STATE OF WISCONSIN
COURT OF APPEALS
District 2

Case No. 97-1504

CITY NEWS & NOVELTY, INC.,

Plaintiff-Appellant,

v.

CITY OF WAUKESHA,

Defendant-Respondent.

REPLY BRIEF OF PLAINTIFF-APPELLANT

Appeal From the Decision of the Circuit Court for
Waukesha County, Branch 11, in
Case No. 96-CV-1427, Entered April 2, 1997.
The Honorable Robert G. Mawdsley, Presiding

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I. THE WAUKESHA LICENSING ORDINANCE IS UNENFORCEABLE BECAUSE IT IS A PRIOR RESTRAINT WITHOUT CONSTITUTIONALLY REQUIRED SAFEGUARDS.

A. Ordinance No. 8.195 Must Be Analyzed as a Prior Restraint.

In its response, the City of Waukesha asserts that its licensing ordinance is merely a content-neutral, time, place and manner restriction. This is wrong. Any restrictions which require "governmental permission before engaging in protected speech must be analyzed as prior restraints. . . ." 11126 Baltimore Blvd. v. Prince George's County, 58 F.3d 988, 995 (4th Cir. 1995) (en banc), cert. den. 116 S.Ct. 567. Ordinance 8.195(2)(a) provides that no adult bookstore may operate in Waukesha without a license. Therefore, as anyone who wishes to sell sexually explicit material must apply to receive permission before dispensing the material, this regulation is a prior restraint and must be analyzed as such.

The City also asserts that Waukesha's licensing ordinance is based on the ordinance used by the City of Delafield, which was found constitutional in Suburban Video v. City of Delafield, 694 F.Supp. 585 (E.D. Wis. 1988). It is not a matter of record that the Waukesha ordinance is identical to that of Delafield; nonetheless, even if the two ordinances are identical, the issues raised herein have not been previously determined. In Suburban the Court considered four challenges to the Delafield ordinance: (1) legislative motivation; (2) whether the ordinance permitted reasonable alternative avenues of communication; (3) whether the require-

ment of open doors on video booths violated patrons' privacy; and (4) whether the disclosure requirements contained in the ordinance were constitutional. Suburban, 694 F.Supp. at 589, 592. The issue of constitutionally required procedural safeguards in a regulation which acts as a prior restraint was neither raised nor decided.

As Waukesha's licensing ordinance unquestionably operates as a prior restraint, the burden falls to the City to demonstrate that it contains the requisite procedural safeguards in order to be found constitutional. While "prior restraints are not unconstitutional per se, . . . any system of prior restraint . . . [bears] a heavy presumption against its constitutional validity." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990); Freedman v. Maryland, 380 U.S. 51, 57 (1965).

B. Waukesha's Licensing Ordinance Lacks the Explicit Standards Which Are Constitutionally Required.

It is far from clear that, as the City asserts, the "standards" found at § 8.195(4) govern license renewal as well as the issuance of new licenses. This section of the ordinance makes no mention at all of license renewals. Furthermore, the sections of the ordinance which do explicitly pertain to renewals use substantially different language. For example, § 8.195(10)(b) refers to acts or omissions of employees and of the operator; § 8.195(4) refers to the officers, directors, and stockholders of a corporate appli-

cant. Thus, actions of a stockholder which violate provisions of the licensing ordinance would serve as a disqualifier for the issuance of a new license, while the same is not true of renewal.

Even if the City is correct that the "standards" in § 8.195(4) govern license renewals as well as the issuance of a new license, the terms of that provision fail to measure up to constitutional standards in two ways.

First, the "standards," such as they are, merely list acts which disqualify one from receiving a license. Nothing in the ordinance states that in the absence of any violations, the license must be issued. This flaw undermined the constitutionality of the ordinance in Wolff v. City of Monticello, 803 F.Supp. 1568, 1573-74 (D. Minn. 1992). The City argues that the ordinance at issue in Wolff is so unlike Waukesha's ordinance as to preclude legitimate comparison; however, this is inaccurate. While the ordinance examined by Wolff contained provisions for both zoning and licensing, and Waukesha's ordinance contains only licensing regulations, the licensing provisions of both are remarkably similar. Monticello's ordinance required the council to investigate all facts in a license application and, following public hearing, to grant or refuse the application. Sections 3-13-1(E) and (F) of the Monticello ordinance state that persons are ineligible for a license under certain circumstances. Like the respondent, the City of Monticello argued that those

sections set forth the exact criteria for license eligibility. The Court disagreed, saying:

> Contrary to defendant's assertion, sections 3-13-1(E) and (F) do not support the criteria for persons and places eligible for a license; rather, the sections state that certain persons and places are ineligible for a license. Moreover, there is no provision in the ordinance requiring the city council to grant license applications for any person or place that is not rendered ineligible under sections 3-13-1(E) and (F). . . .

Wolff, 803 F.Supp. at 1574.

What is required is that standards narrowly circum scribe the discretion of city officials; the Waukesha ordinance fails in this regard as well. The City's response to the appellant's argument that lesser sanctions should have been invoked before the drastic sanction of nonrenewal of the license is a perfect example of one way in which the lack of standards manifests itself. The appellant argued that the City should have been required to first seek the more minor penalty of a suspension of its license. In response, the City asserts that there is no requirement that a suspension must be invoked before nonrenewal is appropriate and that this is a matter "totally within the discretion of the licensing authority." (Respondent's Brief at 31) The licensing ordinance provides at § 8.195(8)(a)2 that for a first offense by an operator where the conduct was solely that of an employee, the penalty shall not exceed a suspension of 30 days. And yet, the City argues that this provision does not limit its ability to choose instead the more drastic penalty

of nonrenewal of the license for the same offense. This lack of objective standards which govern the discretion of the licensing body fosters the possibility of censorship as it subjects the "enjoyment of freedoms which the constitution guarantees" to the "uncontrolled will of an official." Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1967).

C. Waukesha's Licensing Ordinance Lacks Strict Time Limits and Fails to Preserve the Status Quo.

The City argues that § 8.195(3) sets "strict" time limits of 21 days; however, the City overlooks the fact that in this very case the 21-day time limit was not observed, as fully 35 days elapsed between the date the application was submitted and the date renewal was denied. The appellant does not argue that 35 days is an excessive period of time, but uses this as an example to show that if the 21-day time period can be disregarded, which it obviously was, then any amount of time can be taken before the initial decision is made on whether or not to renew a license. The City further argues that both Ch. 68 and § 8.195(3)(d) provide for specific time limits because each requires a hearing or review to be held within a matter of days, 15 days in the case of § 68.09(3) or 10 days in the case of a hearing requested under § 8.195(3)(d). However, neither provision provides for a date

certain by which a decision must be rendered.[1] Therefore, in all respects, any "time limits" are illusory.

The circuit court found that "[administrative] review can be completed within 10 to 15 days." (A-30) However, this is a mere possibility at best; nothing in either the licensing ordinance or in Ch. 68 requires that an adminis-

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[1] In its brief, the City made no attempt to respond to the appellant's contention that § 8.195 is defective in regard to its lack of specified time limits because neither branch of administrative review, neither § 68.08, Wis. Stats., nor § 8.195(3)(d) requires an administrative decision in any certain period of time. Instead, attempting to distract the Court from this very valid argument, the City argued, raising this issue for the first time, that the appellant has waived its right to challenge the facial validity of the ordinance in regard to lack of time limits by having chosen to proceed under Ch. 68, rather than under § 8.195(3)(d), citing U.S. v. Thirty Seven Photographs, 402 U.S. 363 (1971), as support for its position. In Thirty Seven Photographs, the Supreme Court considered a statute which permitted the seizure of materials alleged to be obscene which mandated a post-seizure judicial hearing on the alleged obscenity of the materials. The statute, which was drafted some 30 years prior to the Freedman decision, did not contain any specific time limits, and therefore was defective. Noting that the legislative history evinced a clear intent to protect the materials from possible censorship, the Court construed the statute to require court proceedings to be commenced within 14 days of the seizure and to be completed within 60 days of the commencement. In explaining this prospective construction, the Court noted that if such time limits were not observed, and if the failure to observe the time limits were due to delay for which the owner of the materials was responsible, such delay would not invalidate the proceedings. Thirty Seven Photographs, 402 U.S. at 373-74.

Thus, Thirty Seven Photographs provides no support for the City's waiver theory but supports the appellant's position, that in order to be constitutional, a time limit needs not only to place a limitation on the initiation of administrative proceedings, but also must set a specific, brief period of time in which an administrative decision must be announced. Further, the appellant's attack on the facial validity of Waukesha's licensing ordinance was not waived by having pursued its remedies under Ch. 68, rather than under § 8.195(3)(d) as either remedy contains the same defect.

trative decision be rendered in this brief period of time, and it is the explicit requirement of a time limit which is constitutionally mandated.

This very issue was addressed by the Fourth Circuit Court of Appeals, en banc, which noted:

> [W]e must express disagreement with how the district court disposed of this case. The court held that the licensing scheme, on its face, poses the risk that protected expression will be suppressed for an indefinite time before an administrative decision. . . . However, notwithstanding this risk of indefinite delay, the court ruled that the licensing scheme is enforceable because . . . the Licensing Department might decide within a reasonably brief period of time whether to issue or deny a license. . . . We find no support in the Supreme Court's cases for the proposition that a licensing scheme that lacks an essential procedural safeguard -- and thus constitutes an impermissible prior restraint -- may nevertheless be enforced. . . . Indeed, the Court's cases clearly suggest otherwise. . . . In short, the licensing scheme is unenforceable because it does not ensure a prompt administrative decision. . . .

Chesapeake B & M, 58 F.3d 1005, 1011 (4th Cir. 1995) (en banc), cert. den. 116 S.Ct. 567 (emphasis in original).

The City's argument that the status quo is preserved by the operation of the time limits is equally unavailing. The City's position is that because an application for renewal is filed 60 days in advance of the date by which renewal is required, operation will inevitably be uninterrupted. However, because nothing in the ordinance prevents the City from disregarding the 21-day time period and because the status quo is not explicitly required by the terms of the ordinance, there is the very real danger that First Amendment-

protected activities will be interrupted for an indefinite period of time. These deficits could have been corrected by the City's modifying the ordinance to provide that at the expiration of the 21-day time period, if no action has been taken on an application for renewal, the license is deemed to have been renewed, or alternatively, the application is deemed to have been denied, so that the applicant may initiate administrative review. If the terms of § 8.195(3)(d) provided not only for a public hearing within 10 days but also for a decision in a certain period of time (similar to the terms of § 68.12, Wis. Stats., which requires a decision within 20 days of the hearing) the time limits would be definite. Additionally, the City could have, in its ordinance, mandated retention of the status quo pending the outcome of an administrative hearing. Absent these safeguards, the ordinance does permit the administrative decision making process to extend indefinitely and consequently contravenes the constitutional requirement of an "essential" safeguard, i.e., that the "licenser must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained." FW/PBS, 493 U.S. at 228 (emphasis added).

D. The Waukesha Ordinance Fails to Provide Prompt Judicial Review of an Adverse Decision.

The City argues that the requirement for prompt judicial review means only the availability of an entry into

the judicial system, as opposed to a judicial decision, citing Chesapeake B & M, Inc. v. Harford County, Maryland, 831 F.Supp. 1241 (D. Md. 1993), as support. That decision was reversed. The Court of Appeals held that "prompt judicial review means a sufficiently prompt decision on the merits." Chesapeake B & M, Inc. v. Harford County, Maryland, 58 F.3d at 1012. Therefore the City's argument that by incorporating Ch. 68, Wis. Stats., the Waukesha licensing ordinance provides for prompt judicial review, is unpersuasive, because Ch. 68 only provides access to judicial review and sets no requirement for a judicial decision within any immediate period of time.

Many Supreme Court cases have equated "prompt judicial review" with a prompt judicial decision, most notably Freedman v. Maryland, 380 U.S. at 58-60 ("[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 of time compatible with sound judicial resolution.); Teitel Film Corp. v. Cuzak, 390 U.S. 139, 141 (1968) (invalidating a Chicago ordinance because, although requiring prompt resort to the courts after the administrative decision, it did not assure "a prompt judicial decision"); U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 367-370 (1971) (using the term "prompt judicial review" as synonymous with "prompt judicial decision"); Blount v. Rizzi, 400 U.S. 410, 417 (1971) (requiring "prompt judicial review -- a final judicial determination on the merits within a speci-

fied, brief period"); and Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 549, 561-62 (1975) (holding that regulation was unconstitutional where a judicial decision on the merits was not obtained for more than five months).

Moreover, the City has made no response to the appellant's argument that because the period of time for an administrative decision is indefinite, the possibility of judicial review is also indefinitely delayed. Since judicial review can only follow an administrative decision, any delay in the preliminary decision making results in an inevitable delay in entry into the judicial process. Chesapeake B & M, 58 F.3d at 1011; Redner v. Dean, 29 F.3d 1495, 1502 (11th Cir. 1994), cert. den. 115 S.Ct. 1697.

II. THE LICENSING ORDINANCE, BY ALLOWING THE DRASTIC SANCTION OF NONRENEWAL TO BE INVOKED PRIOR TO THE MORE MINOR PENALTY OF SUSPENSION, IS NOT THE LEAST RESTRICTIVE ALTERNATIVE AND IS THEREFORE UNCONSTITUTIONAL.

Despite the city's assertion to the contrary, its licensing ordinance is a prior restraint and therefore is subject to the "least restrictive alternative" requirement. The very case cited by the City in its brief, Ward v. Rock Against Racism, 491 U.S. 781 (1989), makes clear the distinction between mere content-neutral regulations such as a regulation requiring noise reduction, regardless of content, and a prior restraint, such as the one in this case, which is subject to the least restrictive alternative analysis. Ward, 491 U.S. 781, 800, n.6 (1989). The federal court used the

least restrictive means analysis to invalidate a portion of the Delafield licensing ordinance. Suburban Video, 694 F.Supp. at 590.

By allowing the City the option of choosing the most drastic sanction of nonrenewal for five years, without first requiring the City to invoke the lesser sanction of suspension for 30 days in the case of a violation, the ordinance fails. As noted above, by allowing the City to choose the most drastic sanction over the lesser sanction with no objective standards to distinguish between the appropriate circumstances for invoking the various sanctions, the ordinance also violates the requirement of limiting the City's decision-making criteria to objective, discernible standards. Additionally, ordinance permits the City to allow a violation to continue unabated until the time for license renewal, instead of requiring immediate correction by invoking the lesser penalty of suspension at the time a violation occurs, and thus both fails to address the City's legitimate interest in curbing secondary effects and imposes a greater restriction where a lesser one would accomplish the interest more speedily with less restriction of First Amendment freedoms. As a result, the portion of the ordinance which permits nonrenewal is neither narrowly tailored no the least restrictive alternative.

III. CITY NEWS AND NOVELTY WAS DENIED AN IMPARTIAL DECISION MAKER IN THE ADMINISTRATIVE REVIEW HEARING.

An unbiased tribunal is a constitutional necessity in an administrative hearing, and the denial of such is a denial of due process. State ex rel. DeLuca v. Common Council of the City of Franklin, 72 Wis. 2d 672, 242 N.W.2d 689, 695 (1976). In arguing that Mayor Opel's dual participation did not deny the appellant this basic right, the City argues that DeLuca requires only that the tribunal not be biased by personal or financial considerations. This constitutes too narrow a reading of DeLuca.

In DeLuca, the Court based its decision on Withrow v. Larkin, 421 U.S. 35 (1975), which holds an adjudicative body is not disqualified because it has previously acted in an investigative capacity in the same case. The Larkin Court found there is "no incompatibility" between an agency's filing a complaint based on probable cause and a subsequent decision that there has been no violation. Larkin, 421 U.S. at 57. The Court likened this practice to that of a judge in making an initial finding of probable cause and then going on to hear a case on its merits.

DeLuca did not involve the circumstances of this case, where the chief executive officer has made a determination of whether to ratify or to veto the act of the legislative body and has then gone on to judge the appropriateness of that decision. While prior investigative involvement would

not disqualify a decision maker from being impartial in a reviewing situation, a decision maker cannot review her own merits-phase decision. The principle was clearly enunciated in Goldberg v. Kelly, 397 U.S. 254, 271 (1970). The Supreme Court has always held that "when review of an initial decision is mandated, the decision maker must be other than the one who made the decision under review." Larkin, 421 U.S. at 58, n.25. The record does not reflect, as the City intimates, that the mayor abstained from exercising her executive power in deciding whether to ratify or veto the December 19, 1995, Resolution to deny renewal to City News and Novelty. Consequently, the mayor was involved in the Initial Determination, and her subsequent act in reviewing that determination violates both the constitutional principles of due process and the statutory requirements of Ch. 68, Wis. Stats.

CONCLUSION

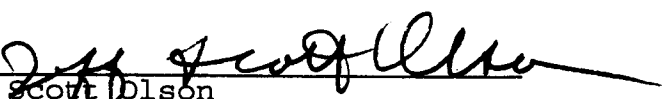
The decisions of the City and of the Circuit Court should be vacated and this case should be remanded for further proceedings in accord with this Court's opinion.

Dated this 2nd day of September, 1997.

Respectfully submitted,

CITY NEWS AND NOVELTY, INC.,
Plaintiff-Appellant

By



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