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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM MCCLELLAND, Plaintiff and Appellant, v. CITY OF SAN DIEGO, Defendant and Respondent.	D059392 (Super. Ct. No. 37-2010-00103502-CU-WM-CTL)

APPEAL from an order of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

By ordinance respondent City of San Diego (City) prohibits nude entertainment establishments from operating between 2:00 a.m. and 6:00 a.m. Appellant William McClelland operated such an establishment during the prohibited hours and, after a number warnings, City revoked his nude entertainment police permit. The revocation was upheld in an administrative hearing, but stayed on the condition McClelland observe all laws and ordinances, including City's hours of operation limitation, for 12 months.

Notwithstanding the stay, McClelland challenged the revocation by way of a petition for a writ of mandate, which the trial court denied.

On appeal McClelland argues the ordinance infringes on his rights of free speech and free expression as guaranteed by the state and federal Constitutions and that in any event he was subjected to discriminatory enforcement. We find no such infringement or discriminatory enforcement of City's after hours ordinance.

As City points out, its ordinance merely regulates the time, place and manner of nude entertainment and is aimed at mitigating documented adverse secondary impacts such entertainment has on surrounding communities rather than suppressing the entertainment itself. Because City's ordinance was limited in its impact on nude entertainment businesses and narrowly tailored to deal with the secondary impacts identified by City, City was neither required to show it had a compelling interest in regulating nude entertainment nor show it had chosen the least restrictive means of doing so.

We must also reject McClelland's discriminatory enforcement claim because he failed to establish a record which shows a competing nude entertainment establishment operated after hours as a result of an intentional decision by city officials as opposed to simple laxity of enforcement.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Hours of Operation Ordinance*

McClelland owns and operates Ten's Show Club, a totally nude entertainment club. City's police department issued McClelland a nude entertainment business permit. However, the permit is subject to City's municipal code which, as we have indicated, in pertinent part prohibits nude entertainment businesses from operating between the hours of 2:00 a.m. and 6:00 a.m. (San Diego Mun. Code (SDMC), § 33.3609(b).)[1]

City's hour of operations limitation was enacted in 2000 after the city council reviewed studies from 14 other cities with respect to the adverse secondary impacts of adult-oriented businesses. The city council found the studies were convincing evidence: "(1) Adult-oriented businesses are linked to increases in the crime rates in those areas in which they are located and in surrounding areas; and [¶] (2) There is substantial evidence that an increase in crime tends to accompany, concentrate around, and be aggravated by adult-oriented businesses including but not limited to an increase in the crimes of narcotics distribution and use, prostitution, pandering, and violence against persons and property . . . ."

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1 SDMC section 33.3609(b) states: "It is unlawful for any responsible person to allow a nude entertainment establishment to be open for business between 2 a.m. and 6 a.m. Permittees shall not be granted an after-hours permit pursuant to Division 8."

In determining that a limitation on the hours of operation of a nude entertainment establishment would reduce these adverse impacts, the city council relied on the factual background set forth and rationale articulated in published cases which upheld such limitations. (See e.g. *Mitchell v. Com'n on Adult Entertainment Est.* (3d Cir. 1993) 10 F.3d 123, 133-139 (*Mitchell*); *Star Satellite, Inc. v. City of Biloxi*, (5th Cir. 1986) 779 F.2d 1074,1079-1081; *Sundance Saloon, Inc. v. City of San Diego* (1989) 213 Cal.App.3d 807, 819-821(*Sundance*).) The city council also received recommendations from the chief of police and city manager, both of whom concluded a limitation on the hours of operation of nude entertainment would reduce the adverse secondary effects associated with nude entertainment businesses.

In imposing the hours of operation limitation, the city council stated that it had no interest in suppressing nude entertainment but that its sole goal was to "address the adverse secondary effects of adult-oriented businesses."

2. *Administrative Hearing*

Notwithstanding City's hours of operation limitation, McClelland stipulated that on a number of occasions, including instances on July 24, 2010, August 8, 2010, and September 22, 2010, detected by city vice officers, he operated Ten's Show Club after 2:00 a.m. Following discovery of his after hours operation and, following warnings and notices of violation, the chief of police revoked McClelland's nude entertainment license. At an administrative hearing, McClelland challenged the revocation on two grounds. He argued that the hours of operation ordinance was, on its face, unconstitutional.

McClelland further argued that in any event, city vice officers had permitted a competing nude entertainment establishment, The Body Shop, to operate after hours. In support of this claim, McClelland's counsel asked City's attorney to bring any enforcement file against The Body Shop to the administrative hearing. City's attorney declined to do so, arguing at the administrative hearing that any enforcement file was privileged. At the hearing McClelland also testified that he had been at The Body Shop on the previous evening and that it was operating after hours.

The administrative hearing officer found McClelland had repeatedly violated the hours of operation ordinance. The hearing officer determined he did not have the power to consider either McClelland's facial challenge to the ordinance or his claim of discriminatory enforcement. Thus the hearing officer upheld the revocation and ordered that McClelland pay City $5,000. As we indicated at the outset, the hearing officer stayed the revocation on the condition McClelland obey all ordinances and laws during the following 12 months, including the hours of operation ordinance. The hearing officer's ruling further provided that if McClelland obeyed the terms of the stay, after 12 months the revocation would be rescinded.[2]

3. *Trial Court Proceedings*

McClelland challenged the revocation of his permit by way of a petition for a writ of administrative mandate. (Code Civ. Proc., § 1094.5.) He again asserted SDMC

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[2] According to McClelland, City later found that he violated the law in other respects and the stay was lifted.

section 33.3609(b) was unconstitutional and that he had been the victim of discriminatory enforcement; in this regard he asked the trial court to remand the matter to the hearing officer so that he could obtain records of City's enforcement action taken against The Body Shop. For its part City produced a declaration from one of its vice officers who stated he had investigated The Body Shop's operations, determined that The Body Shop in fact violated the hours of operation ordinance, and obtained The Body Shop's agreement to comply with the ordinance.

The trial court denied McClelland's petition and his request for remand. With respect to McClelland's request for a remand, the trial court found the request was untimely and did not meet the requirements of section 1094.5, subdivision (e).

McClelland filed a timely notice of appeal.

I

Contrary to McClelland's argument on appeal, SDMC section 33.3609(b) does not infringe on his rights of free speech and expression.

The principles which govern McClelland's state and federal constitutional rights have been set forth in a series of state and federal cases and in the end pose three related questions: First, is City's hours of operation ordinance directed at controlling the content of the expression which occurs at nude entertainment businesses or is it content neutral in that it is predominantly directed at the impacts which the operation of such business have on communities in the vicinity of such businesses? Second, if the ordinance is content neutral, is it designed to serve a legitimate and substantial governmental interest?

Finally, if the ordinance is content neutral and serves a legitimate and substantial government interest, does it leave open ample alternative channels of communication?

As we explain, we find that the ordinance is content neutral, is needed to serve a substantial and legitimate governmental interest and leaves ample alternative channels of expression and communication. Thus we find the ordinance does not infringe on McClelland's rights of free speech and free expression.

A. *Content Neutral*

Although there is no question McClelland's operation of a nude entertainment club is protected by both the state and federal Constitutions (see e.g. *Barnes v. Glen Theatre, Inc.* (1991) 501 U.S. 560, 565-566; *People v. Glaze* (1980) 27 Cal.3d 841, 846 (*Glaze*)), it is also the case that notwithstanding that protection, local governments, so long as they are not attempting to regulate the content of speech, may nonetheless impose reasonable regulations on the time, place and manner of such otherwise protected speech and expression. (*Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 47-48 (*Renton*).) If the regulation of sexually explicit materials or activities is aimed primarily at suppression of First Amendment rights, then it is thought to be content-based and it presumptively violates the First Amendment. (*Renton, supra,* 475 U.S. at pp. 46-48; *Mitchell, supra,* 10 F.3d at p. 130.) However, if the regulation's predominate purpose is the amelioration of socially adverse effects of speech-related activity, the regulation is content-neutral and the court must measure it against the traditional content-neutral time, place and manner standard. (*Renton, supra,* 475 U.S. at pp. 46-48; *Mitchell, supra,* 10 Fed.3d at p. 130.)

"A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791 [109 S.Ct. 2746].)

Here, the record is clear City's hours of operation ordinance was not aimed at restricting nude dancing but was only intended to address the secondary adverse impacts of such adult entertainment businesses have. In this regard, City's findings at the time it enacted the hours of operation ordinance are persuasive. The findings show that the predominant purpose of the regulation was to address the numerous adverse impacts the city council had found. (See *Renton*, *supra*, 475 U.S. at p. 48.) However, the neutral and predominant purpose of the regulation can also be found in the manner in which it operates: it does not completely prohibit nude dancing, but merely limits the time it may take place to those hours of the day during which it has less of an adverse impact on City's legitimate social and law enforcement interests. (*Ibid*.) Had City wished to regulate nude dancing because of the nature of such entertainment, as opposed to its impacts, it could have enacted far harsher time limits or strictly limited the number of such establishments it would permit within the city. (See *Young v. American Mini Theatres* (1976) 427 U.S. 50, 82, fn. 4 [96 S.Ct. 2440], conc. opn. Powell, J.) In short, the ordinance is content neutral because it is "*justified* without reference to the content of the speech." (*Ibid*.)

Where as here regulation is content-neutral but nonetheless has an impact on protected speech, both the United States Supreme Court and our state Supreme Court in

interpreting the liberty of speech clause of the California Constitution, article I, section 2, have held the regulation must nonetheless serve a legitimate and substantial government interest and be narrowly drawn so as to permit other channels of communication. (See *Renton, supra*, 475 U.S. at pp. 50-51; *Glaze, supra*, 27 Cal.3d at p. 846.) Thus we turn to those questions.

B. *Governmental Interest*

In determining that adult entertainment has substantial adverse impacts in the areas where it exists, the city council was entitled to rely on the experience of the other cities it studied. (*Renton, supra*, 475 U.S. at pp. 51-52.) In identifying secondary adverse impacts, City was not required to "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." (*Ibid*.) Here, the study of other cities relied upon by the city council and reflected in its findings amply demonstrate legitimate and significant interests City was addressing in its hour of operations ordinance. City has obvious and significant interests in attempting to diminish the occurrence of narcotics distribution, prostitution, pandering and crimes of violence.

Moreover, based on the advice of its police chief and city manager, as well as its consideration of pertinent case law with respect to hours of operation regulations in other localities, the city council could reasonably conclude that restricting the hours of operation was a reasonable and necessary means of addressing the identified adverse impacts. In this regard, we note that with respect to *live* entertainment—whether it

involves nude or clothed dancing—the cases have uniformly recognized that a limitation on the hours of operation are an appropriate means of limiting the negative impact such businesses have surrounding communities and law enforcement. In *7978 Corporation v. Pitchess* (1974) 41 Cal.App.3d 42, 47-48 (*7978 Corporation*), the holder of ballroom dancing and live entertainment licenses challenged an ordinance which, like City's ordinance, prohibited operations by such licensees between 2:00 a.m. and 6:00 a.m. In upholding the validity of the ordinance, the court stated: "With respect to the subject matter of the regulation here, i.e., closing hours, 'the right to regulate hours of closing of such business as public dance halls and similar public exhibitions at reasonable hours has long been recognized and is universally supported.' [Citation.]

"We cannot say that the closing hours imposed on plaintiffs' business are arbitrary or unreasonable. The county could justifiably conclude that public dancing and public entertainment 'at such late hours would tend to attract and congregate evilly disposed persons at hours when the [county] would be least prepared with police to guard against the acts of such persons.' [Citation.] The county could also conclude that during a portion of the 24-hour day the desires of those who seek to present public entertainment around the clock should yield to the wishes of those who seek peace and quiet in the small hours of the morning. As further evidence of the reasonableness of the regulated hours, we note that the closing hours correspond precisely with the hours during which alcoholic beverages may not be sold. [Citation.]" (*Id*. at pp. 47-48.)

Relying on *7978 Corporation,* in *Sundance, supra,* 213 Cal.App.3d at page 821, we upheld a similar ordinance which prohibited the operation of cabarets, defined as businesses which serve alcohol and provide entertainment, between the hours of 2:00 a.m. and 6 a.m. In doing so we distinguished the earlier holding in *Glaze*, where the court considered a broad prohibition on the operation of all picture arcades within the City of Los Angeles between the hours of 2:00 a.m. and 9:00 a.m. and which the city justified as a means of preventing masturbation by arcade customers.

While recognizing the ordinance in *Glaze* was overbroad both because the city could deal with masturbation more directly by arresting offenders and because the ordinance applied even to arcades which showed children's cartoons, in *Sundance* we found the limitation on operations of cabarets quite different: "A closing hour regulation implemented in order to control masturbation is far different than a closing regulation designed to help control the potential for excessive noise and disorderly conduct associated with cabarets. The control or failure to control masturbation seldom has an immediate impact on the community and the policing problems involved with it are narrow. On the other hand the generation of excessive noise and the potential for disorderly conduct by the patrons of establishments that serve alcoholic beverages and provide live entertainment are often immediate, intrusive and dangerous to control." (*Sundance, supra*, 213 Cal.App.4th at p. 821.)

Notwithstanding McClelland's argument to the contrary, our reasoning in *Sundance* applies here as well. The adverse impacts identified by the city council here—

narcotics distribution and use, prostitution, pandering, and violence against persons and property—are graver, more immediate and plainly not subject to the focused enforcement suggested by the court in *Glaze* as an alternative means of dealing with public masturbation. Moreover, here, unlike the ordinance considered in *Glaze*, City's hours of operation ordinance does not cover establishments which are not associated with the identified adverse impacts. In this regard, we reject McClelland's contention that because *Sundance* considered an establishment which served alcohol we should not rely on it here. While consumption of alcohol no doubt played a role in adoption of the ordinance we considered in *Sundance*, our reasoning in upholding the ordinance there was based on the existence of almost indistinguishable kinds of secondary impacts which were identified by the city council in adopting SDMC section 33.3609(b). It is the existence of such secondary impacts—whether they are associated with alcohol consumption or adult entertainment—which justifies hours of operation limitations both in *Sundance* and here.

This brings us to what we perceive as McClelland's principal contention: that City could not show Ten's Show Club produced the adverse effects identified by City when it enacted the ordinance. Like the court in *Mitchell, supra,* 10 F.3d at page 138, we do not believe City was required to show more than that adult entertainment as a business category produced the adverse impacts City was attempting to address: "*Renton* indicates that a state legislature considering an ordinance or a statute designed to regulate the incidental undesirable effects of marginally protected expressive activity does not need to survey every adult book store in the state to determine the effect the statute or regulation

will have on each. (See *Renton*, 475 U.S. at 52, 106 S.Ct. at 931 (legislative restriction must be designed 'to affect only that category of theatres shown to produce the unwanted secondary effects'). We think *Renton* leaves a legislative body free to classify and draw lines, provided it does not wholly or practically prevent access to the expressive material whose sale and distribution the ordinance or statute incidentally regulates.

"Thus, we agree with the district court's conclusion that the state need not prove that Adult Books' particular ability to disseminate its materials needs restriction in order to prevent the undesirable impact on its neighbors that justified the closing-hours amendment. We think, rather, that it need only show that adult entertainment establishments as a class cause the unwanted secondary affects the statute regulates." (Fn. omitted.)

Moreover, the absence of such problems at Ten's Show Club would hardly prove that the ordinance was not needed. As we noted in *Sundance*, the government is not "foreclosed from adopting regulatory schemes that not only deal with problems after they exist but also attempt to reasonably remove the potential for such problems." (*Sundance, supra*, 213 Cal.App.3d at pp. 821-822.)

In sum then, the record here shows that City's hours of operation ordinance was necessary as a means of ameliorating significant secondary impacts associated with adult entertainment.

C. *Alternative Channels of Communication*

We need not spend a great deal of time dealing with the question of whether City's hours of operation ordinance leaves alternative channels of communication. On its face the ordinance leaves McClelland 20 hours a day—from dawn until well into the wee hours of the morning—to engage in the expressive activity he offers at Ten's Show Club. This is more than a sufficient alternative channel of communication. (See *Sundance, supra*, 213 Cal.App.4th at p. 822.)

Because SDMC section 33.3609 is content neutral, is a necessary means of addressing significant secondary impacts of adult entertainment and permits alternative means of expression, McClelland's facial challenge to the ordinance fails.

II

In the alternative, McClelland contends he was the victim of discriminatory enforcement. We reject this claim as well.

The elements of the defense of discriminatory enforcement, as well as its limitations, were set forth by our Supreme Court in *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832 (*Baluyut*): "Unequal treatment which results simply from laxity of enforcement or which reflects a nonarbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. [Citation.] However, the unlawful administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination. [Citation.]

"In *Murgia* [*v. Municipal Court* (1975) 15 Cal.3d 286] this court explained the showing necessary to establish discriminatory prosecution: ' [I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the direct victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' (*Murgia, supra*, 15 Cal.3d at p. 298, fn. omitted.)."

The only evidence of discriminatory enforcement which McClelland offered at the administrative hearing was his own statement that he observed The Body Shop operating after 2:00 a.m. on the morning before the administrative hearing and that his employees had also observed after hours operation at The Body Shop on other occasions. This statement showed no more than the lax enforcement of SDMC section 33.3609 which is insufficient to establish discriminatory enforcement. (*Baluyut, supra*, 12 Cal.4th at p. 832.)

As McClelland points out, arguably the trial court could have remanded the case to the hearing officer with directions that City produce records with respect to enforcement of SDMC section 33.3609 in general and conceivably any available records with respect to The Body Shop's compliance with the ordinance. Code of Civil Procedure section

1094.5, subdivision (e) permits a court hearing a petition for writ of mandamus to remand for further proceedings where "there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before [the agency]." (See *Voices of Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 527.)

However, like the trial court, we find two difficulties with such a remand on this record. First, the record shows that the only attempt McClelland made to obtain enforcement records from City occurred by way of counsel's informal request for them prior to the administrative hearing and a request made in the memorandum of points and authorities filed in the trial court shortly before the hearing on the petition. If McClelland were serious about obtaining enforcement records, he could have sought assistance either from the hearing officer prior to the administrative hearing or from the trial court prior to filing his memorandum of points and authorities. Thus, like the trial court, we have difficulty finding that McClelland exercised the reasonable diligence required by Civil Code section 1094.5, subdivision (e).

Secondly, however, in apparent response to McClelland's request for enforcement records, City produced a declaration from a vice officer stating that in fact City had obtained The Body Shop's compliance with the hours of operation ordinance. Thus, the trial court could properly conclude that a remand would not produce evidence of any discriminatory enforcement.

In sum then, the record did not support the existence of any discriminatory enforcement and the trial court did not abuse its discretion in declining McClelland's request to remand in order to produce such a record.

The order denying McClelland's petition is affirmed. City to recover its costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.