

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000469-MR

LM ENTERTAINMENT, INC.  
d/b/a 110 VIDEO

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 06-CI-90263

CITY OF MT. STERLING,  
KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: STUMBO AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR  
JUDGE.

STUMBO, JUDGE: LM Entertainment (hereinafter LM) appeals the Montgomery  
Circuit Court's grant of summary judgment in favor of Mt. Sterling, Kentucky. At  
issue is the constitutionality of two city ordinances, one dealing with the licensing  
of sexually oriented businesses and the other dealing with signs advertising such a

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

business. We find that the two ordinances are constitutional and that summary judgment was proper.

LM sought to establish a business in Mt. Sterling called 110 Video. It rented a building from John Allen. It is alleged that this business was to be a video and arcade business, but which also sold sexually oriented and adult materials. At all times relevant to this case, Mt. Sterling had in effect an ordinance dealing with the licensing and regulation of adult oriented businesses.

LM attempted to obtain a business license from the city on multiple occasions, but before one would be issued, renovations and inspections of the business needed to take place. On July 20, 2006, the renovations had been completed and Jeff Prater, the Planning and Zoning Administrator and Building Inspector for Mt. Sterling, and Michael Jones, the Code Enforcement Officer, conducted an inspection of the store. While there, they observed sexually explicit merchandise on display. At the end of the inspection, Mr. Prater gave Anthony Curry, the president of LM, an adult entertainment business license application. At this time, Mt. Sterling had in effect Ordinance 339-99 which regulated adult businesses.

Mr. Curry believed he should have been given a regular business license application. Later the same day, Mr. Curry went to the city clerk's office where he turned in a standard business license application, the required licensing fee, and a handwritten note stating he was applying for a standard business license.

On July 28, 2006, Mr. Prater sent Mr. Curry a letter explaining he would not accept a standard business license because he believed the business was to be an adult oriented one. He also explained that if Mr. Curry had proof he didn't intend to operate an adult business, he would gladly hear it. No adult business license application or reply came from this letter.

On July 24, 2006, Mr. Allen, who owned the building LM was using for 110 Video, submitted an application for signage variance. The sign would be located at 110 Video, but would exceed the height and square footage limitations for signs in that district. The sign ordinance setting forth the size prohibitions is Ordinance 2-01.

On August 9, 2006, the Mt. Sterling Planning and Zoning Board of Adjustment conducted a hearing on the variance request. No representative of Allen or LM attended the meeting. The Board denied the variance request because LM had not obtained any type of business license for 110 Video. Allen was notified he could reapply for a variance after a business license had been issued.

On August 17, 2006, Mt. Sterling enacted Ordinance 17-06, which established new licensing requirements and regulations for sexually oriented businesses and replaced Ordinance 339-99.

LM eventually began operating 110 Video without a business license and then on October 23, 2006, sued Mt. Sterling alleging the general business license ordinances, the sexually oriented business ordinance, and the sign ordinance were all unconstitutional. Discovery proceeded and on January 22,

2008, Mt. Sterling moved for summary judgment arguing that the ordinances were all constitutional. The trial court agreed and granted Mt. Sterling's motion for summary judgment.

On appeal, LM only addresses the sexually oriented business license ordinance and the sign ordinance. LM claims that the sexually oriented business ordinance is unconstitutional in that it violates the First Amendment, equal protection, due process, and section two of the Kentucky Constitution. In regard to the sign ordinance, LM argues that it was unconstitutional for Mt. Sterling to deny the sign variance due to a lack of business license because it acted unconstitutionally in denying the license in the first place. Again, we note that LM never applied for a sexually oriented business license.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03 . . . .  
“The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . .” *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992).

*Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Here, LM argues that Mt. Sterling was not entitled to summary judgment because the city did not demonstrate that the sexually oriented business ordinance was constitutional. LM's first two arguments center on the constitutionality of Ordinance 339-99, which was in effect when the application for a regular business license was made. We need not address these arguments because Ordinance 339-99 is not in issue. A careful review of the complaint reveals that 339-99 was replaced by Ordinance 17-06 before this suit was brought and LM did not raise the constitutionality of Ordinance 339-99 in its complaint. In fact, the first time the constitutionality of Ordinance 339-99 was called into question was in LM's response to Mt. Sterling's motion for summary judgment. The constitutionality of a statute cannot be first raised in such a manner. *See Chambers v. City of Newport*, 101 S.W.3d 904 (Ky. App. 2002). Therefore, our opinion will address only Ordinance 17-06.

LM argues that summary judgment was improperly granted because there remained a genuine issue of material fact as to whether LM should have been subject to the sexually oriented business ordinance. While 110 Video can contest the issue of whether its sale of sexually oriented literature and other media is its principal business, as defined by Ordinance 17-06, 110 Video is undeniably a sexually oriented business. The definitions section defines an "Adult bookstore or Adult Video Store" as:

a commercial establishment which, as one of its principal business activities, offers for sale or rental for any form of consideration any one or more of the following:

books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, digital video discs, slides, or other visual representations which are characterized by their emphasis upon the display of “specified sexual activities” or “specified anatomical areas.”

It further provides that “[a] ‘principal business activity’ exists where the commercial establishment: . . .”

(f) maintains an “adult arcade,” which means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are regularly maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are characterized by their emphasis upon matter exhibiting “specified sexual activities” or specified “anatomical areas.”

Here, 110 Video does not *dispute* the evidence in the record that part of its business is an adult arcade. It therefore fits the definition of an adult bookstore or adult video store. A sexually oriented business is defined in the ordinance as an adult bookstore or adult video store. As such, 110 Video needed to obtain a sexually oriented business license pursuant to Ordinance 17-06.

LM contends that, based upon Kentucky Revised Statute (KRS) 100.253(1), because Ordinance 339-99 was unconstitutional, it should have been issued a regular business license. It argues that when Ordinance 17-06 went into effect, it was entitled to lawful nonconforming use status and should not be bound by the new statute. KRS 100.253(1) states that “[t]he lawful use of a building or premises, existing at the time of the adoption of any zoning regulations affecting it,

may be continued, although such use does not conform to the provisions of such regulations, except as otherwise provided herein.”

KRS 100.253(1) does not apply in this case. In *Mr. B's Bar and Lounge, Inc. v. City of Louisville*, 630 S.W.2d 564 (Ky. App. 1981), a previous panel of this Court found that an ordinance regulating adult entertainment activities was not a zoning ordinance. Since Ordinance 17-06 regulates adult entertainment activities, it is not a zoning ordinance and KRS 100.253 does not apply.

We now move on to LM's argument that Ordinance 17-06 violates the First Amendment's guarantee of freedom of speech. A government regulation will pass First Amendment muster if it is content neutral, *Commonwealth v. Jameson*, 215 S.W.3d 9, 28-29 (Ky. 2006), and “within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *U. S. v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).

Here, Ordinance 17-06 is content neutral because it is used to combat crime and other negative secondary effects caused by the presence of adult businesses and not to suppress freedom of speech. *Jameson* at 29. As for the first *O'Brien* prong, we find that regulating adult businesses is within the power of Mt. Sterling. KRS 82.082(1) states:

A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute.

Additionally, KRS 82.088(1) states:

In order to prevent crime, protect the city's retail trade, maintain property values and generally to protect and preserve the quality of its neighborhoods, commercial districts, and the quality of urban life, a city, by ordinance, may regulate the location of adult establishments by dispersing them throughout the city or by concentrating them in one (1) area.

“Similarly, the third prong of *O'Brien* is satisfied as the government's interest in preventing negative secondary effects associated with sexually oriented businesses . . . is unrelated to the suppression of expression.” *Jameson* at 30.

Also, the fourth prong is satisfied because the restrictions in the ordinance are reasonable time, place, and manner restrictions and allow ample opportunity for sexually oriented businesses to conduct their business.

As for the second prong, LM alleges that the ordinance does not actually further the interest of combating negative secondary effects of adult businesses. In support, LM cites to *Abilene Retail No. 30, Inc. v. Board of Commissioners of Dickinson County, Kansas*, 492 F.3d. 1164 (10<sup>th</sup> Cir. 2007).

This case found that a rural community cannot reasonably rely on studies from urban areas regarding the negative secondary effects of adult businesses.

In the case at hand, pages two and three of Ordinance 17-06 set forth the rationale behind the enacting of the ordinance and cite to numerous federal and state cases and reports and studies propounded by numerous cities. LM argues that these all deal with city environments, but 110 Video will be located in a rural area. We find this argument unpersuasive. 110 Video may be located in a rural area, but it is still within the city limits of Mt. Sterling. Mt. Sterling as a whole is not rural. Thus, the cases and studies cited in the ordinance were reasonably believed to be relevant to Mt. Sterling's rationale for regulating adult businesses. Ordinance 17-06 satisfies all four prongs of *O'Brien* and therefore, does not violate the First Amendment.

We further reject LM's argument that Ordinance 17-06 violates equal protection. As the United States Supreme Court held: If the ordinance does not violate the First Amendment, it will not violate equal protection. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 n. 4, 106 S.Ct. 925, 933 n. 4, 89 L.Ed.2d 29 (1986).

LM next argues that Mt. Sterling was not entitled to summary judgment on the issue of due process. For this ordinance to comport to the requirements of due process, it must: allow for the prompt issuance of licenses; allow prompt judicial review of licensing decisions; and preserve the status quo pending a final licensing determination. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).

Here, Ordinance 17-06 meets these requirements. After the filing of the sexually oriented business license application, the City Clerk has twenty days to either issue a license or deny it. If the license is denied, a hearing by the Board of Adjustments will be held within ten-to-twenty days. Then, if a court action is initiated challenging the Board of Adjustment's decision, the Board will send the court a transcript of the proceedings within ten days and facilitate prompt judicial review of the proceedings. Finally, the City Clerk will give a provisional license to the sexually oriented business to allow it to operate pending the outcome of the judicial proceedings. Ordinance 17-06 clearly meets with the standards of due process and summary judgment was proper on this issue.

Finally, LM challenges Ordinance 17-06 on the grounds that it violates section two of the Kentucky Constitution. Section two of the Kentucky Constitution states that “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” For this ordinance not to be arbitrary, there should be some set of “prescribed standards or qualifications” a license applicant must meet. *City of Pineville v. Helton*, 188 S.W.2d 101 (Ky. 1945).

Here, the City Clerk “shall issue a license unless:”

- (1) An applicant is less than eighteen (18) years of age.
- (2) An applicant has failed to provide information required by this Ordinance for issuance of a license or has falsely answered a question or request for information on the application form.

(3) The license application fee required by this Ordinance has not been paid.

(4) The sexually oriented business . . . is not in compliance with the interior configuration requirements of this Ordinance or is not in compliance with locational requirements of this Ordinance or the locational requirements of any other part of the City of Mt. Sterling Code of Ordinances.

(5) Any sexually oriented business in which the applicant has had an influential interest, has, in the previous five (5) years (and at a time during which the applicant had the influential interest):

- (i) been declared by a court of law to be a nuisance; or
- (ii) been subject to an order of closure or padlocking.

(6) An applicant has been convicted of or pled guilty or nolo contendere to a specified criminal activity, as defined in this Ordinance.

As is shown, there is a set criteria that must be followed in which to deny a sexually oriented business license, otherwise, one must be granted. This ordinance is not arbitrary.

LM also argues that Mt. Sterling's Ordinance 2-01, which regulates the physical characteristics of signs, is also unconstitutional on its face and as it was applied. We disagree.

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs-just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

*City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S.Ct. 2038, 2041, 129 L.Ed.2d 36 (1994). Because we are dealing with a commercial enterprise, we will look to the four-part test used in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981), which states:

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

There is no suggestion here that any of the signs LM wishes to put on its property will be misleading or that they would promote unlawful activity. This speech could only be restricted if a substantial governmental interest is served, the restriction directly advanced that interest, and does not overreach. Prong two is satisfied because the ordinance itself sets forth the governmental interest being served:

permit signs that will not, by reason of their size, location, construction, or manner of display, endanger life and limb, confuse or mislead traffic, obstruct vision necessary for traffic safety or otherwise endanger public morals, health, or safety; and further to regulate such permitted signs in such a manner as to prevent them from causing an annoyance or disturbance to the citizens, residents and visitors of Mount Sterling.

Further, the ordinance advances the above governmental interest because signs are designed to attract the attention of drivers and other passersby. Certain regulations regarding these signs are necessary. Finally, Mt. Sterling does not disallow all

signs, but only certain ones, and it allows the Board of Adjustment to issue variances for signs that are needed to exceed the limitations. As such, this ordinance does not violate the First Amendment.

Additionally, as we have stated earlier, if the ordinance can pass the First Amendment test, it will also pass the test for equal protection. *City of Renton, supra.*

As for LM's due process claims, a hearing was held prior to the sign variance being denied. No one from LM or 110 Video was present at the hearing. The Board of Adjustment stated that if 110 Video would get a proper business license, then it could reapply for a sign variance. The right to due process was not violated.

Also, section two of the Kentucky Constitution is not violated by this ordinance because it specifically sets forth what types of signs are and are not allowed, and even uses a chart to illustrate the regulations regarding height and width limitations. Ordinance 2-01 is constitutional on its face and summary judgment was properly granted.

LM also contends that Ordinance 2-01 was unconstitutionally applied. LM argues that because the sexually oriented business license ordinance was unconstitutional, the sign variance should not have been denied due to a lack of business license. We disagree. As we stated above, the sexually oriented business license being challenged is constitutional. Additionally, LM was told it would need to apply for a sexually oriented business license and not a general business

license. LM then had multiple opportunities to show proof that it was not going to operate an adult business, but did not do so. At the time the sign variance was requested, 110 Video was illegally operating because it did not have a business license of any type. The Board of Adjustment reasonably denied the variance request until LM had acquired a business license.

Based on the foregoing, we find that Ordinances 17-06 and 2-01 are constitutional and summary judgment was therefore proper. We accordingly affirm the trial court's decision.

ALL CONCUR.

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