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Speech: Zoning Bylaws Restricting Facility Height and Square Footage in Adult Businesses Only Are Under-inclusive; Cannot Survive Facial Challenge

Showtime Entertainment, LLC. V. Town of Mendon, No. 12-2121 (1st Cir. Oct. 8, 2014).

A zoning ordinance limiting the height and square footage of adult entertainment facilities only—allegedly to curb traffic and control boisterous out-of-town visitors—has been struck down by the First Circuit. Reversing the lower court, the Circuit Court found Mendon, Massachusetts' adult business zoning bylaws were under-inclusive if their aim was to limit traffic and preserve a "historically rural" atmosphere.

In May 2008 Mendon, Massachusetts amended its zoning bylaws to create an Adult-Entertainment Overlay District. The District comprised four contiguous parcels of land within an already commercialized area. The purposes for creating such a District included addressing the secondary-effects of the adult businesses, and the preamble specifically stated the Town did not intend to impose limits on the expressive activity taking place within the businesses. The regulations that accompanied the District comprised eighteen pages and included everything from signs and lighting, to security personnel and employee attire.

In June 2008 Showtime Entertainment applied for a license to operate such a business in the District. At a town meeting local residents spoke out against the application for various reasons and petitioned the town board to enact additional bylaws to address "(1) restricting the maximum size and height allowances for buildings operating adult-entertainment businesses; (2) limiting the operating hours of such businesses; and (3) banning the sale or consumption of alcohol on their premises." The next month the Town rejected Showtime's application because of the health and safety effects of increased traffic, noise pollution, and criminal activity and the Town adopted new bylaws as suggested by the residents – that these businesses "(1) have a

facility no bigger than 2,000 square feet; (2) have a facility no taller than fourteen feet; and (3) open no earlier than 4:30 p.m. on days when school is in session," and (4) ban the sale and of alcohol. Residents approved the new bylaws by vote with the ultimate justifications stated as to "maintain Mendon's historically rural atmosphere," to ensure traffic safety, and "to provide an opportunity for all elementary school buses to finish student bus routes." No other businesses were subject to these laws.

Showtime applied for a license again under the regulations and met all of them. The license was granted, but additional limitations were added– among them, a limit on parking signs, soundproofing, hiring off-duty police officers, and patrolling its parking lot. Unhappy with such last-minute modifications Showtime filed suit, alleging the bylaws amounted to unconstitutional restrictions of its First Amendment rights. The District Court held for Mendon with cross-motions for summary judgment before it.

HELD: The First Circuit reversed and remanded, holding the bylaws unconstitutionally restricted Showtime's First Amendment rights to free expression.

DISCUSSION: Before reaching the merits, the court addressed the parties' disagreement over whether the case was a facial or as-applied challenge. Mendon claimed the plaintiff was limited to a facial challenge since it had not been sanctioned under the bylaws as of yet; Showtime argued it could file an as-applied challenge since it was clearly subject to the bylaws and its initial application had been denied based on the bylaws' size and height limits.

The court looked to *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010), wherein the Supreme Court said in cases that have characteristics of both facial and as-applied suits the "important point is that [the] claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs." Here, Showtime was seeking to invalidate the bylaws, *per se*—pointing to a facial challenge. And because the bylaws only applied to four small contiguous parcels of land, all accessed by the same road, with nearly identical effects on traffic, property values, and so on, an as-applied challenge would essentially have the same impact as a facial challenge.

Next the court evaluated what level of scrutiny to apply. It found such analysis immaterial because the bylaws could not even survive intermediate scrutiny. As an initial matter, the bylaws were wholly under-inclusive. The proffered reasons for the exceptional restrictions on Showtime – maintaining the rural aesthetics of the town and avoiding traffic congestion, particularly on school days – were insufficient. For example the commercial park where Showtime would have operated included a self-storage facility, a drive-in movie theater and a 10,000 square foot nightclub, none of which suffered under size and height restrictions applicable to adult businesses. Moreover, the commercial park had no rural character, and nor did the businesses in it. As to the traffic concerns it was incomprehensible to the court that the traffic from the adult business was any different from the traffic, on school days or other days, created by the neighboring businesses in the same commercial park; certainly nothing that justified an extraneous set of laws to limit traffic from the former and not the latter.

Mendon relied on studies to prove that the traffic would be different or increased; however, after "an independent review of these studies" the court found "the vast majority ma[d]e no mention of traffic effects at all" and "those that d[id] discuss traffic d[id] so in a tellingly dissimilar manner relative to Mendon's suggested concern." Mendon tried to argue that adult business attracts more out-of-town patrons than other businesses in the park and that this group was less

concerned about the quality of life of Mendon than local patrons visiting the other businesses. The court rejected this logic, noting that the commercial park is on is a state highway travelling the entire east-west width of Massachusetts and that there would be little difference between the adult business and a roadside restaurant catering to cross-state travelers.

The court also found that Mendon failed to show that the bylaws actually regulated secondary effects of adult businesses. The record actually showed the town did not regulate adult business based on its stated interest – although those interests were "theoretically substantial." Noteworthy was the fact that the bylaws were passed in the aftermath of Showtime's initial application and that they only applied to four contiguous parcels of land in the entire town. That "narrow application" belied Mendon's purported broad-based interests. It was Showtime--not Mendon--that should have been granted summary judgment by the lower court.

http://media.ca1.uscourts.gov/pdf.opinions/12-2121P-01A.pdf (last accessed Oct. 22, 2014)