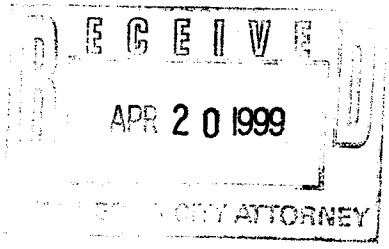
THE JEFF SCOTT OLSON LAW FIRM

Jeff Scott Olson

Elizabeth D. Kessler

Suite 403
44 East Mifflin Street
Madison, Wisconsin 53703
Telephone 608 283 6001
Facsimile 608 258 9105

April 19, 1999




Honorable Harry G. Snyder
Honorable Neal Nettesheim
Honorable Daniel P. Anderson
Court of Appeals, District II
2727 N. Grandview Blvd., Suite 300
Waukesha, WI 53188

RE: City News and Novelty, Inc. v.
City of Waukesha
Case No. 97-1504

Dear Judge Snyder, Judge Nettesheim and Judge Anderson:

At the outset of the oral argument in this case on April 13, the Court invited counsel to bring to the Court's attention any new authorities which counsel believed bore upon the issues. Prior to my rebuttal argument, Judge Snyder asked both counsel to send the Court letters containing the citations to any new authorities cited in our arguments. This is the plaintiff's requested letter.

During my oral argument for the plaintiff, the Court asked whether the three-part test from Freedman v. State of Maryland, 380 U.S. 52 (1965), had not been superseded, at least for the purposes of this case, by FW/PBS v. City of Dallas, 393 U.S. 215 (1990). I answered that the United States District Court for the District of Wyoming had analyzed the several opinions, none endorsed by a majority of the Supreme Court, in FW/PBS, and determined that the set of separate opinions did not change the law of Freedman. Franken Equities v. City of Evanston, 967 F.Supp. 1233, 1238-1240 (D. Wyo. 1997). Thus, the Wyoming court found that, "after a thorough review of the current case law, the court concludes that the prompt judicial review requirement mandates prompt judicial resolution rather than mere access to the courts within a brief period." Id. at 1239.

I also cited Franken Equities in support of my argument that, while the city's ordinance provides at § 8.195(3)(d) that after an initial denial with a statement of reasons, and an applicant's request for a hearing, the city must begin a public hearing within 10 days, and while § 68.12, Wis. Stats., provides that the decision maker shall render its written decision within 20 days after the completion of any hearing and the filing of briefs, if any, no provision of any Waukesha ordinance nor any statute prevents the hearing from extending into weeks or even months of duration, being

continued from time to time, and defeating the applicant's right to remain open pending administrative determination of its application.

This was the precise position taken by the Wyoming court:

> Although the Administrative Procedures for the Planning and Zoning Commission govern applications for conditional use permits . . . it does not require that the licensor rule on an application within 45 days. Instead, the licensor must hold a public hearing to consider the application within 45 days of receipt of a complete application. . . . Additionally, failure of the licensor to "act within forty-five (45) days following the closing of the record of a public hearing for an official submission shall be deemed a denial of such submission." . . . (emphasis added by the Wyoming court). At a minimum, then, the Evanston licensing authority may suppress protected speech for 90 days. But a closer examination of the ordinance in conjunction with the procedural rules of the planning and zoning commission reveals that the licensor may suppress protected expression indefinitely.
>
> Neither the ordinance nor the procedural rules indicate when or how the record closes.

Id. at 1238 [citations omitted].

Later in my argument I contended that, although we were in error in our principal and reply briefs in suggesting that the city was required to use the "least restrictive means" to achieve whatever ends it believes are served by its ordinance, it is required by Ward v. Rock Against Racism, 491 U.S. 781 (1989), to employ measures which are "narrowly tailored" as that term is defined in Ward, to achieve its ends. I argued that the combination of ingredients in this case consisting of (1) the city saving up allegations of ordinance violations, at least some of them secretly in the sense that it gave no notice to the store at the time either that the event had occurred or that the city considered it to be a violation, (2) the city's strict liability approach to ordinance violations whereby the corporation is liable for violations committed not only by its officers, shareholders and directors but also by its lowliest counter clerks and even its

customers, and (3) the city's decision to employ, as a first corrective measure, the most severe sanction available to it, a nonrenewal which carries a five-year disability, all add up to the inevitable conclusion that the city is employing means narrowly tailored to achieve its end only if that end is to close the store to enforce community morals.

I pointed to the new decision of the Wisconsin Supreme Court in State v. Zarnke, ___ Wis. 2d ___, 589 N.W.2d 370 (2/26/99), for the proposition that "the state is limited in the use of strict liability statutes, particularly so in the area of expression where 'an elimination [of the scienter requirement] may tend to work a substantial restriction on the freedom of speech and of the press.'" Id. at 375 quoting Smith v. People of California, 361 U.S. 147 (1959).

I also drew the Court's attention to Bright Lights v. City of Newport, 830 F.Supp. 378 (E.D. Ky. 1993), for the proposition that strict liability is not appropriate in the context of licensing adult businesses.

In my rebuttal argument I pointed out that the city is asking the Court to do quite a bit of heavy lifting in the reconstruction of its ordinances by, for example, reading them to eliminate the mayor's veto power when the city council passes judgment on a licensing application which judgment may be reviewed by the city's administrative review board (on which the mayor sits), or by reading time limits into the potential duration of the public hearing and post-hearing briefing allowed by the ordinances and state statutes. I suggested that the Wisconsin Supreme Court has been extremely reluctant of late to rewrite legislation which offends the First Amendment in order to render it marginally constitutional, and cited the Court to a trend which began with State v. Princess Cinema of Milwaukee, 96 Wis. 2d 646, 292 N.W.2d 807 (1980), and which continued more recently with the opinions in Lounge Management, Ltd. v. Town of Trenton, 219 Wis. 2d 13, 580 N.W.2d 156 (1998), State v. Janssen, 219 Wis. 2d 362, 580 N.W.2d 260 (1998), and most recently with State v. Zarnke, supra.

The Court had a very specific question, at one point, about the course of events prior to the December 19, 1995. decision by the common council to deny the plaintiff's application for renewal of its license. That course of events was as follows: On November

15, 1995, the plaintiff applied for renewal of its license. Review Board Decision, plaintiff-appellant's appendix at A-7. On December 13, 1995, Alderman Joseph C. LaPorte, Chairman of the Waukesha City Council's Ordinance and License Committee, wrote to Attorney Jeff Scott Olson to inform him that the application for renewal would be taken up by the Committee on Monday, December 18, 1995, at 7:00 p.m. This meeting occurred and resulted in a recommendation to the common council for nonrenewal which is reflected in the minutes of the common council of December 19, 1995, under the heading "Ordinance and License Committee Report." I am not sure whether Alderman LaPorte's letter and the council minutes are in the record, but I believe that they are because I believe the city submitted an extensive compilation of papers from the administrative history of this case to the circuit court. In any event, the city's first action on the plaintiff's application, the December 18, 1995, meeting of the Ordinance and License Committee occurred significantly after the city's "mandatory" 21-day deadline for ruling on the application had passed. Why this delay occurred is not a matter of record, but the council minutes contain a clue. They say that Alderman LaPorte, at the December 19 council meeting, read "portions of letters from the Building Inspector and from the Police Department in support of not renewing the license for City News and Novelty." December 19, 1995, minutes, p. 232. These letters, which, I believe, were filed with the minutes, are both dated December 19, 1995. Again, I am not sure that these minutes and the supporting correspondence are in the record before the Court of Appeals, and, if they are not, I apologize for mentioning them. I will have the record reviewed and make an appropriate motion to supplement if required.

Sincerely,

THE JEFF SCOTT OLSON LAW FIRM, S.C.

Jeff Scott Olson

JSO:m

cc: Curt Meitz
City News and Novelty