Zoning and Internet Adult Businesses: The Cases of *Voyeur Dorm & Flava Works*

by John A. Greco



With the growth of the Internet, adult entertainment businesses have capitalized on the market for products delivered to customers through their computers. Two such websites were called "Voyeur Dorm" and "CocoDorm." The content for these Internet sites was created in two cities in Florida, and resulted in litigation over the application of municipal zoning regulations to these businesses. This litigation resulted in two circuit court opinions that address the application of municipal adult entertainment ordinances to adult entertainment transmitted over the Internet, and the application of residential zoning restrictions to Internet businesses.

Legal Standard for Zoning Regulations

More than 80 years ago, the U.S. Supreme Court tackled what was then a relatively new concept. The Village of Euclid, consisting of approximately 14 square miles of farmland in Ohio, enacted a comprehensive zoning plan for regulating and restricting, among other things, the location of trades, industries, apartment houses, and single- and two-family houses. The ordinance divided the Village into zoning districts, and the permitted uses in the various zones were cumulative and overlapping.

One property owner, fearing that its property had lost resale value due to the new zoning plan, challenged the zoning ordinance. The suit asserted that the ordinance was in derogation of the Fourteenth Amendment to the federal Constitution, in that it deprived the property owner of liberty and property without due process of law and denied it the equal protection of the law, and that it violated provisions of the state Constitution.

In upholding the ordinance, the Supreme Court stated:

> ...the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. ... A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.[1]

After discussing numerous cases sustaining the broad exercise of police power for the general welfare, the Court concluded that if the Village's rationale did "not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons [were] sufficiently cogent to preclude" the Court from ruling, as necessary for the ordinance to be declared unconstitutional, "that such provisions [were] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[2]

The Court would later reaffirm the broad scope of a local government's police power to enact and enforce zoning ordinances:

> Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. ... We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. ... The values it represents are spiritual as well as physical, aesthetic as well

as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[3]

In the exercise of this police power for the general welfare, adult entertainment establishments have become a specific subject of zoning regulation, and, hence, the subject of many court challenges. In cases involving such laws, the typical pivotal issue being litigated is whether the ordinance was aimed at the secondary effects of such businesses on the surrounding community, and whether it was designed to serve a substantial government interest.[4]

Adult Businesses and the Internet

"Voyeur Dorm" operated an Internet-based website, voyeurdorm.com, that provided a continuous Internet transmission that captured the lives (and sexual activities) of the residents of a house.[5] The house, on property zoned for residential use, was located in Tampa, Florida.[6] Throughout its existence, Voyeur Dorm employed 25 to 30 different women, most of whom entered into a contract that specified, among other things, that they were "employees" on a "stage and filming location," with "no reasonable expectation of privacy," for "entertainment purposes."[7] The subscribers to the voyeurdorm.com website paid a subscription fee of $34.95 a month to watch the women employed at the premises, and could pay an additional monthly fee of $16.00 to "chat" with the residents.[8] From August 1998 to June 2000, Voyeur Dorm generated subscriptions and sales totaling $3,166,551.35.[9]

A similar website, called "CocoDorm," was established in Miami, Florida.[10] CocoDorm was operated by Flava Works, Inc.[11] The CocoDorm website transmitted images over the Internet, via webcam, of the occupants of a residence in Miami. The residence, owned by Angel Barrios, was leased to Flava Works, and was zoned as multi-family high-density residential.[12] The persons living at the residence were independent contractors of Flava Works, Inc. In exchange for $1,200 per month, plus free room and board, they were expected to engage in sexual relations, captured by the webcams located throughout the premises.[13] Individual subscribers paid Flava Works, through the CocoDorm website, for access to live or recorded video feeds, including those of sexually-explicit conduct, from the webcams in the residence.[14]

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The Regulation of Internet Adult Businesses

At the time Voyeur Dorm was established, the City of Tampa had an ordinance that regulated adult entertainment. That ordinance, section 27-523, defined adult entertainment establishments as "[a]ny premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities[.]"[15] Similarly, when CocoDorm was in operation in Miami, the City of Miami Zoning Ordinance, section 2502, defined "adult entertainment or service establishment" as:

> ...one which sells, rents, leases, trades, barters, operates on commission or fee, purveys, displays, or offers only to or for adults products, goods of any nature, images, reproductions, activities, opportunities for experiences or encounters, moving or still pictures, entertainment, and/or amusement distinguished by purpose and emphasis on matters depicting, describing, or relating by any means of communication from one (1) person to another to 'specified sexual activities' or 'specified anatomical areas' as herein defined. An adult entertainment or adult service establishment is not open to the public generally but only to one (1) or more classes of the public, excluding any person under eighteen (18) years of age.[16]

In light of the location of the Voyeur Dorm and Coco Dorm businesses, both Cities determined that the companies were in violation of the respective ordinances.

Voyeur Dorm, L.C. v. City of Tampa

When Voyeur Dorm learned that law enforcement was investigating its business, it asked the Tampa Zoning Coordinator if the activities at the subject home were an "adult use" under the Tampa ordinance. After the coordinator determined that they were, Voyeur Dorm appealed, unsuccessfully, to the Tampa Variance Review Board. The business then filed suit in federal court, challenging Tampa's pre-enactment "secondary effects" evidence, and arguing that the activities of the business simply did not violate the ordinance. The district court ruled in favor of the City of Tampa.[17] However, on appeal, the U.S. Court of Appeals for the Eleventh Circuit disagreed on narrow grounds and reversed.[18]

The Eleventh Circuit Court of Appeals agreed with Voyeur Dorm as to the second argument and held that the activities at the residence did not violate the Tampa ordinance:

> The residence of 2312 West Farwell Drive provides no 'offer[ing] [of adult entertainment] to members of

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> the public.' The offering occurs when the videotaped images are dispersed over the internet and into the public eye for consumption. The City Code cannot be applied to a location that does not, itself, offer adult entertainment to the public.[19]

The appellate court added that it did not necessarily follow that a zoning ordinance, designed to restrict facilities that offered adult entertainment, could be applied to a particular location that did not, at that location, offer adult entertainment. "[T]he audience or consumers of the adult entertainment do not go to 2312 West Farwell Drive or congregate anywhere else in Tampa to enjoy the entertainment. Indeed, the public offering occurs over the Internet in 'virtual space.'"[20] The court concluded that, while the district court "read section 27-523 in a literal sense, finding no requirement that the paying public be *on the premises*, we hold that section 27-523 does not apply to a residence at which there is no public offering of adult entertainment."[21]

Because it found the activities did not come within the Tampa ordinance, the Eleventh Circuit did not find it necessary to address the remaining issue, the constitutionality of the zoning restrictions as applied to Voyeur Dorm.[22]

Flava Works, Inc. v. City of Miami

In 2007, due to the activities of CocoDorm, the City of Miami Code Enforcement Board charged the owner of the residence with several code enforcement violations resulting out of the Flava Works use, including operating an adult entertainment that was not permitted in a residential zone, and illegally operating a business in a residential zone. After several days of testimony, the City's Code Enforcement Board found the owner guilty of the charges. Flava Works and the owner challenged the Code Enforcement Order by filing a lawsuit in federal court, and also filed a Petition for Writ of Certiorari in the State Circuit Court's Appellate Division.[23] The federal action alleged a prior restraint; a lack of a reasonable relationship in the lawful exercise of police power, in violation of the Fifth and Fourteenth Amendments; a regulatory taking; a violation of Equal Protection (selective enforcement); overbreadth; that the ordinance was not narrowly tailored; and a violation of the Dormant Commerce Clause. It included a Petition for Writ of Certiorari pursuant to state law.[24]

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The parties filed competing motions for summary judgment on most of the issues, as framed by the federal complaint.[25] The primary argument of Flava Works and the property owner, in addition to challenging the decision of the Code Enforcement Board on constitutional grounds, was that the Board's decision was contrary to the Eleventh Circuit's previous pronouncement in the *Voyeur Dorm* case.

The district court judge accepted CocoDorm's argument and found that the opinion in *Voyeur Dorm* controlled all aspects of the case. Accordingly, the court granted summary judgment in favor of Flava Works and reversed the decision of the Code Enforcement Board as to both charges: operating an adult entertainment in a residential zone, *and* illegally operating a business in a residential zone.

With regard to the charge that Coco-Dorm was improperly operating a business in a residential zone, the district court held that the undisputed facts showed that the accounting and financial activities of Flava Works occurred at 2610 North Miami Avenue in Miami, where the company was licensed to operate a video and graphics business, and that the servers necessary to transmit the live and recorded video feeds to subscribers were not housed in either the residence or the North Miami Avenue office.[26] Further, while the performers were paid to be at the residence and captured on video, the processing and transmitting of the resulting images were done at a third, different location. These were not sufficient to make the residence the site of a business operation:

> Although I agree with [the City] that the business, that is the website cocodorm.com, would not likely exist without the activities taking place within the 503 residence, that does not make the activities into a business, nor does it make the activities susceptible to application of the zoning ordinances at issue here. Because of this, and because no customers physically come to the 503 residence, I must conclude that the activities taking place at that residence do not amount to the unlawful operation of a business in a residential zone.[27]

The City appealed from that part of the decision—the finding that Flava Works was not operating a business in a residential zone.

On June 25, 2010, the U.S. Court of Appeals for the Eleventh Circuit agreed with the City and reversed the district court decision, in part.[28] The appellate court's decision was based on two grounds: first, that its earlier decision in *Voyeur Dorm* did not apply to the charge of illegally operating a business in a residential zone; and second, that Flava Works was, in fact, operating a business at the residence.[29] The Court of Appeals explained its finding that Flava Works was operating a business:

> Flava Works argues that no business was being conducted at the ... residence because no goods were bought or sold and nothing was manufactured on the premises. However, it can be reasonably asserted that raw video images, which were later sold over the Internet, were created at

> the... residence. While these images are not tangible goods, they have a commercial value and enable Flava Works to earn a profit. This seems to comport with the common definition of a business, which is '[a] commercial enterprise carried on for profit.' (Citation omitted).[30]

The court elaborated that the activities taking place at the residence were "part and parcel" of Flava Work's business operations, regardless of the fact that other aspects of the business took place at other locations. Business objectives were "the sole reason" that individuals were paid to live in and engage in sexual activities at the residence, and Flava Works would be unable to deliver content to its subscribers without these activities.[31] Accordingly, the activities taking place at the residence were "a clear violation of the prohibition against operating a business in a residential zone."[32]

The Eleventh Circuit entered partial final judgment for the City of Miami, and remanded the case to the district court for consideration of the remaining constitutional issues.

Conclusion

Although this is the beginning of litigation over various forms of new and "non-traditional" adult businesses, the Eleventh Circuit decision in *Flava Works* stands as a solid precedent for a finding that this type of Internet business, whether or not it relates to adult entertainment, violates local restrictions on operating a business in a residential zone.[33] Although the constitutional issues have been remanded to the district court for resolution, based on the premise of *Village of Euclid* and its progeny, the subject zoning ordinance and others will be upheld as long as they are not clearly arbitrary and unreasonable, or have no substantial relation to the public health, safety, morals or general welfare.

Notes

1. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
2. *Id.* at 395.
3. Berman v. Parker, 348 U.S. 26, 32-33 (1954). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (zoning ordinance, limiting occupancy of single-family dwelling to traditional families or groups of not more than two unrelated persons, was constitutional under the 14th Amendment).
4. *See e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002); City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); U.S. v. O'Brien, 391 U.S. 367 (1968).
5. Voyeur Dorm, L.C. v. City of Tampa, Fla., 265 F.3d 1232 (11th Cir. 2001).
6. *Id.* at 1233.
7. *Id.*
8. *Id.*
9. *Id.*
10. Flava Works, Inc. v. City of Miami, Fla., 609 F.3d 1233, 1235 (11th Cir. 2010).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Voyeur Dorm, L.C. v. City of Tampa, Fla., 265 F.3d 1232, 1236 (11th Cir. 2001).
16. City of Miami Zoning Ordinance, art. 25, § 2502 (1991 and Supp. No. 19, Oct. 25, 2007).
17. Voyeur Dorm, L.C. v. City of Tampa, Fla., 121 F. Supp.2d 1373 (M.D. Fla. 2000).
18. 265 F.3d 1232, 1236 (11th Cir. 2001).
19. *Id.* at 1236.
20. *Id.* at 1236-37.
21. *Id.* at 1237 (emphasis in original).
22. *Id.*
23. The City of Miami, in turn, filed a lawsuit in State Circuit Court, seeking an order to enjoin Coco Dorm from operating its business on the subject property. The State cases were stayed, leaving the federal action to be litigated.
24. During the course of the federal litigation, the City of Miami amended its adult entertainment ordinance, rendering moot Coco Dorm's arguments regarding prior restraint and the lack of pre-enactment evidence of secondary effects. *See* Coalition for the Abolishment of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1310 (11th Cir. 2000) ("[W]hen an ordinance is repealed by the enactment of a superseding statute, then the 'superseding statute or regulation moots a case ... to the extent that it removes challenged features of the prior law."). The City also changed the language of its Ordinance to ensure that it would be applied to this type of Internet adult business.
25. The district court had earlier denied motion to dismiss filed by the City of Miami. *See* Flava Works, Inc. v. City of Miami, Fla., 559 F.Supp.2d 1318 (S.D. Fla. 2008).
26. Flava Works, Inc. v. City of Miami, 595 F. Supp.2d 1341, 1343, 1348 (S.D. Fla. 2009).
27. *Id.* at 1348.
28. Flava Works, Inc. v. City of Miami, Fla., 609 F.3d 1233 (11th Cir. 2010).
29. The Eleventh Circuit Court of Appeals noted that the business undertaken by Flava Works at the residence was not akin to a "home occupation" or other home business: "We are careful to distinguish the activities taking place at the ... residence from a home occupation, which is incidental and subordinate to a dwelling's use for residential purposes. The Miami Zoning Ordinance allows for a variety of home occupations in residential zones. These exceptions to the general prohibition against operating a business in a residential zone are strictly defined by the zoning ordinance. In the R-4 zoning district, home occupations may not be conducted by more than three persons and are limited to certain enumerated occupations, such as: architect, broker, or lawyer. The activities taking place at the... residence do not fall within the zoning ordinance's limited exception for home occupations." *Id.* at 1239.
30. *Id.*
31. *Id.*
32. *Id.*
33. Flava Works did not file a timely motion for rehearing with the Eleventh Circuit, or a petition for writ of certiorari to the United States Supreme Court. However, on November 16, 2010, Flava Works served a motion to recall the mandate of the Eleventh Circuit, which remained pending at the time this article was written.