Needed:

A Prompt Resolution to the "Prompt Judicial Review" Quandary

— by Scott D. Bergthold —

On two occasions in the last five years, the Supreme Court has granted certiorari to clarify the kind of judicial review that is required when a local government, pursuant to an ordinance regulating the time, place, and manner of expressive conduct, denies a permit or license to an entity for content-neutral reasons.[1] Unfortunately, the Court lacked occasion to reach the issue in each case, and the circuit split over whether the First Amendment requires "prompt access" to judicial review, or a "prompt judicial decision" on a local government's content-neutral licensing determination, continues to grow.[2]

The Supreme Court's ultimate resolution of the question will have far-reaching implications for hundreds of local governments that have enacted ordinances to prevent the negative secondary effects of strip clubs and adult bookstores.

The confusion in the federal appellate courts has special implications for zoning and licensing ordinances that regulate sexually oriented businesses. As such establishments continue to pop up in both large cities and small communities, the Supreme Court's ultimate resolution of the question will have far-reaching implications for hundreds of local governments that have enacted ordinances to prevent the negative secondary effects of strip clubs and adult bookstores.

When the Supreme Court finally addresses the judicial review issue, its opinion of what procedural safeguards ordinances must contain is likely turn on the importance that the justices give to the distinction between censorship schemes, which permit content-based review of actual speech, and content-neutral licensing ordinances, which aim to protect the public health, safety, and welfare from health and safety risks, crime, and urban blight.

First Principles: The Distinction Between Censorship and Time, Place, and Manner Regulations

In *Thomas v. Chicago Park District*,[3] the Supreme Court revisited the history of the prior restraint doctrine and explained that "the core abuse against which [the First Amendment] was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the 'evils' of the printing press in 16th- and 17th-century England."[4] This scheme explicitly allowed a government official to suppress works he found to be "heretical, seditious, schismatical, or offensive."[5]

The Court in *Thomas* contrasted Chicago's content-neutral park permit ordinance with England's censorship scheme and the "strikingly similar" licensing law in *Freedman v. Maryland*.[6] In *Freedman*, a state statute required that, before public showing, all films first be submitted to the Maryland State Board of Censors for approval. The Board of Censors had discretion to suppress films that "tended, in the judgment of the Board, to debase or corrupt morals or incite to crimes."[7] Because a censor's business is to eliminate expression of certain material or ideas, the *Freedman* Court acknowledged the danger that a censor may be "less responsive than a court—part of an independent branch of government—to the constitutionally protected interests of free expression."[8] Accordingly, the Court in *Freedman* determined that, in order for a censorship scheme to pass constitutional muster, the following three procedural safeguards must be present:

> (1) any restraint of speech prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained;
> (2) prompt judicial review of that decision must be available; and

(3) the censor must bear the burden of going to court to suppress the speech, and must bear the burden of proof once in court.[9]

Although *Freedman* provided this three-part test for a statute that authorized censorship of the content of expression, the Supreme Court nevertheless applied a modified version of the test for regulations that licensed entities to engage in a sexually oriented business. In *FW/PBS, Inc. v. City of Dallas*, the Court reviewed a licensing scheme that required adult business operators to apply for a license, and prohibited those convicted of certain crimes (such as prostitution, promotion of prostitution, and sexual assault) from obtaining a license.[10] In an opinion by Justice O'Connor, a plurality of justices concluded that the Dallas licensing scheme was "significantly different from the censorship scheme examined in *Freedman*."[11] Although the censorship requirement in *Freedman* was "presumptively invalid" because it permitted direct censorship of expressive conduct, Justice O'Connor explained that the city's ordinance at issue did not require individuals to judge the content of the speech.[12] Instead, "the city review[ed] the general qualifications of each license applicant, a ministerial action that is *not* presumptively invalid."[13]

Because the Dallas ordinance was directed at preventing crime and not at suppressing speech, Justice O'Connor's plurality opinion held that the three-part *Freedman* test could be relaxed for such licensing ordinances and still maintain the needed protection against suppression of ideas:

> Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. Limitations on the time within which the licensor must issue the license as well as the *availability* of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'[14]

In a concurring opinion, Justices Brennan, Marshall, and Blackmun opined that all three procedural safeguards should apply just as much to the Dallas ordinance as to the Maryland censorship statute.[15] Further, Justice Brennan concluded that the judicial review requirement in *Freedman* contemplated a prompt determination on the merits.[16]

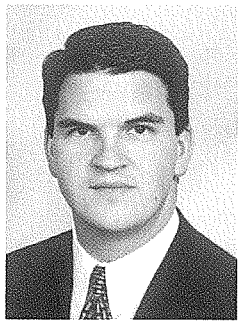
Thus, the broad circuit split has focused on whether, under *FW/PBS*, the "availability of prompt judicial review" is sufficient, or whether the local government must guarantee that a court will issue a prompt judicial decision on an applicant's challenge to a license denial.[17]

The Inherent Problems with the "Prompt Judicial Decision" Requirement As Applied to Time, Place, and Manner Regulations

The most glaring problem with the "prompt judicial decision" requirement is that it is impossible for a local government to guarantee when a court will issue a decision: "[q]uite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter."[18] As a result, some cities in jurisdictions requiring a prompt decision have had to modify their ordinances to provide a temporary license or a stay of enforcement until a judicial decision has been rendered.

While such an approach is effective in winning litigation,[19] it creates its own vice in that the local government must allow the operation of adult businesses—sometimes for months, or even years—contrary to an ordinance which, under independent requirements for time, place, and manner regulations, is narrowly tailored to advance a substantial and content-neutral government interest. Thus, the prompt decision requirement, for all practical purposes, places the "burden" of obtaining judicial review squarely upon a local government because, until judicial review is completed, the ordinance cannot be enforced. This result reverses the incentives, discussed in *FW/PBS*, of adult businesses to pursue prompt judicial resolution—as the court could affirm the municipality's licensing decision—and is clearly contrary to the *FW/PBS* Court's opinion that municipalities should not bear the burden of going to court to defend content-neutral permitting decisions.

continued on page 16



Scott D. Bergthold is a private practitioner whose national practice focuses on the drafting and defense of adult business regulations. He has written previously for IMLA, and is the co-author of *Protecting Freedom of Speech and Expression: The First Amendment and Land Use Law* (ABA State and Local Government Section, 2001). For complimentary resources on developing or defending constitutionally sound adult use ordinances, e-mail Scott at sbergthold@adultbusinesslaw.com.

continued from page 15

The prompt judicial decision requirement is flawed in another way: it necessarily rejects the view that prompt access to a court of law is sufficient to safeguard First Amendment rights.[20] The underlying presupposition is that state courts are unwilling to promptly issue preliminary injunctions in cases where the First Amendment would require such relief. The U.S. Court of Appeals for the Sixth Circuit phrased it this way: "[W]e cannot be sure that a state judge, who is often elected and toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner."[21]

Recently, in *Z.J. Gifts D-4, LLC v. City of Littleton*, the Tenth Circuit expanded this notion to encompass city officials, opining "[a] licensing official may have little or no discretion in reviewing an [adult business permit] application, but he or she may be tempted nonetheless to overstep the bounds of the ordinance."[22] Of course, such speculations that a state court would drag its heels, or that a local government official would act in bad faith, are contrary to federalism and the presumption that public officials will execute their duties with honesty and attention to governing law.[23]

Why Sexually Oriented Business Licensing Ordinances Should Be Evaluated Under the Framework of *Thomas* and *Renton*

The Supreme Court's decision in *Thomas* explains why the procedural requirements of the prior restraint doctrine, rooted in efforts to prohibit content-based censorship of speech, should not apply to content-neutral licensing regulations that advance substantial government interests. In *Thomas*, the Court explained that censorship—government control over the content of speech—is the critical element of prior restraint analysis. The Chicago ordinance in that case was not a prior restraint, the Court held, because "[n]one of the grounds for denying a permit [had] anything to do with what a speaker might say."[24]

Municipalities that have adhered to the Court's adult business cases should not be required to provide an impossible safeguard in ordinances which do not permit censorship, do not vest city officials with unbridled discretion, and do not otherwise run afoul of intermediate scrutiny simply because those ordinances are narrowly tailored to address the secondary effects engendered by sexually oriented enterprises.

Similarly, the objective grounds for denying a license under a typical adult business ordinance—such as improper zoning, or recent convictions for sex-related crimes—address the local government's substantial interests in controlling land use and preventing crime and blight. These undeniably important interests have nothing to do with what a speaker might say. To be sure, as the *Thomas* court recognized in a footnote, the typical adult business ordinance is distinguishable from Chicago's park permit scheme because it is directed at sexually oriented businesses.[25] However, the point that many courts (and some commentators) have missed is that under the Supreme Court's cases, adult business ordinances—which regulate expressive as well as non-expressive businesses[26]—*must be* directed at sexually oriented businesses and their negative secondary effects in order to be narrowly tailored and to avoid violating the First Amendment's overbreadth doctrine. In the only solid-majority adult business decision from the Supreme Court, *Renton v. Playtime Theatres, Inc.*,[27] the Court stated that "the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw [of overbreadth] that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." Of course, this narrow tailoring does not change the fact that nothing in a well-drafted adult business ordinance gives municipal officials the discretion to deny a license based on the content of speech.

A Possible Resolution on the Horizon

In its October 2003 term, the Supreme Court will decide whether to grant certiorari to review the Tenth Circuit's decision in *Z.J. Gifts*. If certiorari is granted, the case will present the Court with an opportunity to clarify what will satisfy the judicial review requirement for sexually oriented business licensing ordinances. The Court should follow *Thomas* and *Renton* and hold that such regulations are constitutional if they are narrowly tailored to advance substantial government interests, and if they provide prompt access to judicial review in the event of a license denial.[28]

Municipalities that have adhered to the Court's adult business cases should not be required to provide an impossible safeguard in ordinances which do not permit censorship, do not vest city officials with unbridled discretion, and do not otherwise run afoul of intermediate scrutiny simply because those ordinances are narrowly tailored to address the secondary effects engendered by sexually oriented enterprises. Such narrow tailoring should not make content-neutral regulations subject to extraordinary requirements that are generated by a censorship context.

Notes

1. *See* City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001); Thomas v. Chicago Park Dist., 534 U.S. 316 (2002).

2. The Fourth, Sixth and Ninth Circuits have previously held that a prompt judicial determination must be assured, whereas the First, Fifth, Seventh, and Eleventh Circuits have held that, for content-neutral licensing ordinances, "prompt judicial review" means only *access* to prompt judicial review. *See* 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988 (4th Cir. 1995); Nightclubs, Inc. v. City of Paducah, 202 F.3d

884 (6th Cir. 2000); Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998); *but see* Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993); TK's Video, Inc. v. Denton County, Tex., 24 F.3d 705 (5th Cir. 1994); Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) (*en banc*); and Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999). Recently, the Tenth Circuit joined the prompt judicial decision side of the circuit split in Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220 (10th Cir. 2002). In that case, the City has petitioned for certiorari and IMLA, along with the National League of Cities, filed an *amicus* brief in support of the petition.

3. 534 U.S. 316 (2002).
4. *Id.* at 320.
5. *Id.* (quoting FREDERICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776, 240 (1952)).
6. 380 U.S. 51 (1965).
7. *Id.* at 52 n.2.
8. *Id.* at 57-58.
9. *Id.* at 58-59.
10. 493 U.S. 215, 233 n.2 (1990) (plurality opinion) (listing specified crimes in the Dallas ordinance which would temporarily disqualify an applicant from obtaining a sexually oriented business license)
11. *Id.* at 218.
12. *Id.*
13. *Id.* at 229 (emphasis added).
14. *Id.* at 240 (emphasis added) (quoting Bantam Books v. Sullivan, 372 U.S. 58, 66 (1963)).
15. *Id.* at 238-39.
16. *Id.* at 240.
17. Although the type of review required upon license denial is the primary thrust of the circuit split, the federal appellate courts have also expressed differing views concerning the safeguards required upon license suspension or revocation. The Ninth Circuit, for example, has explicitly expanded its "prompt judicial decision" policy to license suspensions and revocations. 4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108 (9th Cir. 1999). The Eighth Circuit, on the other hand, has rejected the "inherently suspect" view that *prior* restraint analysis is applicable to sanctions after a business has been allowed to operate. Jake's, Ltd. v. City of Coates, 284 F.3d 884, 890 (8th Cir. 2002). The Eighth Circuit view is consistent with the Supreme Court's statement, in City News & Novelty, Inc. v. City of Waukesha, that, "[u]nlike the initial license applicant whose expression cannot begin prepermission (the situation of the complainant in *Freedman*), City News was already licensed to conduct an adult business and sought to fend off a stop order. Swift judicial review is the remedy needed by those held back from speaking." 531 U.S. 278, 285 (2001).
18. Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 894 (6th Cir. 2000).
19. *See, e.g.*, Baby Tam & Co., Inc. v. City of Las Vegas, 199 F.3d 1111, 1114 (9th Cir. 2000); Currence v. City of Cincinnati, 2001 U.S. App. Lexis 1258, 28 Fed. Appx. 438, 445-446 (6th Cir. 2001); Pack Shack, Inc. v. Howard County, 770 A.2d 1028, 1044 (Md. App. 2001) ("The time required to go through the appellate process is irrelevant because the ordinance provides that adult entertainment businesses may continue to operate pending appeal").
20. In TK's Video, Inc. v. Denton County, 24 F.3d 705, 709 (5th Cir. 1994), the Fifth Circuit summarized that, under the "prompt access" to judicial review requirement, "the state must offer a fair opportunity to complete the administrative review process and access the courts within a brief period."
21. *Nightclubs, Inc.*, 202 F.3d at 892.
22. 311 F.3d 1220, 1238 (10th Cir. 2002).
23. *See* Steffel v. Thompson, 415 U.S. 452, 460-62 (1974) (state courts are presumed to abide by their solemn responsibility to safeguard constitutional rights); Withrow v. Larkin, 421 U.S. 35, 47 (public officials are entitled to a presumption of honesty and integrity in the absence of facts to the contrary).
24. Thomas v. Chicago Park Dist., 534 U.S. 316, 322 (2002).
25. *Id.* at 323 n.2.
26. The Court in *FW/PBS*, for example, recognized that certain sexually oriented businesses regulated by the Dallas ordinance—escort agencies and "sexual encounter centers"—were not presumptively protected by the First Amendment. 493 U.S. at 224.
27. 475 U.S. 41, 52 (1986).
28. As explained in *Thomas*, this test requires that time, place, and regulations be narrowly tailored to advance a substantial government interest and that adverse permitting decisions be made on a record that will permit "effective judicial review." 534 U.S. at 324. ML