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Adult Entertainment: Denial of Application for Nude Dancing Establishment in Shopping Center Does not Violate First Amendment

***Terry Sutton, d/b/a Cinkaj Brogue Limited Partnership, et al. v. Chanceford Township,* No. 18-1846 (3d Cir. Feb.13, 2019).**

Where a proposed adult entertainment venue would (1) be located in a shopping center; (2) not necessarily meet sewage disposal and ground water discharge limits; and (3) allow patrons to bring their own alcohol, in violation of state law, denial by a local zoning board was not constitutionally suspect.

Terry Sutton and his business partners ("Sutton") sought to open an adult entertainment club inside a shopping center he owned in Chanceford Township, Pennsylvania ("Chanceford"). The zoning laws in Chanceford divide it into five zones, in which some uses are generally permitted, some are prohibited, and others are permitted by "special exception." There are baseline findings Chanceford's Zoning Hearing Board must make for the last of these, but for an "adult oriented facility" there are some additional ones related specifically to the visibility of it, distance from sensitive uses like schools etc., and the prohibition of signage and materials related to the

entertainment provided inside the building. Sutton's application for a special exception to use part of his property as an adult cabaret was denied for three reasons: 1) shopping centers, in which the cabaret was to be located, can only contain "stores," which a cabaret was not; 2) Sutton did not demonstrate that the proposed use would meet the sewage-disposal and ground-water recharge requirements (these are required for any special exception); and 3) the plan to feature nude dancing while also permitting patrons to bring in their own alcohol would violate state law (which prohibits lewd entertainment in a "bottle club"). Sutton responded by filing suit in district court claiming that Chanceford's ordinance violated the First Amendment, both facially and as applied. Sutton appealed that court's grant of summary judgment to Chanceford.

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) and its "secondary effects" doctrine controlled the facial First Amendment claim the Third Circuit tackled first. Under it adult entertainment ordinances are valid if they are narrowly tailored to serve a significant or substantial government interest, while simultaneously leaving open alternative channels of communication. The Circuit recognized Chanceford's evidence regarding "secondary effects" - which it was required to present with "some particularity" - was "thin," but deemed it sufficient. The evidence included affidavits from Chanceford officials about why the ordinance was passed, that other cities' studies "demonstrating a direct relationship between the presence of [adult] facilities and increases of crime and decreases in surrounding property values" were relied on, and that Chanceford's attorney at the time had "reviewed various court decisions, as well as legislative findings, discussing the negative secondary effects of adult entertainment businesses." Sutton failed to argue the ordinance was *not* narrowly tailored and did *not* leave open alternative communication channels (other prongs of the analysis he could have argued), and thus the Court's first finding that Chanceford had enacted the ordinance based secondary effects meant his facial challenge failed.

His as-applied challenge fared no better. The three reasons for denying the application stated by Chanceford's Zoning Hearing Board showed no animus toward nude dancing. The Court specifically pointed out that the second reason - failing to demonstrate that his use would meet the *uniformly-applicable* sewage-disposal and ground-water recharge requirements - was fatal. Sutton's application stated that since his shopping center *previously demonstrated compliance* with this general requirement and since the cabaret use would not require more water than other prior uses there, he complied with the ground-water discharge requirement. But the Court pointed out that Sutton, when asked by the Zoning Hearing Board, confirmed he did not conduct any studies or engineering to show this. The Court found this alone was a legitimate, content-neutral reason to reject his application.

Finally, the Court, very briefly, addressed Sutton's argument that he would have changed the application to *not* violate the state laws' prohibition on featuring lewd activity and permitting patrons to bring in alcohol. But the Court was crisp with its response: "the application for the cabaret did include a provision permitting patrons to bring their own beverages [and t]he [Zoning Hearing] Board cannot be faulted for evaluating the application on its stated terms." Sutton's claims failed.

LINK

Contracts: Breach Occurred When Defective Database First Delivered to County; Vendor's Remedial Efforts Do not Toll Statutes of Limitation

York County. v. PropertyInfo Corporation, Inc., 2019 Me 12 (Me Jan. 24, 2019).

Declining to apply a "continuing breach of contract" theory, the Maine Supreme Court

has found that a County's right to bring suit for a defective database accrued when the work product was initially delivered and found be defective-the fact that the vendor continued to attempt fixes over a subsequent five-year period did not toll the statute of limitations.

In 2003 York County, Maine ("County") contracted with Landata, the predecessor of PropertyInfo Corporation, Inc. ("PropertyInfo") to digitize and make available to the public and to York County Registry of Deeds an indexed collection of registered documents. The agreement had no set implementation deadline - the parties were to cooperatively work it out - and the agreement was to "remain in effect until the Agreement expire[d], or until terminated for breach of contract." The initial term was five years and could be renewed for any length of time by the parties. The parties entered a supplemental agreement in 2005 setting out parameters for digitizing the County records for the years 1940-1965. PropertyInfo delivered the first fruits of this agreement in 2006, though some data was missing, which became the subject of emails for a year between the parties. In 2011 - five years later - a re-indexed database was delivered that still contained various data problems. In 2015 and 2016, PropertyInfo undertook a quality assurance process to review the 1940-1965 project, which revealed errors concerning mortgages and mortgage releases as well as other types of errors. PropertyInfo delivered a brand-new index in the summer of 2016; the County filed suit in December of that year, ten years after the initial database product had been delivered to the County, alleging a breach of contract. PropertyInfo answered with a statute of limitations defense, followed by a motion for summary judgment, with which the Superior Court of York County agreed. The County appealed.

The crux of the County's argument was that PropertyInfo failed to complete performance of a service contract that had not expired and that, since the cause of action does not accrue until completion of the contract, its suit was not barred by a statute of limitations. The Maine Supreme Judicial Court laid out that a breach of contract claim accrues "when a party to the contract fails to provide the bargained-for benefit," and that in cases such as here where no time for performance was set in the contract, "a reasonable time is implied." The County posited that the Superior Court erred in holding that date was 2006 when PropertyInfo delivered the first database and the County paid the $500,000 because PropertyInfo continued to make corrections to the database through 2016 when the suit was filed.

This issue of a "continuing-breach-of-contract theory" was one of first impression for the Court, leading it to survey state and federal opinions. It noted that in Texas and New York when a breach of contract occurs, subsequent attempts to remedy the defects or provide assurances do *not* alter the date of the breach, but that installment contracts and those where the contract imposes a continuing duty (recurring pension deposit obligations for example) have been subject to this theory in New Jersey and New York. On the other hand, Washington and the District of Columbia do not recognize the theory in any circumstance. A tangential issue noted was tolling of statutes of limitations in some negligent professional conduct cases - malpractice for example and like tort cases where special relationships with continuing duties of care are involved.

The Court deftly dodged committing Maine to such a thorny contract theory, saying instead that "even if [it] were to bless the "continuing" breach doctrine, the doctrine would not apply in this case because it found under the facts that the material breach occurred in 2006 when the defective database was delivered. Closing with the statement that this "is not a situation in which the "'continuing" breach doctrine could apply," seemed to indicate, however, that it rejected the theory at least where no installment contract existed or where no repetitive obligation was placed on the breaching party. It affirmed the lower court.

LINK

Police: No Property Right in Having Law Enforcement Arrest or Take

into Custody a Mentally Ill Person to Forestall Potential Violence

***Wilborn v. Jones,* No. 18-11824 (11th Cir. Feb. 7, 2019).**

Finding that police officers' decision about whether or not to take a mentally ill person into custody to avoid potential crimes was a matter of discretion, the Eleventh Circuit has upheld a lower court's refusal to find a protectible property interest under Alabama law for such an arrest.

Darius Lashaun Wilborn ("Shaun") is a neighbor-and relative of Daniel Webster Wilborn ("Wilborn"). Shaun lived with his mother. One night she activated a silent alarm after Shaun began acting violently, prompting the arrival of Lee County Alabama deputies. Shaun told the officers that he was taking his medications, said he would go to his room, and that there would be no problems, but he refused to leave the residence voluntarily. His mother left, but Wilborn arrived at the house and requested that the officers arrest Shaun. The officers rejected the request, saying they lacked probable cause to do so. Wilborn called an ambulance, but because Shaun would not leave voluntarily, Sergeant Mayo of the Lee County Sheriff's Office cancelled the ambulance request. The officers all left the house and Shaun subsequently attacked Wilborn.

Based on these facts, Wilborn filed a six-count civil rights complaint against Sheriff J. M. Jones ("Jones") and Sergeant David C. Mayo alleging various violations of federal and state law. After sorting through the complaint, the ultimate question before the district court was whether Alabama law guarantees citizens a property interest in police assistance to arrest or take mentally ill persons into custody to prevent potential crimes. Determining that there was *not* such a right, the district court granted the defendant's motion to dismiss. This was the sole issue on appeal for the Eleventh Circuit.

The Circuit laid out that in *Town of Castle Rock. v. Gonzales*, 545 U.S. 748 (2005), the Supreme Court reviewed the Tenth Circuit's dismissal of a complaint filed by a mother alleging that police officers' failure to enforce a domestic abuse restraining order, despite her repeated demands, resulted in her estranged husband murdering their children. The Supreme Court held that the federal constitution controls whether an interest rises to the level of a "legitimate claim of entitlement" protected by Due Process. It then determined that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion," *Town of Castle Rock* at 756, which is generally the case under arrest statutes.

The Eleventh Circuit found Wilborn's situation was analogous to the one in *Town of Castle Rock* because Ala. Code § 22-52-91 provides officers with the discretion to arrest when confronting mentally ill persons and those posing a danger to themselves or others. Wilborn's failure to state facts that plausibly claimed the *officers had probable cause to arrest Shaun* was thus fatal to his claim.

LINK

Sanctuary Cities: Attorney General Lacks Authority to Implement Conditions on Municipalities' Receipt of Byrne-JAG Award Funds

***City of Philadelphia v. Attorney General of the United States of America*, No. 18-2648 (3d Cir. Feb.15, 2019).**

Rebuffing an attempt by Attorney General Sessions to condition localities' receipt of federal "Byrne JAG" police grants on cooperation with federal immigration authorities, the Third Circuit has determined, after a thorough parsing of the relevant legislative

language, that Congress did not intend to give the Attorney General such sweeping authority.

The federal Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG") was created in 2006 and provides federal criminal justice funding to States and local governments - about $80 million per year. Philadelphia ("City") has received the grant every year since 2006, to the tune of an average of $2.5 million. The Justice Department notified the City that it was withholding its FY2017 award because the City was not in compliance with three newly implemented conditions ("Challenged Conditions"), which require greater coordination with federal officials on matters of immigration enforcement. Summarized, the Challenged Conditions are: 1) a "Certification Condition" that requires grant recipients to "certify compliance with [8 U.S.C. § 1373 ("Section 1373")]; 2) an "Access Condition" that requires grant recipients to "permit personnel of the U.S. Department of Homeland Security ("DHS") to access any detention facility in order to meet with an alien and inquire as to his or her right to be or remain in the United States"; and 3) a "Notice Condition" that requires grant recipients to "provide at least 48 hours advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien." The reason stated for not providing the funds to the City was that it "appeare[d] to have laws, policies, or practices that violate 8 U.S.C. § 1373," which the Court noted was "no doubt" a reference to the City's "policies adopted by police or executive order that limit the circumstances under which City officials will share immigration information with the federal government, permit federal officials to access City prison facilities, and coordinate with federal officials regarding the release of aliens from local custody."

The City filed suit to enjoin the Attorney General from withholding its award - i.e. from implementing the conditions. The district court granted a preliminary injunction, and then it granted summary judgment and a permanent injunction for the City. The City had a litany of claims, all of which the district court ruled in the City's favor, and included that the Attorney General lacked statutory authority to promulgate the Challenged Conditions; that he promulgated the Challenged Conditions arbitrarily and capriciously; that the Challenged Conditions violate the Spending Clause; that the Certification Condition violates the Tenth Amendment; and that the City was in substantial compliance with the Challenged Conditions anyway--all of this prompted the Attorney General to appeal, which resulted in the Third Circuit affirming the lower court.

Recognizing that if the Attorney General did not have statutory authority to enact the Challenged Conditions, it would not need to address anything further, the Third Circuit started with that threshold claim. Since the Challenged Conditions are not constitutionally authorized, the only avenue under which the Executive Branch could possess authority for their promulgation is Congress. The Attorney General claimed three sources of authority: 1) the Byrne JAG statute, 34 U.S.C. §§ 10151-10158; 2) the provision defining the duties of the Assistant Attorney General for the Office Justice Programs, 34 U.S.C. § 10102(a); and 3) for the Certification Condition only, Section 10153(a)(5)(D) of the Byrne JAG statute.

The Attorney General pointed to two portions of the Byrne JAG statute for his first argument: one that direct applicants to report "data, records, and information (programmatic and financial)" that he may "reasonably require," 34 U.S.C. § 10153(a)(4), and a second that requires grantees to certify that "there has been appropriate coordination with affected agencies," *Id*. § 10153(a)(5). The argument was that notice of an alien's release is "information" the Attorney General can "reasonably require" and that access to prison facilities can be demanded as "appropriate coordination." The Third Circuit - like others that have tackled this issue - rejected these theories, noting first that "information" is statutorily limited to *financial* and *programmatic* information and, second, that since "Congress' use of a verb tense is significant in construing statutes," the fact that the certification only related to whether there *has been* appropriate coordination - not a command to demand future coordination - was fatal to the Attorney General's second argument. The Court also noted, sua sponte, that, overall, other provisions of the statute at issue and those of the U.S. Code that mention the Byrne JAG statute all significantly curtail the Attorney General's discretion with regard to withholding grantee's funds, thus generally weakening his arguments.

The Attorney General' second argument hinged on his general statutory authority with respect to the Office of Justice Programs, specifically that he shall "exercise *such other powers and functions* as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, *including placing special conditions on all grants* . . . ." (emphasis added). The Circuit pointed out the phrase "placing special conditions on all grants" is preceded by the word "including," and that the consequence of this particular wording is that "the [Attorney General] has the power to place special conditions on grants *only to the extent that such power has been vested in him or her "pursuant to this chapter or by delegation of the Attorney General*." (emphasis added). The Court backed-up this statutory construction by referring to the overall statutory structure, highlighting that it was "hesitant" to read the "sweeping grant" of power advocated for by the Attorney General when the subsection was nestled within five subsections that are exclusively ministerial in nature.

The Attorney General's third argument hinged on the Byrne JAG statute's requirement that applicants certify that they "will comply with all provisions of this part *and all other applicable Federal laws*." 34 U.S.C. § 10153(a)(5)(D) (emphasis added). He argued that Section 1373's *prohibition on* cities restricting the sharing of information regarding immigration status is an *applicable federal law* and, ergo, he can require the City (and all grant applicants) to certify compliance with Section 1373 restriction on information sharing. After scrutiny of the text, structure, and history of 34 U.S.C. § 10153(a)(5)(D)'s applicable law language the Circuit rejected this argument. A particularly noteworthy part of which was the Circuit's focus on the "Administrative Provisions" section of the same chapter of the code as the clause at issue. It states "[n]othing in this chapter or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof." The Circuit pointed out the Attorney General's reading of the clause at issue would, in fact, authorize the Department of Justice to direct, supervise, or control Philadelphia Police communications with ICE.

As a result the Court ruled Congress had not empowered the Attorney General to enact any of the Challenged Conditions, meaning he exceeded his statutory authority in promulgating them. It affirmed the lower court, never reaching the City's further claims.

LINK

Takings: Substantive Due Process Claim Must Rely on Enumerated Constitutional Right

Hillcrest Property, LLP v. Pasco County, No. 17-14789 (1th Cir. Feb. 13, 2019).

Holding that under *Koontz*, a landowner's claim of unconstitutional conditions must be predicated on an "enumerated" constitutional provision (the Takings Clause), the Eleventh Circuit has reversed a judgment in favor of a Florida developer who disputed a county's right of way conditions, because the claim was based on a deprivation of substantive due process.

Pasco County, Fla. ("County") Land Development Code ch. 900, § 901.2(A)(2) is designed "to preserve, protect, and provide for the dedication and/or acquisition of right-of-way and transportation corridors that are necessary to provide future transportation facilities and facility improvements to meet the needs of [projected] growth." In sum, the County drew up a corridor-preservation map depicting land that the County believes will be required to adequately provide

transportation, regardless of who currently owns the land. When development applications are made for properties adjoining this corridor, the County, "as a condition of approval," requires a right-of-way dedication. The language of the County code tracks with Takings cases - i.e. the dedication must be "roughly proportional," and in cases where more land is needed, compensation is built into the process as well through a review board.

Hillcrest Property, LLP ("Hillcrest") owns 16.5 acres of undeveloped, commercially zoned land and sought to develop a 83,000 square-foot retail shopping center, triggering the required dedication of land. After some years of back-and-forth between the County and Hillcrest over site plans, in 2008 the County approved a construction plan but conditioned approval upon reaching an agreement on the dedication (which three years into the development process the parties still had not hammered out). Over the next two years the parties continued to disagree over the dedication and in 2010 Hillcrest filed a seventeen-count complaint. The litigation worked its way through the courts, including up to the Eleventh Circuit once before, but unsurprising to say that at this juncture, nine years in, the outstanding issue is attorney's fees. In order to decide that final issue, however, the Circuit recognized it had to "decide the one claim that lingers": Hillcrest's substantive due process claim.

The Circuit set out the "two strands [of substantive due process] -one that protects against deprivation of fundamental rights and one that protects against arbitrary legislation." It began with the former. It noted out of the gate that Hillcrest did not allege denial of any fundamental right directly because it accurately recognized that argument was foreclosed by the Circuit's *McKinney* case, .which holds fundamental rights in the constitutional sense do *not include* "state-created rights" and land-use claims are state-created rights. What Hillcrest did instead was make two arguments to avoid the *McKinney* rule. First, it argued there was a distinction between "old property" and "new property" for due process purposes. The Circuit rejected this theory flat out with string citations to Supreme Court cases and its own precedents. The second argument was that the *McKinney* precedent was undermined by two Supreme Court cases, most notably *Koontz*, which Hillcrest argued shows land-use rights are fundamental rights. The Circuit unpacked *Koontz* methodically, showing it held "an unconstitutional-conditions claim is its own constitutional cause of action" that is "*predicated" on some other enumerated constitutional right*-in [Mr.] Koontz's case [his claim was] "predicated on the Takings Clause." The problem for Hillcrest was that it did not assert an *"enumerated* right allegedly infringed by an unconstitutional condition," instead it used an *un*enumerated right: it filed a *substantive* due process claim. In sum: *Koontz applies* to Taking Claims (and other claims made under rights enumerated in the federal Constitution), and it does *not* apply to a substantive due process claim.

As for the second "strand," if party can show a legislative act infringes a state-created right, a party may have a substantive due process claim - in the familiar language of lawyers, the party may have an argument that the government action was arbitrary and irrational. This second substantive due process "strand" also hinged on *McKinney* because that case also sets the precedent for the Eleventh Circuit's distinction between "legislative" and "executive" acts. Executive acts characteristically apply to a limited number of persons, often even one, but in contrast legislative acts apply to the general population. Land-use regulation decisions generally fall in the "executive" act category, meaning substantive due process claims *are not viable in the land-use context*. The Court found Hillcrest failed to appreciate *McKinney* in this part of its argument either but that the case also barred its argument because Hillcrest challenged the application of the dedication ordinance *to itself*, not anything inherent in the ordinance's design that was generally applicable. This was evidenced by the claim: Hillcrest filed an as-applied challenge. The Circuit ruled against Hillcrest and, thus under the complex proceedings over nine years of litigation, reversed the district court's most recent grant of summary judgment to Hillcrest.

LINK

Trials: Plaintiff Cannot Amend Complaint after End of Discovery Period and after City has Moved for Summary Judgment

Evans v. City of Philadelphia, No. 18-1947 (3d Cir. Feb. 13, 2019).

A Philadelphia police officer who was discharged for failing a drug test and who initially brought a disparate treatment claim could not later add a disparate impact claim after the initial discovery deadline had passed and the City had already moved for summary judgment; to hold otherwise would countenance undue delay and be prejudicial.

Michele Evans was terminated from the Philadelphia Police Department following a positive drug test. She filed a claim for disparate *treatment* race discrimination under Title VII of the Civil Rights Act of 1964. *After* the City of Philadelphia ("City") filed a motion for summary judgment, Evans moved to amend her complaint to add a disparate *impact* claim. The district court denied the motion to amend, basing its decision on both undue delay and futility. Evans appealed, arguing that the district court abused its discretion.

Evans defended the general lateness of her motion to amend - attacking the district court's finding that she acted with undue delay - by arguing that the City failed to respond to her requests for discovery regarding the theory of disparate impact and, even though she was diligent in trying obtain the discovery that would support such a claim, until the City responded to the discovery requests she did not have a basis to add the disparate impact claim. The Circuit was unsympathetic for two reasons. First, it noted Evans did not file a motion to compel discovery until *after the discovery deadline*. Second, her motion to amend the complaint to add the new theory was not filed until a full month *after the City moved for summary judgment.* Thus, both the motion to compel discovery and the motion to amend were untimely. While the Circuit conceded delay alone is not a basis for denying a motion to amend, it confessed that at some point the delay becomes "undue" both because the lateness burdens the court and because it becomes prejudicial to the other party. Here, both the lower court and the City suffered these repercussions, warranting denial of the motion. In closing, the Circuit noted it found it relevant that the City had no basis to provide discovery regarding disparate *impact* until Evans' motion to amend was filed because until then it was only faced with a disparate *treatment* case.

As for the district court's second basis for denial - futility - the Circuit characterized it as "bolstering" the lower court's opinion. Disparate *impact* cases require the plaintiff to show "that the facially neutral employment practice [that is challenged] had a significantly discriminatory impact." Evans attempted to meet this initial hurdle by arguing that the facially neutral practice of not considering reconfirmation test results when making termination decisions for employees who initially test positive for drug use has a statistically discriminatory impact because the racial makeup of the fired officers after the initial positive test *and* subsequent request to retest differs from the racial makeup of the police department as a whole. The former number is 80% black and 20% white, while the department itself is 33% black and 56% white. The hiccup for the lower court, and the basis for its finding that this does *not* make out a prima facie case was that the comparator pools were mismatched. The facially neutral practice *only affects officers who ask to retest*, thus, the comparator is *not* the entire police department; rather, it is those officers who requested the retest. Looking at that number, there was zero statistical disparity - all six who requested retesting were terminated. The Circuit found the district court did not abuse its discretion when it denied this motion based on futility because Evans did not make out a prima facie disparate impact case. The Circuit held both dismissals were correct and affirmed the lower court.

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