IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

WILLIE CENICEROS, Appellant

vs.

No. 88-MCA-1933
88-MCA-1934
88-MCA-1935
88-MCA-1936

STATE OF TEXAS, Appellee

OPINION

Appellant appeals his conviction by a jury in Municipal Court for four zoning violations involving the operation and location of an "adult bookstore". Specifically, the first citation issued on March 24, 1988 charged Appellant with operating an adult bookstore in a C-1 commercial zone when such use was not a permitted use as provided by the zoning ordinances of the City of El Paso. The other three citations were issued on April 12th, 13th, and 15th, 1988, respectively, and charged Appellant with operating an adult bookstore within 1000 feet of a church.

After being found guilty, the jury assessed a $1,000.00 fine on each violation, and this appeal ensued. The legal issues presented in each of the four cases are the same, and will be addressed accordingly.

Appellant's first point of error contends that the zoning ordinance in question is unconstitutional because it

restricts his freedom of expression. Appellant contends, in a Motion to Quash and in his brief before this court, that the enforcement of this Municipal Ordinance infringes upon his freedom of expression as secured by the U.S. Constitution, Amendments 1 and 14, and by the Texas Constitution, Article 1 Section 8. Although Appellant in his assignment of error in his brief does not specifically identify the constitutional provisions upon which he relies, this court nonetheless, will address the issue in the context of the above constitutional provisions.

It is clear that "adult businesses" may be subject to zoning regulations. Stansberry vs. Holmes, 613 F2d 1285 (5th Cir. 1980) (Cert. denied 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed. 2d 112, [1980]). Further, the courts have upheld ordinances which regulate the location of adult movie theaters and have further noted that "reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interest, are permitted by the 1st Amendment. Young v. American Mini Theaters, Inc. 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 31 (1976). Such regulations are not directed at the Appellant's freedom of expression, but rather are directed at "secondary effects" which such adult businesses have on the surrounding community in terms of depreciated property values, increased incidence of crime, and other matters which impact the general health, welfare,

morals, and safety of the community. Since ordinances, such as the one the City of El Paso adopted relating to the regulation of the location of adult businesses, do not seek to prohibit the operation of adult businesses all together, but rather are directed to limiting or restricting their location, the ordinances are properly analyzed as a form of time, place, and manner of regulation which are valid if they are "content neutral." City of Renton vs. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). As the court held in Renton, supra, the appropriate inquiry as to the validity of such an ordinance, because it does impact constitutionally protected interests, is whether such ordinances are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

El Paso's ordinances relating to adult bookstores and other sexually orientated businesses are modeled after other ordinances which have been upheld by the courts of this land. However, such ordinances will not be upheld simply based on similarity of content, since the court must look to the practical application of the ordinance in any particular given case or factual situation. That is, the city's ordinances must be "narrowly tailored" to effect only those categories of businesses or other prohibited conduct which have been shown to produce the unwanted "secondary effects", the prevention of which represent a legitimate exercise of

the city's police power, but which must, at the same time, provide a reasonable opportunity to open and operate adult businesses within the city.

Sexually orientated businesses and other activities do enjoy First Amendment rights, even though they may be of a lesser magnitude than other First Amendment rights which may be more popular to espouse and less subject to controversy than those involved in this particular case. Renton and Young, supra. However, even though sexually orientated expression enjoys less than full First Amendment protection, nonetheless, the court must review challenges based on such constitutional protections to insure that a city has made an independent anaylsis of the "secondary effects" which such businesses have on their communities, and to insure that alternative avenues of communication have been considered, so that zoning does not become a pretext for the deprivation of otherwise protected constitutional rights.

In such connection, the record before this court contains a study conducted by the City's Department of Planning, Research and Development for the office of the City Attorney concerning the effects of adult entertainment businesses on residential neighborhoods. Such report was made available to the City Council and public hearings before the City Planning Commission and City Council were held addressing the "admitted serious problems" created by the existence of adult entertainment businesses. The

preamble to the ordinance which was passed by City Council, after thoughtful consideration, expresses the deleterious "secondary effects" that such businesses have on residential neighborhoods, professes that the Council's intention to regulate the location of such businesses is directed at diminishing such negative "secondary effects" of such use, and is not directed at the suppression of Appellant's freedom of expression. Clearly, the record reflects that this ordinance was "narrowly tailored" to serve a substantial governmental interest in minimizing the impact of such "secondary effects", and it is therefore a valid exercise of the city's inherent right to control the use of land within its municipal boundaries.

However, the city must go further than meeting the above burden of proof, and show that there are alternative channels of communication left open for such expression, and that those similarly situated as Appellant, must be provided a reasonable opportunity to open and operate such an adult business within the city limits. It was either absolute prohibition or unreasonable restraint and unavailability of alternative avenues of communication which condemned the ordinances in Schad v. Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed. 2d 671 (1981) and see also, Basiardanes v. Galveston, 682 F.2d 1203 (5th Cir. 1982), Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988).

The issue relating to alternative avenues of communica-

tion presents a more troubling question to this court because the evidentary standards applicable are not entirely clear, and as stated in Basiardanes, "what level of exactitude is required in such cases is not clear." Further, if the zoning scheme of the city requires that adult businesses be located in practically "unavailable or inaccessible" areas, then the ordinance must fail. See Basairdanes and Walnut Properties, Inc., supra.

On the other hand, as recognized in Renton, supra, the test of an ordinance as providing alternative avenues of communication must be whether the ordinance effectively denies Appellant a reasonable opportunity to open and operate adult businesses within the city. Nonetheless, the fact that Appellant must fend for himself in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.

In the record before this court, the testimony reflects that approximately 1,264 acres of the City of El Paso are appropriately zoned for adult business use, and that such acreage includes both developed and undeveloped property, shopping center property, large and small parcels of property, property located along freeways, paved and unpaved roads, and property located in nearly every geographical area of El Paso. Nothing in the record, either developed through cross-examination or otherwise, reflects that the

available acreage within the boundaries of the City of El Paso is "practically unavailable or inaccessible" for use for the operation of adult business activity, and therefore places no restriction on Appellant, or others similarly situated, to open and operate an adult business within the city boundaries except for market factors to which all purchasers of real estate are subject. Therefore the city's evidence reflects that there is adequate available acreage within the city limits of El Paso, Texas which is zoned C-4, and in which Appellant's business could legally be located. Although, that amount of acreage represents a very low percentage of the total acreage within the city limits of El Paso, that fact alone is not sufficient to establish that Appellants are unduly restricted relating to opening and operating an adult business enterprise. Appellant attempts to support his argument in this matter by incorporating testimony presented to another court in another case on his Motion to Quash, but this court cannot take cognizance of those proceedings or the content of those proceedings since they do not appear in this record. That is particularly so of Appellant's comment in his brief that the city's witness testified that virtually every adult business violated the ordinance. Appellant does not provide the court with a reference to the statement of facts or to the record for such assertion, and this court has been unable to find such statement in the record presently before it. In any event,

this court concludes that the amount of available acreage to open and operate an adult business enterprise is sufficient, and adequately provides Appellant with alternative avenues of communication in such respect.

Appellant seeks to distinguish Renton and Young since their operation was prospective only, and that there were no "amortization" issues involved in those cases. See Murmur Corp. v. Bd. of Adj. City of Dallas 718 S.W.2d 790 (Tex. App.-Dallas 1986). Although Appellant is correct in his characterization of this distinguishing feature, this court is not pursuaded that it has any significance. Clearly, a municipality has the power to require the termination of existing uses of property rendered nonconforming under zoning regulations by the use of "amortization" techniques. As stated in City of University Park v. Benners 485 S.W.2d 773 (Tex. 1972).

> "The usual approach rests on the principal that there is not a legally significant difference between existing and prospective uses in land; and that the required termination of pre-existing land use, with allowance for recoupment, is not different in kind from restrictions upon future land use alternatives."

In the case before this court, the Appellant had in excess of 11 years to conform his use of the property to the zoning regulations, or relocate, and to recoup his investment. Since "amortization" techniques are valid to terminate nonconforming land uses, Appellant's attempt to

distinguish the controlling cases in this area is not persuasive.

Although Appellant includes Article 1, Section 8 of the Texas Constitution in his point of error, no citation of authority or other support is provided in his brief to suggest that our State Constitution provides any additional rights for the Appellant. Therefore, the issue need not be addressed, but suffice it to say in passing, it does not appear that our State Constitution provides any additional rights beyond those guaranteed by the U.S. Constitution relating to freedom of expression, and that our Texas constitutional provisions guaranteeing freedom of expression are co-extensive with the Federal guarantees. Reed v. State 762 S.W.2d 640 (Tex. App. - Texarkana 1988); Campbell v. State, 765 S.W.2d 817 (Tex. App. - San Antonio 1988).

This court holds that the ordinance in question is constitutional both in its content and as to its application to Appellant. Appellant's first point of error is overruled.

Appellant's second point of error contends that the City of El Paso's ordinance relating to the operation of adult bookstores violates Texas Local Government Code Sections 243.001 and 243.004. These provisions are state statutes which address the authority granted to both cities and counties to regulate the location of sexually orientated businesses. The argument which Appellant makes is the same

which failed to persuade the Houston Court of Appeals in Jolar Cinema of Houston v. City of Houston, 695 S.W.2d 353 (Tx. App. 1 Dist. 1985). Likewise, this court believes that there is nothing inconsistent between the city's ordinance in this case and Tx. Rev. Civ. Stat. Ann. Art. 2372w, Section 3b, (Vernon Supp. 1985) since that statute provides that it shall neither enhance nor diminish the authority of local governments to regulate commercial enterprises covered by the act....

However, Appellant contends that Section 243.004 of the Texas Local Government Code exempts "bookstores" from the application of such regulations. This court finds a clear difference between the meaning of "bookstore" as used in the statute and "adult bookstore" as defined under the city ordinance. Under 20.02.004 of the City Code of El Paso, an adult bookstore is defined as an establishment having a majority of its stock and trade, books, magazines and other periodicals, and peep shows or film strips or video cassettes which are distinguished or characterized by their emphasis on pictoral or photographic representation of "specific sexual activities" or "specific anatomical areas", or an establishment with a section or segment devoted to the sale, rental or display of sexual material, where such section or segment comprises 20% or more of such establishment, stock and trade, sales or rentals. Had the legislature intended to exclude "adult bookstores" from the operation of

Article 2372w or any city ordinance passed pursuant to or independent of its provisions, it could have so provided. It seems incongruous to believe that the legislature provides for regulation of sexually orientated businesses on one hand, and on the other, would exclude "adult bookstores" which are the principal purveyors of such material. The point is overruled.

Lastly, Appellant contends that the evidence is insufficient to sustain Appellant's conviction because it failed to show that a majority of Appellant's stock and trade, etc., was within the definition of an "adult bookstore" as contemplated by the city ordinance.

Clearly, the standard for reviewing the sufficiency of the evidence on appeal is the same for direct and circumstantial evidence cases; and that is to view the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. See Sutherlin v. State, 682 S.W.2d 546 (Tex. Cr. App. 1984), Carlsen v. State, 654 S.W.2d 44 (Tex. Cr. App. 1983); Freeman v. State, 654 S.W.2d 450 (Tex. Cr. App. 1983); Denby v. State, 654 S.W.2d 457 (Tex. Cr. App. 1983), see also Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed2d 560 (1979).

In applying that standard to the evidence presented to the court, the State sought to prove its case by offering an employee of the Public Inspection Department as a witness

who testified to the following facts:

1. That Appellant's business is located in a C-1 zone, and that the operation of an "adult bookstore" is not permitted in such a zone, but rather should be in a C-4 or C-5 zone.

2. That he visited and was inside Appellant's business on March 24, 1988, on April 12th, 13th, and 15th of 1988.

3. That on each of such occasions, he observed magazines and paperback books which had pictures on the cover graphically showing "specified sexual activities" and "specified anatomical areas", which he vividly described for the record.

4. He testified that "all that I saw" of the stock and trade depicted such articles and photographic representations.

5. That on his subsequent visits to Appellant's establishment on April 12th, 13th, and 15th of 1988 he saw the same type of material.

6. That the only items which did not fall within the prohibited definitions which he observed in the store were the cash register and the counters.

Appellant argues persuasively, that the inspector only spent approximately 5 minutes in Appellant's establishment on March 24, 1988, and less than that on the other occasions. Further, that he had neither counted the items comprising the stock of the establishment nor determined a

percentage of the stock which consisted of the prohibited material.

Further reading of the record and the inferences to be drawn therefrom, in the light most favorable to the jury's verdict, supports the conclusion that the majority, if not all, of the stock and trade of Appellant's establishment depicted "specified sexual activities" or "specified anatomical areas" as prohibited by the ordinance. Further, this court is not persuaded that the city's witness could not have made accurate visual observations of this material, even in the short time frame in which he was in Appellant's establishment since there is no legal time limit imposed on the witness to make such observations. Obviously, such testimony would go to its weight, and the jury was the exclusive judge of not only the credibility of the witnesses, but the weight to be given to their testimony. It seems a fair observation that it would take very little time for one to realize what he sees around him, thus enabling him to accurately characterize the nature and content of the material observed. Although the city's witness did not purchase nor confiscate any of the material, he vividly described what he saw, and although he did not peruse the contents of the material because they were wrapped and sealed in cellophane, the exterior of the magazine fairly suggested its probable content, and the jury was free to reach a similar conclusion. The maxim "**that you cannot judge**

a book by its cover" is not always true. Lastly, there is also uncontested evidence in the record to support the jury's finding that this business establishment operated within 1000 feet of a church.

Appellant's contention that the evidence is insufficient is overruled.

Therefore, although the State's evidence could have been stronger and more exhaustive, still it was sufficient to justify the jury's finding that the Appellant operated an "adult bookstore" in violation of the city's valid ordinance applicable to such business.

Having found no reversible error, the judgment of the Trial Court is affirmed in each case.

Signed this 5 day of May, 1989.

JUDGE

## JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

Signed this 5 day of May, 1989.