International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 6 – March 26, 2015

Adult Entertainment: Nude Dancing Ban Requires Actual Evidence of Furthering Important Governmental Interest; Merely Copying Other Jurisdictions' Laws is Inadequate

Foxxxy Ladyz Adult World Inc. v. Village of Dix, No. 14-1642 (7th Cir. Mar. 10, 2015).

Reversing the District Court, the Seventh Circuit has held that a municipality's ban on nude dancing cannot merely be modeled on other statutes which have been found to pass Constitutional muster, it must demonstrate some evidence that the ban actually advances a significant governmental interest within its own jurisdiction.

The Village of Dix, Illinois is a "dry" municipality with just 500 residents and Interstate 57 running north-south through it. In 2010 Dirt Cheap, Inc. bought property in the Village and opened an adult entertainment nightclub. Two years later, it leased the property to Foxxxy Ladyz Adult World Inc., which also ran a nightclub with nude dancing. Foxxxy Ladyz did not sell alcohol in the club, but allowed people to bring it in and drink it there.

In response to these businesses, Dix enacted an ordinance prohibiting public nudity, which provided that "[n]o person shall knowingly or intentionally appear nude or in a state of nudity in a public place." (In accordance with United States Supreme Court precedent, a person could comply with this law by wearing pasties and a g-string). The Village also passed ordinances prohibiting open containers of alcohol in public and possession of alcohol in public accommodations. The Dix municipal code provided that a violation of any of these ordinances would result in a fine between $100.00 and $750.00 per occurrence.

In March 2013, Dix sent a letter to Foxxxy Ladyz ordering it to comply with the laws immediately. Foxxxy Ladyz responded by filing suit in District Court arguing that the nudity ordinance violated the free speech protections of the First Amendment and the liquor laws were preempted by Illinois State liquor control laws. Dix answered with a motion to dismiss. The District Court upheld the alcohol ordinances, finding that Dix had the requisite authority and that the laws had a rational basis. It also concluded that the nudity ordinance was content neutral and passed the four-pronged *O'Brien* test. Foxxxy Ladyz appealed.

HELD: The Seventh Circuit affirmed as to the alcohol laws but reversed on the nudity ban, holding that the Village failed to show that public nudity produced adverse secondary effects within the jurisdiction.

DISCUSSION: Dix argued that its public nudity ordinance was not targeted at nude dancing, but at the deleterious secondary effects of nude dancing. The Court thus evaluated the ordinance under the *O'Brien* test, under which it would be upheld if "(1) [it] is within the constitutional power of the government; (2) [it] furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction on alleged First Amendment freedoms is no greater than essential to further the government's interest."

The sticking point for the Seventh Circuit was the second prong—whether the ordinance furthers an important governmental interest. The Circuit Court acknowledged prior Supreme Court precedent that "made clear that relying on the evidentiary foundation of harmful secondary effects set forth in previous caselaw provides an adequate rationale for passing a nudity ban." Accordingly, Dix argued that the evidentiary foundation for the ordinance passed constitutional muster because it was "intentionally modeled after public nudity bans that ha[d] been approved by the Courts as consistent with the Illinois and United States Constitution."

Foxxxy Ladyz countered that Dix had to actually point to data which showed the public nudity ban mitigated some real harm, which it conceded could be from Dix or a similar municipality. The Seventh Circuit came to a similar conclusion in reviewing Supreme Court precedent since *Pap's A.M.* It noted that the plurality opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) held that though "a municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest . . . . [t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance."

The Circuit then noted it had previously reviewed and applied this precedent in *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), and held that Indianapolis failed to meet the standard because it "approached th[e] case by assuming that any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city . . . . But because books (even of the "adult" variety) have a constitutional status different from granola and wine,

. . . the public benefits of the restrictions must be established by evidence, and not just asserted. The evidence need not be local; Indianapolis is entitled to rely on findings from Milwaukee or Memphis (provided that a suitable effort is made to control for other variables). But there must be evidence; lawyers' talk is insufficient." It found Dix made the same critical error as Indianapolis and reversed the lower court.

As to the quantum and quality of evidence Dix had to provide, the Circuit Court indicated the Village should look to *Annex Books* again, wherein the Supreme Court made clear municipalities do not have to conduct independent, new studies every time to justify a public nudity ban and do not have to meet the *Daubert* standard. However, the Court also said that evidence from other municipalities must show the undesirable effects of what the city in question is regulating and an effort must be made to control for the differences between the sample city and the one in question.

The case was remanded to give Dix the opportunity to provide specific supporting evidence.

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D03-10/C:14-1642:J:Flaum:aut:T:fnOp:N:1514465:S:0 (last accessed Mar. 25, 2015)

Police: Evidence Insufficient to Support Allegation that Police Delayed or Denied Response Due to Merchant's Nationality

Mohamed Aly v. City of Lake Jackson, No. 14-20431 (5th Cir. Mar. 13, 2015).

An Equal Protection-based Section 1983 suit brought by an American citizen of Egyptian origin against a Texas city has been rejected where the plaintiff, a merchant, could not support his allegation that police responded to his calls for assistance more slowly than for other merchants.

Mohamed Aly operates a retail business in the Brazos Mall in Lake Jackson, Texas. Aly suffered some theft--and various attempted thefts--at his business and called for police assistance. Believing that the police response was inadequate compared to the police response for other retail merchants, he filed suit against the City. Aly alleged a deprivation of Equal Protection on the basis that the City had a policy or custom of delaying or altogether denying police protection based on an individual's nationality. He also alleged the police conspired with the security at the Brazos Mall to similarly deny a sufficient response to his requests for law enforcement. The District Court granted the City's motion for summary judgment after finding that Aly failed to file a response in opposition. Aly eventual did file a response and asked the court to set side or amend its decision, but the court refused to do so. Aly appealed.

HELD: The Fifth Circuit affirmed, failing to find a constitutional violation of Aly's rights.

DISCUSSION: The Circuit Court began by stating that in order to assign municipal liability it had find "a policymaker, a policy or custom, and a constitutional violation whose moving force is the policy or custom, which collectively establishes the requisite direct causal link between a municipal policy or custom and the alleged constitutional deprivation."

In the relevant context – police protection – the Circuit noted that it is well-settled that a "state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause." As for Aly's Equal Protection Clause claim, the Circuit Court noted Aly had to show evidence of differential treatment. But the record only evidenced that differential treatment had not occurred--Aly's requests for service were appropriately answered. The Fifth Circuit did not find a constitutional violation, let alone a policy or custom that served as a moving force behind a constitutional violation.

http://www.ca5.uscourts.gov/opinions/unpub/14/14-20431.0.pdf (last accessed March 25, 2015)

Police: Shooting of Passenger in Fleeing Vehicle Does Not Violate Fourth Amendment Where Officers' Actions are Objectively Reasonable

Estate of Kelly Allen v. City of West Memphis, No. 05-2489 (W.D. Tenn., Mar. 24, 2015)

In a follow-on case arising from the facts in the Supreme Court's recent decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), a Tennessee federal District Court has rebuffed the attempt by the estate of the passenger in the vehicle—who was also killed when police fired at the vehicle driven by Donald Rickard—to collect damages from the West Memphis (Arkansas) Police Department (WMPD) and individual officers.

Kelly Allen was a passenger in the Honda Accord being driven by Rickard when it was stopped by WMPD officers in for a missing headlight and then pursued into Memphis, Tennessee at speeds exceeding 100 miles per hour after police attempted to check Rickard for driving under the influence. When Rickard's car was finally cornered by police cruisers and he nevertheless continued to accelerate towards officers and their vehicles, they fired numerous shots at the Honda, ultimately killing both Rickard and Allen. In *Plumhoff*, the Supreme Court determined that Rickard's endangerment of police and passers-by constituted reasonable grounds for police to use deadly force, defeating Rickard's Fourth Amendment-based Section 1983 action.

Allen's estate alleged that officer Plumhoff and others violated her Fourth Amendment rights when they shot her, that the WMPD was liable under Section 1983 for failure to adequately train and supervise officers and for maintaining a "policy, custom or pattern" that resulted in Allen's death, that various defendants were liable for negligence and intentional infliction of emotional distress, and so on.

Defendants moved for judgment on the pleadings and summary judgment.

HELD: Defendants' motion for summary judgment was granted.

DISCUSSION: To overcome defendants' qualified immunity, plaintiffs' had to demonstrate that the officers had violated a statutory or constitutional right that was clearly established at the time of their conduct. The court looked to a case closely on point, *Cass v. City of Dayton*, 770 F. 3d 368 (6th Cir. 2014), in which a passenger was killed while police were attempting to stop a fleeing motorist. In Cass, the driver had driven into two officers in an attempt to escape, and the passenger had been shot. The language from Cass was instructive: "in assessing deadly-force claims involving vehicular flight, . . . the critical question is typically whether the officer has reason to believe that the fleeing car presents an imminent danger to officers and members of the public in the area." Under that framework, "an officer may fire at a fleeing vehicle even when no one is in the vehicle's direct path…" (In *Cass*, just as in the *Plumhoff* fact pattern, officers were aware that there was a passenger in the vehicle).

Under *Cass*, an officer does not violate the Fourth Amendment where, although ultimately wrong in his or her assessment of the circumstances, a dangerous situation rapidly evolves to a safe one before the officer could discern the change. Based on this calculus, Plaintiffs' Fourth Amendment claim was dismissed; without a viable constitutional claim, their Section 1983 claim was also dismissed.

Geography presented an interesting element of this case, because Tennessee law does not provide immunity or foreign officers. Confronted with an array of Tennessee state law claims, defendants contended that Arkansas law should govern their immunity. Tennessee law would allow the District Court to apply Arkansas immunity law as a matter of comity, as confirmed in a 2013 Sixth Circuit opinion; however, "[b]ecause applying Arkansas immunity law would not affect the outcome of this case, the Court declines to do so." Applying Tennessee's substantive law to plaintiffs' negligence arguments, the District Court found that defendants had not acted unreasonably. The reasonableness of defendants' actions also defeated plaintiffs' claims of intentional infliction of emotional distress, false arrest, and assault and battery, as well as their claim that West Memphis was vicariously liable.

http://www.imla.org/images/links/MISC/rickard2.pdf (last accessed Mar. 25, 2015)

Speech: Occasional Waiver of Permit Fees for After-Hours Use of Schools in Exchange for Services Provided Does Not Create Discriminatory Policy

Child Evangelism Fellowship of Ohio, Inc. v. Cleveland Metropolitan School District, No. 14-3172 (6th Cir. Mar. 19, 2015).

Cleveland School District's waiver of after-school permit fees for the Boy Scouts—in exchange for goods and services they provide--does not create a discretionary and discriminatory "policy" that violates the First and Fourteenth Amendments, despite arguments by a church group that was denied a similar waiver because it provided no such goods or services.

Cleveland Metropolitan School District ("District") allows community groups to use the school facilities after-hours under its Community Use Policy. The Policy requires a permit and applies a "reasonable fee" for use of the facilities, which, at the time of the suit at issue, was $69.50 per hour. Child Evangelism Fellowship of Ohio, Inc. ("CEF") runs an after-school program for kids – the Good News Club – with a Christian viewpoint. It sought to use the District's facilities during the 2012-13 school year and it sought a fee waiver to do so. The District's Board of Education denied the request for a fee waiver and, instead, sent an estimate of the payment required for the proposed use of the facilities for the year.

CEF then learned that the Boy Scouts used the District facilities without paying a fee and renewed its request for a waiver. When denied again, it obtained an attorney and demanded immediate waiver of all fees. CEF noted it confirmed that the Boy Scouts received free use of the facilities and the District was thus discriminating against CEF by not granting its waiver request. The District did not reply.

CEF sued the District, alleging it had an unwritten policy of waiving fees at its discretion and that its preferential treatment of the Boy Scouts amounted to unlawful discrimination under the First and Fourteenth Amendments. The District responded that it did not have a fee-waiver policy or practice, but that in "limited circumstances" it would allow users to pay fees "in-kind" rather than with money. It said it uses three-criteria to evaluate in-kind proposals: "(1) the goods or services must be of equal or greater value than the Permit Fees; (2) the goods or services must be of tangible benefit to the facilities, staff, students, or academic programs; and (3) the District must not be in a position to readily provide or obtain those goods or services for itself." The District said it evaluated the Boy Scouts in-kind proposal under these criteria and agreed to such an arrangement. It said CEF made no such request or proposal to the District, but rather just sought a complete waiver and it has a policy against that. It also noted it does not consider organizational viewpoints when evaluating in-kind proposals and offered the example of The World Church, which received the benefit of an in-kind arrangement when it provided capital improvements to school buildings.

The District Court ruled in the District's favor in evaluating CEF's request for a preliminary injunction, noting that CEF failed to show a likelihood of success on the merits given that it couldn't show the District even had a fee-waiver policy, let alone applied such a policy in a discriminatory manner. CEF appealed.

HELD: The Sixth Circuit affirmed the District Court, agreeing that CEF did not show any likelihood of success in light of its failure to even show that a fee-waiver policy exists at the District.

DISCUSSION: The Circuit began by reciting the standard four factors balanced in a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." It then recited the three-step analysis of a First Amendment free speech claim, under which it "first, ask[s] whether the First Amendment protects the plaintiff's speech;" second, determine[s] the nature of the forum, "because the extent to which the Government may limit access depends on whether the forum is public or nonpublic"; and third, "assess[es] whether the justifications for exclusion from the relevant forum satisfy the requisite standard."

The Court rejected CEF's argument that the District Court erred and that it should "disregard the District's alleged in-kind arrangement policy as an example of a litigation-driven label that allows schools to evade [equal access] by strategically describing existing student groups." It instead agreed with the District that the distinction between a fee-waiver policy and an in-kind policy is constitutionally significant. This is because, the Circuit noted, a fee-waiver policy subsidizes speech entirely, while an in-kind policy that requires services that are valued equal or greater-than the fee price does not. The Circuit thus concurred with the lower court that CEF had not supplied any evidence that a fee-waiver policy even existed, thus it was impossible to find that the District applied it discriminatorily.

DISSENT: Circuit Judge Helen White dissented, arguing that while CEF did not show a fee-waiver policy existed, the evidence showed a fee-waiver *practice* did. She looked to the District's point that under the Community Use Policy it "accept[s] goods or services as payment of the fee only if the goods or services received are of equal or greater value than the Permit Fees, are of tangible benefit to the facilities, staff, students, or academic programs, and the District is not in a position to readily provide or obtain [the goods or services] on its own accord." She then highlighted that, according to the District, its in-kind arrangement with the Boy Scouts met this standard because "the costs that [the Boy Scouts] bear in providing approximately $195 worth of supplies, uniforms, camping costs and books to each of the approximately 1,420 students who participate in the program" amounts to $276,900 dollars, which exceeds the estimated cost of the facility use of $91,000.

The dissent found that this did not comply with the Community Use Policy since the goods and services are exchanged between *three* parties, not two: the Boy Scouts provide free supplies to the participating scouts, the District lets the organization use the buildings for free, thus at no time do the Boy Scouts in any way provide a value to the school. The dissent closed by saying that "[b]y allowing the Boy Scouts access to its facilities without payment of the Permit Fee—whether in cash or in kind—the District effectively granted the Boy Scouts a waiver from the Community Use Policy's Permit Fees requirement . . . . The District has not sought to justify its fee-waiver *practice*; instead, it has maintained that it does not have a fee-waiver policy. Equal treatment is at issue here; not semantics. Because the district court did not consider whether the fee-waiver practice is viewpoint neutral, I would vacate and remand."

http://www.ca6.uscourts.gov/opinions.pdf/15a0220n-06.pdf (last accessed Mar. 25, 2015)

Zoning: Requirement that Residential Substance Abuse Treatment Facilities Obtain Conditional Use Permits--When Hospitals and Nursing Homes Do Not--Is Upheld

Get Back Up, Inc. v. City of Detroit, No. 13-2722 (6th Cir. Mar. 11, 2015).

Detroit's requirement that residential substance abuse treatment centers must obtain a conditional use permit before operating in the City--even though hospitals and nursing homes need no such permit--has been upheld after being challenged under the ADA, the Fair Housing Act and the Rehabilitation Act.

In 2007 Get Back Up, Inc. purchased an old school building in one of Detroit's Business/Residential Historic districts (B4-H), in which it sought to open a 160-bed rehabilitation facility. Within the B4-H district boarding schools, child care, and nursing institutions are allowed "by right," but residential substance abuse service facilities require a conditional use permit. A conditional use permit is granted after a use is reviewed for neighborhood compatibility using fifteen criteria under Detroit's zoning ordinance. Get Back Up, Inc. applied for the permit, which was approved by the Buildings Safety and Engineering Departments. A local homeowners' association appealed to the Zoning Board of Appeals which, after a hearing, reversed the departmental approvals. Get Back Up then appealed to the Wayne County Circuit Court, which upheld the Zoning Board decision, then to the Michigan Court of Appeals and the Michigan Supreme Court, which were both unsuccessful.

Get Back Up then filed in the federal district court seeking injunctive relief under the ADA, the Rehabilitation Act, and the Fair Housing Act. It alleged that Detroit's ordinance impermissibly discriminates against substance abuse treatment facilities. The federal District Court rejected Get Back Up's challenge, holding the zoning ordinance was neutral in its treatment of disabled and non-disabled residents. Get Back Up appealed.

HELD: The Sixth Circuit affirmed, holding that Detroit's zoning ordinance did not discriminate against residential substance abuse treatment facilities when requiring such facilities to obtain a conditional use permit to operate in its Business/Residential Historic districts.

DISCUSSION: To succeed, Get Back Up had to show that the ordinance in question discriminates against the disabled. The City conceded that individuals at residential substance abuse treatment facilities are "disabled" under federal law, but countered that requiring such facilities to obtain a conditional use permit to operate was not discriminatory.

The Circuit Court noted that Get Back Up facilities are treated the same as other similar residential uses under Detroit's zoning provisions in that they can operate with a

conditional use permit. For example, emergency shelters, rooming houses, and two-family dwellings all require conditional use permits in the B4-H zone.

Get back Up argued that hospitals and nursing homes, which operate "by right" in the B4-H zone, are virtually identical to residential substance abuse treatment facilities in every respect except the nature of their residents. The Circuit disagreed. It noted, for one, that hospitals are not residential. This fact greatly changes the kind of impact hospitals have on a neighborhood in comparison to residential substance abuse treatment facilities with regard to traffic, noise, parking, etc. This, the Circuit Court said, made hospitals particularly well suited to the commercial district B4-H represented, which the zoning code described as "businesses and commercial uses of a thoroughfare-oriented nature." On the other hand, the while nursing homes are residential like residential substance abuse treatment facilities, they differ in neighborhood impacts in other ways. For example, the residents there are elderly, meaning they rarely leave the facility and have a lesser impact with regard to traditional zoning issues such as noise and traffic. The Circuit concluded "[b]ecause there are no materially similar uses that may operate by right in a B4 zoning district, the ordinance is not facially discriminatory."

The Circuit concluded by distinguishing Get Back Up's supporting cases. First, its cases were about outright bans, not requiring a conditional use permit. Second, even though the Supreme Court has held that requiring a facility for the mentally challenged to obtain a conditional use permit while allowing others to operate by right was discrimination in *City of Cleburne v. Cleburne Living Center*., 473 U.S. 432 (1985), that opinion did not say that such a requirement could never be imposed. (The Circuit Court declined to set forth specifically what differentiated this case, however). Third, Get Back Up's remaining cases included evidence of discriminatory intent, which was not demonstrated here.

http://www.ca6.uscourts.gov/opinions.pdf/15a0207n-06.pdf (last accessed Mar. 25, 2015)