zoning, an adult business can be required to look to neighboring jurisdictions for "alternative" venues.

In 2008 the City of Florence, Minnesota (City), a metropolis 0.2 square miles in area, with 39 residents, 16 single-family residences, two small city-owned buildings and a park, adopted two ordinances. The first prohibited the operation of "sexually-oriented businesses" within 250 feet of any residential property, day care, school or park, and restricted adult businesses to areas zoned "C-2." The second created three zoning classes—"R-1" (residential), "B-1" (Business) and "C-2" (Commercial). All parts of the City were zoned R-1. In December 2010 Dale Peterson opened "The Juice Bar" in town, featuring live, nude dancers. Peterson was cited the next day for operating a sexually-oriented business within 250 feet of a park, and charged with three misdemeanors under the ordinances. Peterson sued the City, alleging violations of his First Amendment rights and seeking declaratory judgment, damages, and injunctive relief.

Immediately thereafter, the City passed a new ordinance (Ordinance) declaring that Florence "desires to maintain [itself] solely as a residential community" due to its "limited infrastructure, staff, and resources," which could not support business and commercial uses. The new Ordinance repealed the prior ordinance that had created B-1 and C-2 zoning, leaving the City as a residential-only jurisdiction. The district court granted summary judgment for the City, concluding the Ordinance was content-neutral and narrowly tailored to serve an important government interest.

Peterson made three arguments on appeal: (1) the Ordinance constituted an invalid total ban on the operation of adult entertainment in Florence, or alternatively (2) it was content-based and thus subject to strict scrutiny, or (3) it constituted an invalid time, place, and manner regulation which fails intermediate scrutiny.

The Eighth Circuit affirmed. Given that the new Ordinance banned all commercial conduct in the City, it did not target adult entertainment businesses specifically and was not content-based. Restrictions on Peterson's proposed business were merely an "incidental effect" of the overall ban: "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Given that the Ordinance was content-neutral, it was subject to intermediate scrutiny, requiring the showing of narrow tailoring to achieve a substantial governmental interest and the availability of adequate alternative channels of communication. The City met that standard, articulating its substantial interest in "ensur[ing] public health, safety and general welfare . . . to improve the quality of the physical environment of the city; to protect and maintain property values, and to preserve and develop the economic base of the city." Its decision was based on "limited infrastructure, staff, and resources." In these circumstances, the Circuit Court found that restricting all commercial business was actually narrowly tailored – it was an "effective" way to achieve the "desired interest."

The remaining issue for the Eighth Circuit was determining whether alternative channels of expression remained open for Peterson. The court recognized that the Supreme Court has not expressly answered whether, in the case of small municipalities, opportunities to engage in the prohibited conduct in neighboring jurisdictions are relevant to determining that adequate alternative channels exist. The Circuit Court answered the question in the affirmative. Noting that Peterson's own expert had testified that 32% of Lyon County, Minnesota (in which Florence sits) was available for adult businesses, adequate alternatives existed for locating The Juice Bar.

Peterson v. City of Florence, **No. 12-3017 (8th Cir. Aug. 16, 2013)**
http://www.gpo.gov/fdsys/pkg/USCOURTS-ca8-12-03017/pdf/USCOURTS-ca8-12-03017-0.pdf (last accessed August 21, 2013)

He's Got a Ticket to Ride—But is it a Constitutionally Protected Property Interest in Public Transit?

In an Oklahoma case, the Tenth Circuit has held that transit on a public bus system is a constitutionally-protected property interest.

David Brown, a resident of Tulsa, Oklahoma, was late to a bus stop and attempted to get the driver to stop and wait for him, waving his ticket in the air. The driver passed without stopping. Brown waited for the bus to return and asked the driver why she had not stopped because, he said, most drivers did. Her response was that she was not 'most drivers,' and the journey deteriorated. Brown claims that for the balance of his ride, the driver harassed him without any provocation, then called her supervisor saying she was having a problem with a passenger. When she stopped the bus and demanded that Brown leave or she would call the police, he exited, cursing her. From that point on, Brown claims he was unable to use public buses in Tulsa because the drivers would not admit him.

The Metropolitan Tulsa Transit Authority (MTTA) claimed that Brown was intoxicated at the time of the interaction and that, therefore, he was banned from using the buses for 30 days. He was thereafter again removed from a bus for intoxication and disorderly conduct. At some point after this removal Brown happened to see an MTTA official and a Tulsa police officer, near the bus terminal. He cursed at both of them and was subsequently arrested by the officer after refusing to leave the area.

Brown was then permanently banned from the bus system by the MTTA.

Brown filed suit against the individual employees and the MTTA, arguing, among other things, that his procedural due process rights under the Fourteenth Amendment were violated. The federal district court for the Northern District of Oklahoma held that the MTTA, as a common carrier, had a statutory obligation to carry the passengers presented to it—but that Oklahoma law placed no significant restraint on the MTTA's ability to alter its rules of conduct for passengers at any time (other than requiring that the rules be reasonable.) Therefore, the district court found, Brown had no legitimate expectation in a continuing right to ride the bus—and no Constitutionally-cognizable property right. Given that there was no property right, the issue of whether Brown had been deprived of property without due process was immaterial.

Brown appealed to the Tenth Circuit,

Continued on page 32

which saw things differently. It found that the district court had erred by focusing on the large degree of discretion afforded to the MTTA. The Circuit Court noted it was inconsistent with both Circuit and Supreme Court precedent to find that the MTTA's rules in effect at a given time were irrelevant merely because they could later be changed. Rather, the court found that whether Brown had a protected property interest in continued access to MTTA buses depended upon whether the MTTA's rules "sufficiently constrain its own discretion to deny service in any particular instance." It found that the MTTA had enacted various rules defining the circumstances when transit could be denied. Specifically, the MTTA had stated in an affidavit that Brown's permanent ban was made "pursuant to MTTA's published and written rules against any fighting, throwing of any objects, pushing, rough or loud behavior or vulgar language and pursuant to MTTA's policy to ensure that their customers have a safe and enjoyable ride."

This gave rise to a property interest: because the MTTA had limited itself to a particular set of circumstances under which it could ban riders, the court found that "Brown has a 'legitimate claim of entitlement' to access to MTTA transportation so long as he complies with its rules and regulations, and hence, a protected property interest under the Due Process Clause of the Fourteenth Amendment." The Tenth Circuit reversed and remanded the case to the district court to evaluate the adequacy of the process afforded Brown in denying his right to future MTTA transportation.

Brown v. Eppler, No. 11-5093 (10th Cir. August 2, 2013) http://www.ca10.uscourts.gov/opinions/11/11-5093.pdf (last accessed August 26, 2013)

Volunteer Firefighters Receiving Hourly Wages Are "Employees" Under FLSA and FMLA

In a case which could increase personnel costs for some smaller local governments, the Sixth Circuit has found that purportedly volunteer firefighters who respond to calls when they choose to do so but are paid significant hourly wages for such services are actually "employees" for purposes of the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA).

Plaintiff-appellant Paul Mendel was terminated from his position as a police dispatcher for Gibraltar, Michigan (City). He sued the City for violation of his rights under the FMLA. The City responded that the FMLA does not apply where the workforce consists of fewer than 50 employees, and the City employed a workforce of only 41. Mendel argued that the City's volunteer firefighters should also be included in the employee count, which would drive the number well above the 50-person threshold.

The District Court for the Eastern District of Michigan agreed with the City and denied Mendel's claims.

On appeal, the Sixth Circuit reversed and remanded. It found that in addition to the City's 41 employees, the City had between 20 and 35 "volunteer firemen" who should be considered employees for purposes of the FMLA. The FMLA's definition of "employee" is derived from the FLSA, which defines an "employee" as "any individual employed by an employer." (29 U.S.C. §203(e)(1). The FLSA defines "employ" broadly: "to suffer or permit to work." §203(g).

The Supreme Court has repeatedly given the FLSA's definition of employment an expansive interpretation. In *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) the Court stated that FLSA definition "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Earlier the Court had held that under the FLSA "common law employee categories or employer-employee classifications under other statutes are not of controlling significance." The appropriate evaluation required an "economic reality" test, based upon "the circumstances of the whole business activity." (citations omitted).

The City had pointed to the fact that although the volunteer firefighters were paid an hourly rate, they were not required to respond to any particular emergency call. The City did not control the volunteers' hours, they did not work particular shifts or staff a station, and did not receive health insurance, sick or vacation or social security benefits. And the volunteers were required to attend many hours of firefighting training classes, without compensation.

The Circuit Court found the City's arguments unpersuasive.

First, the City clearly "suffered or permitted" the volunteers to work, fulfilling the initial element for FLSA coverage—regardless of whether the City controlled the volunteers' activities. More significant was the fact that the City paid the so-called volunteers wages of up to $19 per hour. This conflicted with FLSA language. In 1986, Congress had expressly excluded "volunteers," from being covered by the FLSA, defining "volunteers" as being paid "no compensation" or only a "nominal fee." Thus the question of whether the firefighters were "employees" or "volunteers" turned on whether their hourly compensation constituted a nominal fee or something more. The regulations provided that a "nominal fee" was "not a substitute for compensation and must not be tied to productivity"~although such a fee could be paid on a "per-call" basis.

Here, the firefighters rendered services with the "promise and expectation" of being paid for those services, based specifically on time expended, not on a per-call basis. They reported hours worked and were paid for those hours, generally receiving Form 1099's. Under the Supreme Court's "economic reality" and "totality of the circumstances" guidance, the firefighters were clearly "employees" under the FLSA, increasing the City's employee pool above the requisite 50 employees and making the FMLA applicable.

DISSENT: A dissenting opinion argued that whether a payment was "nominal" depended on the skills being performed in the particular circumstance: while $15 per hour would be a significant sum for some workers, it would surely be "nominal" for a surgeon providing volunteers services to the community. It made no sense to apply the same calculus to a fast food worker and to a firefighter with the skills and training to save lives. Furthermore, when the full complement of uncompensated additional training and certification hours required of the volunteers was taken into account, the