No. 97-1504

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

CITY NEWS & NOVELTY, INC., PLAINTIFF-APPELLANT, v. CITY OF WAUKESHA, DEFENDANT-RESPONDENT.	FILED Mar 18, 1998 Marilyn L. Graves Clerk of Supreme Court Madison, WI

CERTIFICATION BY COURT OF APPEALS OF WISCONSIN

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to RULE 809.61, STATS., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.[1]

ISSUES

1. Is an "adult-oriented establishments" municipal ordinance that fails to preserve the status quo during the administrative license renewal process facially unconstitutional?

[1] The parties raise and argue additional issues in the briefs; however, we certify only the following three issues for supreme court review.

2. Is the ordinance unconstitutional if it fails to provide express time limits for judicial review?

3. Can a municipality enforce the ultimate ordinance sanction (license denial) without affording the license holder timely opportunity to remedy alleged violations?

STATEMENT OF FACTS

City News and Novelty, Inc. is an adult-oriented establishment in the City of Waukesha. It is licensed annually under the provisions of § 8.195 of the CITY OF WAUKESHA, WIS., MUNICIPAL CODE (1995). On November 15, 1995, City News applied for renewal of its license; its license was due to expire on January 25, 1996.[2] The code provides that "[w]ithin twenty-one (21) days of receiving an application for a license the City Clerk shall notify the applicant whether the application is granted or denied." *Id.* at § 8.195(3)(c).

On December 19, 1995, the common council passed a resolution that found City News had committed several violations of the ordinance and as a result denied the renewal of its license. City News requested administrative review of this decision; after holding administrative hearings and receiving briefs, the Waukesha Administrative Review Board affirmed the City's decision on June 28, 1996. City News then filed a certiorari action in circuit court and sought judicial review of the denial of its

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[2] The ordinance requires that a renewal application must be filed "not later than sixty (60) days before the license expires." CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195(7)(a) (1995).

license renewal. The circuit court affirmed the decision of the Board in a decision filed April 2, 1997.

DISCUSSION

Preserving the Status Quo

The first issue certified is whether the ordinance is unconstitutional because it fails to explicitly preserve the status quo throughout the administrative process. According to the Supreme Court in ***FW/PBS, Inc. v. City of Dallas,*** 493 U.S. 215 (1990), a licensing scheme that exists as a prior restraint on businesses that purvey sexually explicit but protected speech is constitutionally permissible if it contains safeguards to minimize the possibility that the licensing procedure will be used to suppress speech. *See* ***id.*** at 226. The Court then set out several requirements which licensing ordinances must include in order to pass constitutional scrutiny.

First, the regulatory scheme cannot place " 'unbridled discretion in the hands of a government official or agency.' " ***Id.*** at 225 (quoting ***City of Lakewood v. Plain Dealer Publ'g Co.,*** 486 U.S. 750, 757 (1988)). In other words, if a permit or license may be granted or withheld solely at the discretion of a government official, this is an "unconstitutional censorship or prior restraint" upon the exercise of the freedom of speech. *See* ***id.*** at 226. Second, it is impermissible for a prior restraint to not place limits on the time within which the decision maker must issue or deny a license. *See* ***id.*** The Court held that a licensing decision must be made "within a specific and reasonable time period during which the status quo is maintained." ***Id.*** at 228. Finally, a regulatory scheme must

provide for "prompt judicial review" in the event that a license is erroneously denied. *See id.*

In *Wolff v. City of Monticello*, 803 F. Supp. 1568, 1574 (D. Minn. 1992), a federal district court applying *FW/PBS* referenced the above-quoted statement and went on to conclude that because the ordinance under scrutiny in that case did not include a *specific provision* which assured that the status quo would be maintained, it was unconstitutional under *FW/PBS*. *See Wolff*, 803 F. Supp. at 1574. The *Wolff* court concluded that because the ordinance did not preserve the status quo "on its face," the city's promise that it would take no action to enforce the ordinance prior to a final decision on the license application did not comply with *FW/PBS*. *See Wolff*, 803 F. Supp. at 1575.

The City does not dispute the general requirements of *FW/PBS*. However, the City contends that because its ordinance provides that a decision to grant or deny the application for a license must be made within twenty-one days, the above requirements are met. Because a license renewal is required to be filed sixty days before the expiration of the current license, the City argues that the status quo is automatically maintained because by adhering to the statutory time line outlined by the statute, "the ability to continuously operate the adult oriented establishment is not interrupted. . . . The status quo is preserved because the 21 day period runs prior to the expiration of a license."[3]

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[3] We note that thirty-four days passed between City News' filing for renewal on November 15 and the common council's resolution which denied the renewal on December 19.

There is no Wisconsin law on this issue. There is also no Supreme Court statement on whether the absence of an explicit status quo provision renders an ordinance facially unconstitutional under ***FW/PBS***. Because this issue will greatly impact local municipalities' regulation of adult-oriented establishments, we respectfully request that the state's highest court decide this issue.

Prompt Judicial Review

Related to the first issue is the question of whether the City's ordinance is unconstitutional because it fails to provide express time limits for judicial review. The City cites to ***Chesapeake B & M, Inc. v. Harford County, Md.,*** 831 F. Supp. 1241 (D. Md. 1993), in support of its position that *access to* judicial review is all that is required. However, the district court's holding that "a licensing ordinance need only provide for the availability of prompt judicial review," *see id.* at 1250, was reversed on appeal.

On review the Fourth Circuit stated that "[f]or the reasons announced today in our en banc opinion in ***11126 Baltimore Blvd., [Inc. v. Prince George's County, Md.,*** 58 F.3d 988 (4th Cir. 1995)], we agree that prompt judicial review means *a sufficiently prompt decision on the merits.*" ***Chesapeake B & M, Inc. v. Harford County, Md.,*** 58 F.3d 1005, 1012 (4th Cir. 1995) (emphasis added). As explained in ***11126 Baltimore Boulevard,*** other cases prior to ***FW/PBS,*** including the seminal case of ***Freedman v. Maryland,*** 380 U.S. 51 (1965), had used the term "prompt judicial review" to mean a *prompt judicial determination. See* ***11126 Baltimore Blvd.,*** 58 F.3d at 999-1000. Coupling that history with the Court's decision in ***FW/PBS,*** the

court concluded that the decision in ***FW/PBS*** must be read as maintaining the ***Freedman*** requirement of a prompt judicial determination of the issue.[4] *See* ***11126 Baltimore Blvd.,*** 58 F.3d at 1000.

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[4] *See, e.g.,* ***Freedman v. Maryland,*** 380 U.S. 51, 59 (1965) ("[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"); ***Southeastern Promotions, Ltd v. Conrad,*** 420 U.S. 546, 561-62 (1975) (judicial decision on the merits which was not obtained for five months did not comport with "prompt judicial review"); ***United States v. Thirty-Seven Photographs,*** 402 U.S. 363, 372 (1971) (using "prompt judicial review" as synonymous with "prompt judicial determination"); ***Blount v. Rizzi,*** 400 U.S. 410, 417 (1971) (stating that the ***Freedman*** Court held that a scheme of administrative censorship must require prompt judicial review, defined as "a final judicial determination on the merits within a specified, brief period" in order to avoid constitutional infirmity).

However, in cases subsequent to ***FW/PBS, Inc. v. City of Dallas,*** 493 U.S. 215 (1990), the federal appellate courts are split. *See, e.g.,* ***TK's Video, Inc. v. Denton County, Tex.,*** 24 F.3d 705, 709 (5th Cir. 1994), and ***Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth,*** 984 F.2d 1319, 1327 (1st Cir. 1993) (both cases hold that the requirement of "prompt judicial review" is satisfied by providing access to the courts after an administrative denial). *But see* ***East Brooks Books, Inc. v. City of Memphis,*** 48 F.3d 220, 224-25 (6th Cir. 1995) (unequivocally rejecting the argument that mere access to judicial review satisfies the prompt judicial review requirement). It should be noted that in neither the ***TK's Video*** nor ***Jews for Jesus*** decision did the court attempt to analyze how the conclusion it reached was consistent with Supreme Court precedent in this area. *See* ***11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,*** 58 F.3d 988, 1000 n. 17 (4th Cir. 1995).

In the instant case, the ordinance is silent as to any provision which addresses the timeliness of judicial review of the administrative review process. The City claims that prompt judicial review of a board's determination is provided by § 68.13, STATS., and that under ***FW/PBS,*** this is all that is required. However, as discussed above, this analysis does not square with a significant body of case law preceding ***FW/PBS***. On the other hand, if a prompt judicial *determination* is required in order to comply with ***FW/PBS,*** how can a local governing body pass an ordinance containing directives or requirements that the circuit courts of the state answer issues of this type within a specified time period? None of the cases calling for a prompt judicial determination have squarely addressed this issue, although ***11126 Baltimore Boulevard*** suggests that if a licensee is permitted to operate until a judicial determination is rendered, the constitutional problem could be avoided. *See* ***11126 Baltimore Blvd.,*** 58 F.3d at 1001 n. 18.

Sanctions Imposed

The third issue is whether the City's response to alleged violations of the ordinance, which was to invoke the most severe form of sanction and deny renewal of the license, passes constitutional muster. City News claims that the City acted unreasonably in "saving up" all of its complaints past the point where City News could effectively remedy them prior to renewal. By utilizing a "sub rosa theory of strict liability without ever articulating it as such," City News claims that the City has offended procedural due process requirements. While the ordinance provides for a maximum suspension of thirty days

if a violation occurs without the actual or constructive knowledge of the operator of the establishment, *see* MUNICIPAL CODE, § 8.195(8)(a)2, in this case the City compiled a number of violations, including citations given to patrons of the store, and utilized these violations as the basis for not renewing City News' license to operate.

According to the Supreme Court, content-based restrictions on speech "must be subjected to the most exacting scrutiny." ***Boos v. Barry,*** 485 U.S. 312, 321 (1988). Although time, place or manner restrictions have never been subject to the same "strict scrutiny," if a regulation is content-based it is subject to a least-restrictive-alternative analysis. *See* ***Ward v. Rock Against Racism,*** 491 U.S. 781, 798 n.6 (1989). Such a regulation must be "narrowly tailored" and a less-restrictive alternative cannot be readily available. *See* ***Boos,*** 485 U.S. at 329.

At issue in the instant case is whether the ordinance is constitutionally infirm because it allows the drastic sanction of nonrenewal to be invoked without first implementing the lesser penalty of suspension. City News claims that because the ordinance operates as a prior restraint, it is subject to the least-restrictive-alternative requirement. *See* ***Ward,*** 491 U.S. at 798-99 & n.6. In response, the City asserts that "[t]here is no requirement in the ordinance, nor need there be a requirement that the appellant should first be subject to a warning, a suspension or some other lesser penalty before nonrenewal is appropriate. *This is a matter totally within the discretion of the licensing authority.*" (Emphasis added.)

In several federal cases the least-restrictive-means analysis has been used to invalidate portions of prior

restraint ordinances. *See* ***Genusa v. City of Peoria,*** 619 F.2d 1203, 1219 (7th Cir. 1980) (stating that the city is required to "demonstrate the existence of a substantial and legitimate state interest that is unrelated to the suppression of free expression and that cannot be effectuated by means that impact less drastically on protection freedoms"); ***Suburban Video, Inc. v. City of Delafield,*** 694 F. Supp. 585, 592 (E.D. Wis. 1988) (disclosure requirements that invade plaintiffs' privacy without any legitimate justification are prohibited by the First and Fourteenth Amendments). City News claims that under a least-restrictive-means analysis, the City's nonrenewal of its license to operate without affording it an opportunity to remediate any violations did not afford City News procedural due process and this failure calls into question the constitutionality of the ordinance.

Because these issues impact the ability of municipalities to fairly license and regulate the operation of adult-oriented businesses and because there is an absence of precedent-setting state or federal law in this area of constitutionally sensitive expression, we respectfully request the Wisconsin Supreme Court to accept jurisdiction.