered a memorandum by the Chief of the Judiciary Section in the Office of Legislative Services which outlined, "the concern that private booths provided by sexually oriented businesses encourage anonymous sexual activity and are conducive to the spread of sexually transmitted diseases. The Legislature was made aware that the Third Circuit recently upheld a Delaware statute regulating such private booths or enclosures in *Mitchell v. Comm'n on Adult Entertainment Est.*, 10 F.3d 123 (3rd Cir. 1993). Additionally, a newspaper article in the *Atlantic City Press* was brought to the Committee's attention which described how New Jersey men often enter peep-show booths and gesture through an aperture known as a 'glory hole' to an adjoining booth and engage in anonymous sexual acts". \_ N.J. Super \_ (App. Div. 1997).

The Appellate Court noted that the plain reading of the statute showed clearly that the statute was intended to regulate sexual conduct as a health problem, and not to ban the adult materials. The Court stated that, "the record supported the New Jersey Legislature's decision to ban booths which facilitate sexual activity in sexually oriented businesses, since the Legislature was aware of the dangers to public health, particularly the current concern regarding the spread of AIDS, and that such anonymous sexual encounters present". Further, the Court noted that the Legislature could take notice of what has occurred in other states and could act on the information without waiting for the collection of similar

information in this State from the operation of establishments catering to sexually oriented business".

After the Court concluded that there was a significant governmental interest, the Court looked to whether the statute left reasonable alternative avenues for viewing adult materials. Holding that there were reasonable alternative avenues available, the Court stated that "the adult materials may still be purchased or rented. In addition, nothing in the statute prohibits the use of coin-operated vending machines to view these materials, even in booths, so long as these booths do not facilitate sexual activity". The Court construed the statute to indicate valid compliance if the peep show doors were removed.

Morality in Media of New York City assisted in the preparation of the following statement made by Debbie Crook, President of the Atlantic County American Family Association of New Jersey, to the Senate Judiciary Committee on Bill No. 342, relating to maintaining a sexually oriented business nuisance. February 10, 1994.

"My name is Debbie Crook, I am the President of the Atlantic County American Family Association of New Jersey. I am here to support S-342 making it a nuisance to maintain a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons."

"This law is much needed. We are especially familiar with the deleterious consequences of peep show booths and glory holes between them for anonymous sexual activity since the Atlantic City Press published its article on this subject in July of 1992. I quote from that newspaper dated July 2, 1992:

"A recent survey of six adult bookstores in Atlantic City, Egg Harbor City, Newfield and Vineland has revealed:

Male customers in each store routinely signal a willingness to have sex with strangers..They do this by entering an X rated video peep booth and gesturing through an open tube (called a glory hole) in the wall adjoining the next assigned booth...Participants then position themselves in a way that makes clear that they either will not be using a condom or will not require its use by their anonymous partner....Nearly all stores have substantial numbers of booths with such holes built in; three of the six stores are open 24 hours a day.....The participants do not see one another and rarely speak.....Some men loitering around the booths, usually in the back of the store, have sex randomly and anonymously."

"This article indicates that peep show booths lead to promiscuous sex between anonymous participants either in the peep show booth or through a 'glory' hole between the booths. It is obvious that this activity promotes the spread of AIDS, other communicable diseases and creates unsanitary conditions which are a menace to public health as has been attested to by numerous authorities and case law decisions throughout the country. I shall quote just a few:

'Donald R. Hopkins of the Federal Center For Disease Control in Atlanta issued a memo to territorial health directors reading, (as reported in the December 22, 1985 Allentown Pennsylvania Morning Call at page B15) as follows:

The Center For Disease Control endorses state or local public health action to regulate or close these establishments.' 'If these establishments facilitate behavior such as anonymous contact and/or having intercourse with multiple partners, this clearly could lead to transmission of [The AIDS Virus] as well as other sexually transmitted diseases.'"

"I next draw your attention to a statement of Dr. Lorraine Day of San Francisco General Hospital which appeared in the New York Guardian Newspaper in April 1993. It reads as follows: AIDS has been transmitted through blood, semen and bone...HIV stays alive and infective outside the body dried on a surface for seven days and wet for fourteen days. According to research done at the Pasteur Institute in France. HIV when in body fluids is not easily killed by household disinfectants. The protein in the body fluid surrounds and protects the virus from inactivation...government documents confirm that HIV can be transmitted through intact skin. The May 30, 1989 issue of the Federal Register published by the Occupational Safety and Health Administration states that "mucous membrane and skin exposures are recognized routes of transmission of HIV". That same issue cites similar findings of the Center for Disease Control. In the laboratory, the skin and mucous membranes of the eyes, nose, mouth and possibly the respiratory tract must be considered potential pathways for the entry of the [HIV] virus."

"Finally I wish to quote from an affidavit of Dr. Michael B. Bongiovani of the Pennsylvania State College of Medicine in Hershey Pennsylvania which was entered in a nuisance case against adult bookstore peep show establishments by the Attorney General of Pennsylvania in his successful attempt to close down many of these establishments:

'The risk includes the possible unchecked spread of the AIDS virus because 'tracking of potentially infected parties is not possible given the anonymity of the sexual encounter.'"

"Rather than elongate my oral statement, I have attached to this Statement (which I will leave with the Committee) quotations showing deleterious effects found in case law of these commercial enterprises. The United States Supreme Court has ruled in City of Renton v. Playtime Theaters, Inc., 106 S.Ct. 925 (1986) that a legislative body need not wait until deleterious effects are experienced locally but may rely on the experiences of other communities."

"The state of Delaware has in place Nuisance Open Booth and Hours of Operation Laws which I also append to this statement. These laws were upheld in 1993 by the 3rd Federal Circuit which covers Delaware, New Jersey and Pennsylvania."

"These laws do not offend the First Amendment since they are based on sexual activity not expression. The United States Supreme Court in 1986 in the Arcara case, 106 S.Ct. 3172 held that the First Amendment does not preclude the closing of an adult bookstore (with peep show booths) under a public nuisance statute of the state of New York which related to places of prostitution, lewdness and assignation. In New York City the actions of the City in closing a bathhouse pursuant to state regulation aimed at preventing the spread of AIDS did not violate First Amendment rights of privacy and association. This case is called City of New York v. New Saint Mark's Baths, 497 N.Y.S.2d 979 (N.Y. Sup. Ct. 1986)."

"The 10th Federal Circuit Court of Appeals in 1990 (basing its ruling on the Arcara case allowed the closure of an adult theater because a significant number of acts of public indecency occurred on the premises. That case was the O'Connor case, 894 F.2d 1210. See also Nuisance Abatement of Peep Shows in the Allowill case in Pennsylvania, 478 A.2d 1334."

"Thank you for the opportunity to speak in favor of this measure." -Debbie Crook

#### Attachment

#### Reliance On The Experiences of Other Communities

There is no question that it is not necessary for a city or a state to suffer deleterious effects before it can pass peep show booth laws. It can rely for its justification on the experience of other communities. This principle was enunciated

by the Supreme Court in the landmark case of City of Renton v. Playtime Theaters, Inc., 106 S.Ct. 925, when in 1986 it said that "a city" (in regulating an adult use) 'was entitled to rely on the experience of...other cities'. That concept has been applied to various open-booth laws. It is best summarized in the open-booth area by Bamon Corp. v. City of Dayton, where the Federal Southern District of Ohio Court said:

'Renton teaches us that in enacting regulations targeting the secondary effects of adult businesses, a city need not amass evidence independent of evidence gathered by other cities or summarized in case law dealing with conditions existing in other locals.'

"Now follows a report on deleterious effects found in other jurisdictions resulting from enclosed booths associated with adult book store peep shows and summarized in case law, of such other locales:"

#### Phoenix, Arizona

"The parties stipulated that some customers in the booths...will on occasion...fondle themselves or masturbate...The parties further stipulated that there were 783 sex related arrests in the eleven establishments in the city of Phoenix which had video viewing devices such as plaintiffs". Ellwest Stereo Theaters, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982).

#### San Diego, California

"The city has a substantial interest...in the health and safety problems, which may be anticipated...where the booths are enclosed". DeLuxe Theatre & Bookstore v. City of San Diego, 221 Cal.Rptr. 100 (Cal. Ct. App. 4th Dist. 1985).

#### Los Angeles, California

"The city has the constitutional power to reasonably regulate and license arcades for the purpose of health, safety and the public welfare". EWAP, Inc. v. City of Los Angeles, 158 Cal.Rptr. 579 (Cal. Ct. App. 2d Dist. 1979).

#### East Hartford, Connecticut

"It is obvious that East Hartford felt the need to enact additional regulations to achieve its public health objectives". Grunberg v. Town of East Hartford, 736 F.Supp. 430 (D. Conn. 1989), *aff'd sub nom*, Singer v. Town of East Hartford, 901 F.2d 297 (2nd Cir. 1990).

#### State of Delaware

"Affidavit of Captain Raymond W. Hancock, '...I have been inside peep shows and adult entertainment establishments approximately one hundred occasions in Delaware and New Jersey...Prior to the passage of "[Open Booth State Law]" plaintiff's book store and similar adult entertainment establishments was a masturbation booth...wherein puddles of seminal fluid occur and gather on the floor and also drip from the wall inside and around the booths...In many of said booths, there are holes between said booths approximately 4 inches in diameter located slightly below the waist level, known in the trade as glory holes which allow anonymous homosexual and illicit sex..." Mitchell v. Commission on Adult Entertainment, Case No. 91-436 (D. Del. 1991).

#### Fort Lauderdale, Florida

"The Court further finds that the bookstores were extensively peopled by male prostitutes who engage in homosexual activity which include oral sex and masturbation." "A substantial percentage of the clientele frequenting these bookstores were doing so for the purpose of homosexual encounters which were carried on in the private viewing booths". City of Fort Lauderdale v. A-Adult Bookstore, Case No. 82-2087 (17th Jud. Cir Fla. 1990).

#### Dade County, Florida

"Defendants shall permanently seal off the glory holes...clean the entire premises with a 0.5 sodium hypochlorite solution (10% solution of household bleach) 70% alcohol or 5% nonidet-p 40 to complete inactivate the HIV virus within one minute of exposure". State of Florida ex. rel. Janet Reno v. 7839 Corporation, Case No. 89-40605 (10) (11th Cir. Dade Co., Fla. 1989).

#### Palm Beach County, Florida

"The plaintiff's medical witness testified that there is only a slight possibility that AIDS and other diseases could be spread by masturbation or by ejaculated semen left exposed on the interior of the booths...Dr. Travis admits there is a possibility, however slight...of such transmission". Movie & Video World v. Board of County Commissioners, 723 F.Supp. 695 (S.D. Fla. 1989).

#### Marion County, Indiana

"When Health and Hospital Corporation adopted ordinance 5-1985A, it had information

concerning the incidence of AIDS in Marion County, its rapid increase in other cities, its incurable fatal nature, its transmission via multiple anonymous sexual encounters and about the casual sexual activity including anal intercourse observed in the types of establishments sought to be regulated". Berg v. Health and Hospital Corporation of Marion County, 865 F.2d 797 (7th Cir. 1988).

#### Minneapolis, Minnesota

"The City Council promulgated the ordinance to diminish the proliferation of contagious diseases spread by high risk sexual conduct that was shown to take place in these booths". Doe v. City of Minneapolis, 898 F.2d 612 (8th Cir. 1990).

"The Council examined evidence that high risk sexual activities including multiple anonymous sexual encounters and casual sexual activity occurred in the types of establishments sought to be regulated. The evidence at trial supports the council's findings that multiple anonymous sexual encounters, including fellatio and anal intercourse, facilitates the spread of AIDS". Doe v. City of Minneapolis, 693 F.Supp. 774 (D. Minn. 1988).

#### Bridgeton, Missouri

"In Wall...the court concluded that the city has a reasonable basis for determining that closed booth showings were sufficiently likely to foster a pattern of conduct inimical to public health". Postscript Enterprises v. City of Bridgeton, 699 F.Supp. 1393 (E.D. Mo. 1988).

#### Lincoln, Nebraska

"The evidence at trial showed that...semen, dirty Kleenex and condoms can be observed on the floors of the booths...The city's interest in deterring not only unlawful activity, but conduct inimical to public health...would not be achieved effectively without this ordinance". City of Lincoln Nebraska v. ABC Books, Inc., 470 N.W.2d 760 (Neb. Sup. Ct. 1991).

#### Dayton, Ohio

"Along with evidence from other locales, the city commission was presented with evidence of sexual activity occurring within Dayton's Adult Bookstores". Bamon Corp. v. City of Dayton, 923 F.2d 470 (6th Cir. 1991), *affirming*, 730 F.Supp. 80 (S.D. Ohio 1990) which said: "Police officer told of male prostitutes, of sexual activity

## Statute Restricting Adult Business Signs Upheld

In February, 1997, the Superior Court of New Jersey Appellate Division reversed the lower court's finding that the New Jersey statute which regulates the location and display

of signs of sexually oriented businesses was a content-based restriction on speech and unconstitutional under strict scrutiny analysis. The lower court judge, holding in favor of the plaintiffs, owners and/or operators of sexually oriented businesses, concluded that the Legislature did not have a compelling interest

to warrant the restriction on speech and further stated, the statute would also fail under the time, place, and manner test since it was not narrowly tailored. Refusing to apply strict scrutiny, the Appellate Division said that since the statute involved the regulation of commercial speech intermediate, not strict scrutiny was to be applied. (*Hamilton Amusement Center, Inc. et al. v. Deborah Poritz*).

*continued from page 3*

occurring within the booths...Law Director testified that semen had been found on the walls of viewing booths in Columbus and said 'that per se obviously presents a health risk'.

### Columbus, Ohio

"The Court finds that Section 559.18(1) is designed to serve a documented, substantial governmental interest of the City of Columbus in preserving the health and welfare of its citizens". Williams v. City of Columbus, Case No. C-2-87-1440 (S.D. Ohio 1988), *aff'd*, 872 F.2d 1020 (6th Cir. 1989).

### Chattanooga, Tennessee

"These establishments, particularly the closed booths, have been found to be filthy. Police officers and others have found semen and blood on the walls, floors and video screens...and defecation and urine on the floors. These booths frequently contain 'glory holes' cut or smashed out between the booths to permit inter-booth sexual activity...Dr. Katherine Hawkins of the Hamilton County Health Department testified that exposure to the blood and semen in the booths could transmit the HTLV-III virus that causes AIDS, not to mention the exposure which could be generated by sex acts conducted through the glory holes". Broadway Books v. Roberts, 642 F.Supp. 486 (E.D. Tenn. 1986).

### Nashville, Tennessee

"Sexual acts have been a regular occurrence at the adult-oriented establishments that provide private or semi-private booths or cubicles for viewing films or live sex acts...have included heterosexual and homosexual prostitution, oralgenital sex acts, male and female masturbation and sexual intercourse...The...sexual acts have been committed by and between patrons, employees and patrons, and prostitutes who took their clients into adult oriented establishments".

"Metropolitan health department employees...found semen in some booths in

each establishment...They also found fecal matter in many booths...other unsanitary conditions were widespread...There are at least 50 communicable diseases which are subject to being spread in the environment existing and the conduct occurring at the establishments inspected...The diseases most subject to being spread are syphilis, gonorrhea, AIDS, genital herpes, hepatitis A, amebiasis, salmonella infection and shigella infection". Ellwest Stereo Theatre, Inc. v. Boner, 718 F.Supp. 1553 (M.D. Tenn. 1989).

### Dallas, Texas

"The city could reasonably conclude that enclosed booths encourage illegal and unsanitary sexual activity". FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988).

### Delafield, Wisconsin

"The open-booth provision furthers Delafield's substantial governmental interest in curbing the spread of AIDS. Delafield could reasonably conclude that some peep-show patrons would be more likely to engage in sexual activities with one another behind closed doors than in open cubicles. It could also conclude that the sexual activity is likely to involve strangers and thus pose a danger in terms of spreading AIDS". Suburban Video, Inc. v. City of Delafield, 694 F.Supp. 585 (E.D. Wis. 1988).

### Waukesha, Wisconsin

"The regulations in the Waukesha ordinance clearly serve the goal of attempting to control the spread of communicable disease, including AIDS". City News and Novelty v. City of Waukesha, 487 N.W.2d 316 (Wis. Ct. App. 1992).

### Pierce County, Washington

"Undisputed evidence showed that more than one person sometimes occupied a booth at the same time, that sexual activity did occur in the booth and that such activity created unsanitary conditions". Adult Entertainment Center v. Pierce County, 788 P.2d 1102 (Wash. Ct. App. 1990).

At issue was subsection (c) of the statute which stated, "No sexually oriented business shall display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size".

The Appellate Division, applying intermediate level scrutiny, found that the regulation directly advanced a substantial governmental interest and was properly tailored to that purpose. Discussing the governmental interest involved, the Court stated, "The regulation of signs and billboards has long been recognized as serving the government's substantial interest in traffic safety. In fact, sign restrictions directed specifically at sexually oriented businesses have been upheld in the interest of preserving neighborhoods and protecting minors". *N.J. Super \_\_*, (App. Div. 1997). Additionally, the Court looked to the legislative record, and stated that, "objective lawmakers could reasonably conclude that sexually oriented businesses are associated with higher crime rates and cause a deterioration in the quality of neighborhood life. By isolating these businesses through dispersal, perimeter buffers, and signage restrictions..., they addressed these legitimate concerns while still allowing these businesses to advertise and operate."

After the Court concluded that there was a significant governmental interest, the Court further held, that the statute was not substantially broader than necessary. The Court found, "The two sign limitation is justified given the undesirable secondary effects that such signs attract, e.g., higher incidents of crime, child delinquency". In upholding the statute as constitutional, the Court noted that it did allow two signs to be posted, that it did not proscribe other methods of advertisement, and that the statute did not inhibit in any way the material that may be displayed within the store.

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