The Case Of The Nude Dancer

by Earl A. Talbot

This story is set in the small, bedroom community of Mt. Ephraim, New Jersey. On the commercial strip along Black Horse Pike, Jim Schad operated an "adult" bookstore. In some areas of this country, Schad's operation would be called a "porn shop." Whether he sold any "porn" is not known, but he did show skin flicks. To stimulate business even more, he hired Jane Doe to dance for his patrons — in the nude.

Jane must have done pretty well, for soon the city fathers of Mt. Ephraim had Schad hauled before the bar of justice, where the local judge found him guilty of violating the town's zoning ordinance. Schad appealed the judge's decision. The appellate court sided with the judge and the city fathers. The New Jersey Supreme Court, where Schad went next, supported the lower courts, and Schad took his case before the U.S. Supreme Court[1] which sided with him and directed the New Jersey courts to "un" convict him of wrongdoing.

Zoning Ordinance Violates Right to Free Speech

Why the U.S. Supreme Court even bothered with Schad's nude dancer is a mystery. Schad is an obscure fellow engaged in a sleazy operation in an insignificant town close to Camden which is near Philadelphia. None of the actors or events in this drama is of any particular importance. Moreover, the Court in 1976 had permitted, under the guise of zoning control, the regulation of "adult" movie houses in *Young v. American Mini Theaters, Inc.*[2]

In Mt. Ephraim, however, the justices perceived that the free exercise of expression, protected by the First and Fourteenth Amendments to the Constitution, was at stake. The Supreme Court decided that by enforcing Mt. Ephraim's zoning ordinance, the city fathers and New Jersey courts had run roughshod over Schad's constitutional rights.

The nude dancer is actually a red herring in this case. Instead of Schad being convicted of corrupting the public morals or indecent conduct, he was brought in for the innocuous wrong of having live entertainment at his business, which the zoning ordinance in Mt. Ephraim prohibits. At least that is what the city fathers claimed in their charges against Schad. The kind of live entertainment was not an issue. Whether or not that is true is not clear since live music was tolerated by the city fathers at three saloons in the vicinity of Schad's adult bookstore. Apparently, these musicians were not prosecuted for violating the zoning ordinance on the theory that live music was performed in the three emporiums prior to the revision of the existing ordinance. Hence, the music performances in these watering holes were nonconforming uses.

In the course of the case the city admitted that under its ordinance even a high school play would be prohibited if admission were charged. Plays are a form of free speech protected by the First Amendment, as are music[3] and even nude dancing.[4] Mt. Ephraim's ordinance thus denied free speech and its land use regulation clashed head on with Schad's First Amendment liberties. The town's zoning came out second to Schad's free speech.

Zoning ordinances are an exercise of the government's authority to protect the health, welfare and safety of the community. If reasonable in its terms and application, a zoning ordinance will withstand an attack that it violates a person's constitutional rights. Ordinarily, it is the complainant's burden to demonstrate that an ordinance is unreasonable in content or application.[5] When a protected liberty such as free speech is involved, however, the burden shifts and the government must show that the ordinance is reasonable.[6] Mt. Ephraim failed in this regard.

Earl A. Talbot *is a partner in the Chicago office of the law firm of Kirkland & Ellis. He is a specialist in real estate law and received his degree from the University of Illinois College of Law.*

The city stated that it prohibited live entertainment because of accompanying problems of parking, trash, police protection and the availability of medical facilities, but it offered no proof of the existence of these problems. The justices could see no difference between these problems and live entertainment and the same problems and entertainments such as movies.

Mt. Ephraim also suggested that live entertainment, particularly nude dancing, was available in nearby areas outside the town. The court rejected this claim and said that no facts had been offered to prove this statement. The Court also said that one's liberty of self-expression could not be restricted just because it could be freely exercised elsewhere.

Court Presents Opposing Views

The Court was not unanimous in its opinion. Chief Justice Berger and Justice Renquist dissented saying that the local municipality should be allowed to shape the nature of its own community, and they found no basic liberties violated because the town excluded live entertainment from its borders.

Underlying the opinion of the majority is the notion that Mt. Ephraim was being selective in the enforcement of its statute: nudity on film and music performed by live entertainers were tolerated, but live nudity was not allowed.

The unfortunate aspect of this case is that it seems inconsistent with a decision rendered by the Court in 1976. In the *American Mini Theaters* case, the Court allowed a Detroit zoning ordinance that required adult movie theaters to be at least 1,000 feet apart or 1,000 feet from a regulated use, that is, an adult bookstore, etc., and no closer than 500 feet to a residential zone. The city was attempting to spread out the places to prevent excessive concentrations of these uses, and had city planners and real estate experts testify on the reasons that these restrictions were necessary.

The Court saw that Detroit's restrictions did not totally prevent the expression of the protected liberty involved, and felt that the ordinance was justified by the city's interest in preserving the character of its neighborhoods. The record also disclosed a factual basis for the Detroit regulation.

Mt. Ephraim, on the other hand, took a different route. It did away with all types of live entertainment while permitting some nonconforming live entertainment to continue with no requirement for amortization. It also permitted other forms of entertainment; Schad's nude movie machines, for example, had received licenses from the town. In addition, Mt. Ephraim made no effort to establish a factual basis for its ordinance, which can be viewed as being excessively broad, unreasonable since no connection was made between the regulation and the harm it sought to prevent, and capriciously enforced.

Nevertheless, the nude dancer case is important in that it is the Court's most recent pronouncement on the drafting and enforcement of zoning laws. In addition, it attempts to establish the outside limit for using zoning controls to prohibit sexually-related commercial activities. There is a movement in large cities and in some small ones, too, to prohibit activities such as topless bars, adult bookstores, x-rated movie houses, and the accompanying array of prostitutes, panderers and their patrons, or to move them into designated "adult entertainment" districts or disperse them as was done in Detroit. To accomplish these goals, municipalities use zoning controls instead of laws banning obscenity, pornography and indecent conduct.

The nude dancer case indicates that in any such zoning ordinance the factual justification for such restrictions must be apparent and the restriction should be carefully tailored to attack the exact harm which it seeks to prevent. Otherwise, the drafters could end up like Mt. Ephraim, unable to explain why and what they were doing.

NOTES

1. *Schad v. Mt. Ephraim*, _____ U.S. _____, 68 L. Ed. 2d 671 101 S. Ct. 2176 (1981).
2. 47 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976).
3. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777 (1952); *Schacht v. United States*, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970); *Jenkins v. Georgia*, 418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975). See also *California v. LaRue*, 409 U.S. 109, 118, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972).
4. *Jenkins v. Georgia*, 418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974).
5. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 71 L. Ed. 303, 47 S. Ct. 114, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).
6. *Schneider v. State*, 308 U.S. 147, 84 L. Ed. 155, 60 S. Ct. 146 (1939).