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Legal

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BY ARTHUR S. LEONARD

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BY ARTHUR S. LEONARD | A unanimous New York Appellate Division panel has ruled that a Manhattan State Supreme Court judge's opinion last year rejecting challenges to city zoning regulations regarding bookstores, video stores, and topless night clubs and bars was so terse it lacked the necessary findings of fact the appeals court needs to determine whether its conclusions were supported by the evidentiary record.

In an April 8 ruling from the Manhattan-based First Appellate Department, the 2010 decision by Supreme Court Justice Louis B. York was vacated, and the case was sent back to him for further consideration.

Appellate Division vacates ruling rejecting constitutional challenges to city

A new chapter, therefore, has been opened in a long-running saga that began during the Giuliani administration almost 20 years ago. The former mayor strongly advocated “cleaning up” the city by closing as many adult businesses as possible. The US Constitution’s 1st Amendment, however, puts limits on what government can do in its regulation of sexually-oriented businesses, so long as their goods and services don’t cross the line into constitutionally-unprotected obscenity.

The city can impose restrictions on the siting of adult businesses if it can show their presence has undesirable “secondary effects,” and the US Supreme Court accepts the contention that a zoning plan backed up by studies proving such secondary effects –– crime, such as drug dealing and prostitution, and negative impacts on neighboring property values –– can be constitutional. The city must leave enough eligible locations, however, for residents who wish to purchase adult goods and services.

The city Planning Department carried out such a study that led to the 1995 Amended Zoning Resolution. That barred adult businesses from all residential zones and most commercial and manufacturing districts, defining an "adult business" as a commercial establishment in which a "substantial portion" of space includes "an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof."

The city Planning Commission, in turn, came up with a rule of thumb defining "substantial portion" as 40 percent of a business' "accessible floor area." Operators of businesses defined as "adult" under this guideline and eager to avoid being exiled to remote locations, most of them in the outer boroughs, altered their stock to comply with what became known as the 60/ 40 rule.

City inspectors responded by bringing legal action against businesses that brought themselves into technical compliance, contending the results were a "sham" that left them as "adult businesses." That argument didn't play well in the courts, which looked to the letter of the law.

In 2001, the City Council adopted additional amendments for defining those businesses exempt from an adult designation, which included requirements that customers not be forced to pass adult material in order to get to non-adult inventory, that minors not be barred from the business or that portion of it selling non-adult materials, that outdoor signage not disproportionately feature adult material, that if adult stock was available for rent as well as sale, that non-adult material be offered on the same terms, that adult printing matter not exceed non-adult printed material, and that the business not operate individual enclosures, such as booths, for the viewing of adult movies or live performances.

Lawsuits filed the following year challenging the constitutionality of the 2001 amendments led to temporary injunctions that persist until this day, preventing any enforcement. A 2005 ruling from the Court of Appeals, the state's highest bench, found that the adult business plaintiffs are entitled to have their constitutional claims heard. The contention made by the plaintiffs is that the original secondary-effects study done in the 1990s can no longer be used to support the zoning regulations because the reconfigured businesses of today are substantially different from those operating back then.

The high court did not require the city to carry out an entirely new study, but said it had the burden of showing it "has fairly supported its position on sham compliance –– i.e., despite formal compliance with the 60/ 40 formula, these businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed." If there has been no change, the court said, the original study is sufficient to uphold the zoning regulations' constitutionality.

Justice York, receiving the case from the Court of Appeals, considered further evidence and early last year ruled that the amended definition of "adult establishment" was constitutional as applied to adult bookstores and live entertainment establishments, but not in the case of "adult theaters." His brief decision emphasized the Court of Appeals' comment that the city's burden of proof was relatively light.

Justice Rolando T. Acosta, writing for the appeals panel, pointed out the shortcomings of York's opinion. "In its extremely terse decision," he wrote, "Supreme Court did not elaborate on the criteria by which it determined that the plaintiff's essential nature was similar or dissimilar to the

sexually explicit adult uses that were analyzed" in the original secondary-effects study. "Moreover, it failed to state the particular facts on which it based its judgment… As Supreme Court did not provide any direction for the parties or this Court to adequately review, analyze, or understand the ruling, its decision is 'manifestly inadequate.'"

Without a more detailed explanation from York about how his conclusions are based on particular facts in the record, the Appellate Division is unable carry out its job of determining whether the trial court judge's analysis was valid. Acosta found that York's ruling seemed based on broad generalizations about the 60/ 40 businesses rather than detailed factual findings about the actual establishments contesting the city's labeling of them as "adult business." "The result of Supreme Court's decision," Acosta wrote, "is that some of the non-sham clubs could be put out of business by a law that, in fairness, may not apply to them."

The Appellate Division imposed no deadline on York, but the ruling's clear implication is that the court will have to hear additional evidence. Meanwhile, the preliminary injunctions remain in effect.

Attorneys for the plaintiffs challenging the zoning regulations include Herald Price Fahringer, Erica L. Dubno, and Nicole Neckles of Fahringer & Dubno, and Edward S. Rudofsky of Zane & Rudofsky. The city's Law Department is defending the regulations.