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ZONING & LAND USE - NEW YORK

For the People Theatres of N.Y. Inc. v. City of New York

Court of Appeals of New York - June 6, 2017 - N.E.3d - 2017 WL 242729 - 2017 N.Y. Slip Op. 04385

Owners of putative adult businesses brought separate actions against city, seeking declaratory and injunctive relief based on First Amendment free speech challenges to zoning ordinance barring adult establishments from all residential zones and most commercial and manufacturing districts.

The Supreme Court, New York County, granted summary judgment to owners. City appealed, and actions were consolidated for purposes of appeal. The Supreme Court, Appellate Division, reversed. Owners appealed. The Court of Appeals affirmed as modified and remanded. After nonjury trial, the Supreme Court, entered judgment for city with respect to bookstores and video stores. Owners appealed. The Supreme Court, Appellate Division, reversed in part, vacated in part, and remanded. On remand, the Supreme Court, entered judgment for owners. City appealed. The Supreme Court, Appellate Division, affirmed. City appealed.

The Court of Appeals held that:

- City had only a modest burden, at third stage of three-part burden-shifting framework for First Amendment challenge to zoning of adult businesses;
- Evidence established that owners' bookstores focused on sexually explicit activities and materials; and
- Evidence established that owners' eating or drinking establishments focused on sexually explicit activities and materials.

City had only a modest burden, at third stage of three-part burden-shifting framework for First Amendment free speech challenge in adult-use zoning context, of demonstrating that businesses affected by amendment to city's zoning ordinance for adult establishments, which amendment greatly reduced the significance of 60/40 percentage test for exempting eating or drinking establishments or bookstores from being considered adult businesses, retained a predominant focus on sexually explicit materials or activities, thereby fairly supporting city's rationale for amending the ordinance, i.e., to avoid sham compliance with 60/40 test, and also fairly supporting secondary effects of adult establishments as rationale for city zoning ordinance barring adult establishments from all residential zones and most commercial and manufacturing districts.

Evidence established, at third stage of three-part burden-shifting framework for First Amendment free speech challenge in adult-use zoning context, that the bookstores in question focused on sexually explicit activities and materials, thereby fairly supporting secondary effects of adult businesses as rationale for city zoning ordinance barring adult establishments from all residential zones and most commercial and manufacturing districts. All but one bookstore had peep booths for viewing adult films, with an average of about 17 booths per store, peep booths, by design, obviously promoted sexual activities, all bookstores used signage, displays, and layouts to promote sexually focused adult materials and activities, and many bookstores sold sex toys, adult novelties, and the like in nonadult sections of stores.

Evidence established, at third stage of three-part burden-shifting framework for First Amendment free speech challenge in adult-use zoning context, that the eating or drinking establishments in question focused on sexually explicit activities and materials, thereby fairly supporting secondary effects of adult businesses as rationale for city zoning ordinance barring adult establishments from all residential zones and most commercial and manufacturing districts. Topless dancing took place at all times daily for approximately 16 to 18 hours a day, and lap dances, a quintessentially sexual activity, were offered by dancers in both public and private areas.

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