

Court of Appeals Reiterates “Modest” Burden for Regulating Adult Establishments in People Theatres of N.Y. Inc. v. City of New York

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In [People Theatres of N.Y. Inc. v. City of New York](#), 2017 N.Y. Slip Op. 04385, various owners of adult businesses (“**Plaintiffs**”) brought respective actions against the City of New York (“**City**”) based upon a First Amendment challenge seeking relief against zoning ordinances barring adult establishments from, among other areas, all residential districts and most commercial and manufacturing districts. Some of the actions concerned adult bookstores or videostores (“**Adult Stores**”) and the others concerned adult restaurants, bars and theaters (“**Adult Clubs**”); the cases were ultimately consolidated. After the trial court’s initial determination, the consolidated cases experienced a complex procedural history, having been appealed to the Court of Appeals twice over the course of fifteen (15) years.

The main issue in this case was the relationship between (1) the standard that applies to First Amendment challenges in the context of ordinances affecting adult uses and (2) the burden of proof a municipality must meet in order to sustain such ordinances. The Court held that “intermediate scrutiny”¹ applies in this type of First Amendment adult use zoning context, which

¹ There are essentially three levels of scrutiny that apply to Constitutional challenges: (1) **strict scrutiny**, which is the most stringent, requires the law to be narrowly tailored to meet a compelling government interest by the least

requires that an ordinance be narrowly tailored to the municipality's justified purpose and assure reasonable alternative avenues of communication. The burden of proof is "modest" and akin to substantial evidence, which is accorded more deference than that given to administrative agencies.

In 1994, the City completed a study of sexually focused businesses and identified significant negative secondary impacts, including increased crime, diminished property values, reduced shopping and commercial activity and a perceived decline in residents' quality of life ("**1994 Study**"). A City Planning Commission report adopted the 1994 Study's findings and conclusions and noted that the businesses with adverse secondary impacts had a predominant ongoing focus on sexually explicit materials or activities. Accordingly, the City enacted a zoning ordinance barring adult establishments from residential districts and most commercial and manufacturing districts and mandated that adult businesses, where permitted, must be located at least 500 feet from houses of worship, schools, day care centers and other adult businesses ("**Ordinance**"). The Ordinance defined "adult establishment" as a commercial establishment of which a "substantial portion [] was an adult book store, adult eating or drinking establishment, adult theater or other adult commercial establishment, or any combination thereof."

In 1995, certain adult businesses challenged the Ordinance based upon the First Amendment ([Stringfellow's v. City of New York](#), 91 N.Y.2d 382 (1998)) and lost. Thereafter, the City clarified the application of the Ordinance and meaning of "substantial portion." The City's Department of Buildings and the City Planning Commission issued a determination that any commercial establishment with at least 40% of its customer-accessible floor/cellar area or stock-in-trade used for adult purposes qualified as an "adult establishment." This determination created the 60/40 test to identify adult establishments within the purview of the Ordinance.

In connection with its investigations and enforcement of the Ordinance under the 60/40 test, the City believed that many operators were achieving "technical compliance" without altering their predominant focus on sexually explicit activities or materials - which was the cause of the secondary negative effects. To shore up enforcement, the City amended the Ordinance in 2001 to modify or remove the application of "substantial portion" - effectively eliminating the 60/40 test ("**2001 Amendments**").

In 2002, the Plaintiffs, some or all of whom modified their businesses to comply with the 60/40 test, brought this action to effectively invalidate the 2001 Amendments. Plaintiffs argued that the City failed to support the 2001 Amendments with a new study focusing on the specific secondary effects of the class of 60/40 compliant businesses and that the City improperly relied on the 1994 Study when it enacted the 2001 Amendments. Plaintiffs also argued that 60/40 establishments

restrictive means necessary; (2) **intermediate** or **exacting scrutiny**, which is the intermediate level of scrutiny, requires the law to be narrowly tailored to meet a substantial government interest; and (3) **rational basis review**, which is the least stringent, requires the law be rationally related to a legitimate government interest. Laws that face strict scrutiny almost always fail and laws facing rational basis review almost never fail. The level of scrutiny applied correlates to the severity of the right infringed upon. If the Ordinance attempted to regulate the **content** of expression conveyed through adult businesses (guaranteed by the First Amendment), then strict scrutiny would apply. Here, however, the Court concluded that the ordinance was content-neutral because it was not purposefully directed at controlling the content of the message conveyed through adult businesses; rather, it was aimed at the **negative secondary effects** caused by adult uses.

were very different entities from those studied in 1994, submitted evidence showing 60/40 Adult Stores and Adult Clubs do not negatively affect property values or have adverse consequences in the form of criminal complaints, cited a lack of police reports vis-à-vis adult establishments and proffered other evidence that non-adult establishment nightclubs were more problematic than adult businesses (“**Counter Evidence**”). The City contended that a new study was not necessary because its later enforcement experiences found that 60/40 Adult Stores and Adult Clubs *retained a predominant, ongoing focus on sexually explicit entertainment, which had already been determined to give rise to negative secondary effects.*

In 2005 and in this opinion, the Court of Appeals applied the United States Supreme Court’s three-part “burden-shifting framework” set forth in [Los Angeles v. Alameda Books, Inc.](#), 535 U.S. 425 (2002), which describes a municipality’s burden of proof to sustain its laws in the face of a First Amendment challenge. First, the municipality must “fairly support” its rationale for the ordinance. Second, a challenger must cast direct doubt upon the rationale – either (i) by demonstrating the municipality’s evidence does not support the rationale or (ii) by furnishing evidence disputing the municipality’s factual findings. If the challenger cannot cast doubt, then the municipality wins. If the challenger can cast doubt, then, a third step is analyzed whereat the burden shifts back to the municipality to supplement the record with evidence renewing support to justify the ordinance.

The Court elaborated: at step one, a municipality’s burden to prove it has a substantial interest in regulating adult activities “is not a very heavy one”; very little evidence is required and such local legislative actions are accorded reasonable discretion. The same evidentiary burden applies at the third stage, where the municipality must supplement the record. In its 2005 decision, the Court agreed with the First Department that the City met its burden at the initial stage to justify a “secondary-effects rationale” for the 2001 Amendments. The Court, however, disagreed with the First Department regarding the second step - finding that the Plaintiffs had cast doubt upon the City’s rationale by proffering the Counter Evidence, together with specific changes to their respective establishments illustrating an alleged transformation away from the predominant, ongoing focus on sexually explicit entertainment.

The Court also provided foresight. Having determined the burden shifted back to the City for the third step of the analysis, the Court advised that the City need not re-litigate the secondary effects of adult uses or produce empirical studies showing 60/40 businesses present the adverse effects of businesses having a predominant, ongoing focus on sexually explicit entertainment. The question at step three is as follows: whether 60/40 businesses are so transformed in character that they no longer resemble the kinds of adult uses found to create such negative secondary effects (i.e. sham compliance) – and did the City submit relevant evidence reasonably adequate to support its conclusion. Having advised the lower courts how to apply intermediate scrutiny and measure the City’s evidence against its burden of proof, the Court of Appeals modified and remitted.

On remand, the City supplemented the record with additional evidence and the Plaintiffs provided additional testimony. However, the lower courts improperly applied intermediate scrutiny in their subsequent analyses. After receiving direction from the Appellate Division, the Supreme Court noted it applied a different standard from earlier - not one of rational basis and

substantial evidence, but rather the higher test of intermediate scrutiny; the court took a deep look into factual findings and standards; the burden upon the City was greater than previously understood. A divided Appellate Division affirmed in 2015, after finding that for each of the Adult Stores and Adult Clubs, certain factors did not support the City's position. The City appealed.

In this 2017 decision, the Court clarified the relationship between the level of scrutiny and the City's burden of proof. The Court noted that "intermediate scrutiny" is a level of judicial review that applies to the overall determination concerning whether a municipality's purpose justifies a law, i.e. narrowly tailored to serve a substantial government interest while allowing reasonable alternative means of communication. In so applying scrutiny, a court reaches legal determinations in balancing the interests, as well as assessing a municipality's factual judgments. A municipality's burden of proof relates to these factual judgments.

In First Amendment cases applying intermediate scrutiny, courts must assure that the factual judgment was drawn upon reasonable inferences based on substantial evidence. And, whether evidence is substantial is measured by a standard that is more deferential than that accorded to judgments of administrative agencies because legislatures are best equipped to apply the date to legislative questions. The lower court's mechanical approach was held to be improper and confused the ultimate *standard of review* (scrutiny) with the *evidentiary burden* borne by the City. Because the third step of the Alameda analysis obliges a modest burden of proof akin to substantial evidence, it was in error for the lower courts to determine that the City failed to meet its burden where one or more factors was not met. Here, the City met its burden of showing continued focus on sexually explicit activities and materials by the Adult Stores and Adult Clubs – despite any 60/40 compliance. Therefore, the 2001 Amendments were sustained.

In effect, the City was required neither to supplement, update or revise its 1994 Study nor provide a new study in connection with enacting the 2001 Amendments because the 2001 Amendments addressed the issues outstanding from the 1994 Study – the negative secondary effects caused by businesses with a predominant, ongoing focus on sexually explicit entertainment. The City met its burden of proof by showing that the Plaintiffs' Adult Stores and Adult Clubs did not rid themselves of predominant, ongoing focus on sexually explicit entertainment by 60/40 compliance or otherwise.