

↓ 110 Nev. 1227, 1227 (1994) City of Las Vegas v. 1017 S. Main Corp. ↓

CITY OF LAS VEGAS, a Municipal Corporation; JAN LAVERTY JONES, Mayor; BOB NOLEN, ARNIE ADAMSEN, SCOTT HIGGINSON, FRANK HAWKINS, JR., Councilmen; CITY OF LAS VEGAS DEPARTMENT OF COMMUNITY PLANNING, an Agency of the City of Las Vegas; and CITY OF LAS VEGAS DEPARTMENT OF BUSINESS ACTIVITY, an Agency of the City of Las Vegas, Appellants, v. 1017 SOUTH MAIN CORPORATION, a Nevada Corporation, dba A-ACTION ADULT AND VIDEO, Respondent.

No. 24786

November 30, 1994

885 P.2d 552

Appeal from district court order enjoining the City of Las Vegas from denying the issuance of certain business licenses and

↓ 110 Nev. 1227, 1228 (1994) City of Las Vegas v. 1017 S. Main Corp. ↓

permits, from enforcing Las Vegas Municipal Code 19.74.040, and from adopting rules and regulations pursuant thereto, and from acting in an otherwise unconstitutional manner. Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge.

Sexually oriented business brought action against city arguing that city ordinance that amended manner in which city measured required distance between sexually oriented businesses and other establishments was unconstitutionally vague, and that city had selectively enforced code provisions in derogation of business's right to equal protection of law. The district court enjoined city from denying issuance of certain business licenses and permits, from enforcing ordinance, and from adopting rules and regulations pursuant thereto. City appealed. The supreme court held that: (1) term "altered" in city ordinance prohibiting nonconforming businesses to alter their use was not unconstitutionally vague; (2) business's modification of its coin-operated video booths to provide visual access to live nude dancer

changed category in which booths were used and such change was “alteration” prohibited by ordinance; and (3) city did not arbitrarily enforce ordinance.

Reversed.

Bradford R. Jerbic, City Attorney, and *Larry G. Bettis*, Deputy City Attorney, Las Vegas, for Appellants.

Gentile & Porter and *David T. Wall*, Las Vegas, for Respondent.

1. Municipal Corporations.

Ordinance is unconstitutionally vague if it either forbids or requires doing of act in terms so vague that person of ordinary intelligence must necessarily guess at its meaning and differ as to its application.

2. Municipal Corporations.

Ordinance may be void for vagueness if its imprecision is likely to encourage arbitrary and discriminatory enforcement.

3. Constitutional Law.

Presumption of invalidity against any system of prior restraint did not apply to city ordinance that amended manner in which city measured required distance between sexually oriented businesses and other establishments, as nude dancing was considered prurient entertainment only marginally within outer perimeters of First Amendment protection. U.S. Const. amend. 1; Las Vegas Municipal Code § 19.74.040.

4. Constitutional Law.

Presumptively invalid ordinance authorizing officials to license certain constitutional activity will be upheld if it establishes precise, narrowly drawn standards to guide and limit enforcement. Zoning regulation with incidental impact upon marginally protected expression will be upheld if it meets same exacting standards.

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↓ 110 Nev. 1227, 1229 (1994) *City of Las Vegas v. 1017 S. Main Corp.* ↓

5. Constitutional Law; Zoning and Planning.

Term “altered” in city ordinance stating that any business made nonconforming by city ordinance that amended manner in which city measured required distance between sexually oriented businesses and other establishments may not be altered was not so vague that it provided unfettered discretion in city officials who were charged with its administration, where term

conveyed clear meaning when standing on its own, and when coupled with other words of limitation. U.S. Const. amend. 1; Las Vegas Municipal Code § 19.74.040.

6. Zoning and Planning.

Sexually oriented business's modification of its coin-operated video booths to provide visual access to live nude dancer changed category in which booths were used to that of "nude show," and such change was "alteration" prohibited by city ordinance stating that any business made nonconforming by city ordinance that amended manner in which city measured required distance between sexually oriented businesses and other establishments may not be altered. Las Vegas Municipal Code § 19.74.040.

7. Constitutional Law.

Facially valid ordinance may be vehicle for unequal protection of law when applied in arbitrary or discriminatoty manner. U.S. Const. amend. 14.

8. Zoning and Planning.

City did not arbitrarily enforce city ordinance, stating that any business made nonconforming by city ordinance that amended manner in which city measured required distance between sexually oriented businesses and other establishments may not be altered, when it retroactively licensed sexually oriented business, yet denied other business's application to modify its coin-operated video booths and add live nude dancing. Newly licensed business received zoning approval prior to effective date of ordinance and was retroactively licensed because of delay in fire inspection and approval. U.S. Const. amend. 14; Las Vegas Municipal Code § 19.74.040.

OPINION

Per Curiam:

FACTS

Chapter 19.74 of the Las Vegas Municipal Code ("LVMC") regulates the zoning of sexually-oriented businesses. Prior to September 20, 1992, LVMC 19.74.030 prohibited the establishment of sexually-oriented businesses within 1,000 feet of any church, school, park, playground, or other sexually-oriented business. The distance was measured "by the most direct route provided for pedestrian traffic from the primary public entrance of the proposed establishment to the primary public entrance of any existing church, school, park or playground or sexually oriented licensed premises."

In July of 1992, the respondent, A-Action Adult and Video (hereinafter "A-Action") received business licenses to operate at the same location a bookstore, video center, and twenty-one coin

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operated amusement devices. A-Action intended to sell sexually-oriented books and videos, and the coin-operated devices were to be used within video booths (*e.g.*, insert money and view a sexually-oriented video in the privacy of a self-enclosed booth). Nine of the twenty-one viewing booths were arranged in a rectangle shape so that all faced a small stage in the center of the rectangle. Because of the nature of its business, A-Action was required to comply with the distance requirements of LVMC 19.74.030, which it did after changing the location of its primary entrance.

On September 20, 1992, the City of Las Vegas (“City”) amended the manner in which it measured the distance between sexually-oriented businesses and other establishments.¹ Additionally, the following provision was added to LVMC 19.74.040:

- (B) Any business existing as of September 16, 1992, that is made nonconforming by the provisions of [this ordinance] shall be permitted to remain in operation; provided, however, that:
- (1) No such business may be increased, enlarged, extended or altered, except to change the use to a conforming use; and
 - (2) If any such business terminates or is abandoned for a period of at least thirty days, any future use of the property shall conform to the provisions of [this ordinance].

As a result of the September 20, 1992 amending ordinance, A-Action became a “nonconforming” business because its property line was within 1,000 feet of Metropolitan Community Church's property line; therefore, it became subject to the provision that prohibited the business from being “increased, enlarged, extended or altered,” except to a conforming use.

On February 1, 1993, A-Action made application to amend its existing “coin-operated amusement center” license for the purpose of removing the video equipment from the nine viewing booths that formed the rectangular configuration and installing glass panes in order for patrons to view, after placing money in a coin-operated device, a live nude dancer on the small stage in front of the booths. The City denied A-Action's application on the basis that such an alteration would violate the provisions of LVMC 19.74.040(B)(1).

Shortly thereafter, A-Action filed a complaint in the district court in which it argued that LVMC 19.74.040 was unconstitutionally vague, and that the City had selectively enforced the code provision in derogation of A-Action's right to equal protection of the law. A-Action's equal protection complaint resulted from the

¹ Rather than measure from entrance to entrance, the City began measuring from property line to property line. See LVMC 19.74.030.

↓ 110 Nev. 1227, 1231 (1994) City of Las Vegas v. 1017 S. Main Corp. ↓

City's accommodation of Books and Video Enterprises, an unrelated business doing business as Talk of the Town. Talk of the Town filed an application with the City on August 13, 1992, seeking business licenses to operate a bookstore, video center, and coin-operated amusement machines. Like A-Action, Talk of the Town offered to provide adult-oriented materials and entertainment to interested patrons. On August 28, 1992, well before the effective date of amended LVMC 19.74.030, the City entered its decision that Talk of the Town was located in an area properly zoned for a business of its type. However, delays caused by either the City or its fire department prevented Talk of the Town from actually receiving its licenses until after the effective date of LVMC 19.74.030.

It is incontrovertible that Talk of the Town complied with the distance limitation required by the old LVMC 19.74.030 at the time it received zoning approval for all three licenses on August 28, 1992; it is equally incontrovertible that *after* September 20, 1992, Talk of the Town no longer complied with the distance limitation because its property line was within 1,000 feet of a church's property line. The City issued the licenses retroactive to August 28, 1992, and Talk of the Town was allowed to commence operations as a nonconforming business.

After a bench trial, the district court found that the word "altered" as used in LVMC 19.74.040(B)(1) was vague, undefined, and therefore unconstitutional; the court also found that A-Action and Talk of the Town had received disparate treatment from the City in violation of A-Action's right to equal protection of the law. This appeal followed.

DISCUSSION

[Headnotes 1, 2]

The City contends that the district court erred in holding that the word "altered" is unconstitutionally vague. An ordinance is unconstitutionally vague if it either forbids or requires the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Such an ordinance is "void for vagueness" and inconsistent with due process of law. Additionally, an ordinance

may be void for vagueness if its imprecision is likely to encourage arbitrary and discriminatory enforcement. *Forsyth County, Ga. v. Nationalist Movement*, ___ U.S. ___, ___, 112 S. Ct. 2395, 2403 (1992) (stating that the First Amendment prohibits the vesting of unbridled discretion in government officials); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972); *Eaves v. Board of Clark County Comm'rs*, 96 Nev. 921, 924, 620 P.2d 1248, 1250 (1980).

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↓ 110 Nev. 1227, 1232 (1994) *City of Las Vegas v. 1017 S. Main Corp.* ↓

The City argues on appeal that LVMC 19.74.040 is not unconstitutionally vague because it plainly precludes nonconforming businesses from being “increased, enlarged, extended or altered” in any way other than to a conforming use. According to the City, each word of the foregoing phrase may be susceptible to semantical debate, yet their collective context, purpose, and effect is clear: a nonconforming business *may not be changed in any way*. See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (stating that because we are condemned to the use of words, “we can never expect mathematical certainty from our language”).

[Headnote 3]

A-Action responds by insisting that LVMC 19.74.040 is presumptively invalid because of constitutional implications prohibiting prior restraint. Indeed, any system of prior restraint is burdened with a heavy presumption *against* its constitutional validity. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). We conclude, however, that the presumption of invalidity is inapplicable to the instant case.

In *Talk of the Town v. City of Las Vegas*, 92 Nev. 466, 553 P.2d 959 (1976), an adult-oriented bookstore challenged the constitutionality of a city ordinance which required it to procure “privileged business licenses” and pay for investigations of all those “associated” with its management or ownership. *Id.* at 468, 553 P.2d at 960. Talk of the Town's business involved the sale of books and other printed material, which are both “presumptively” protected by the First Amendment. *Id.* at 469, 553 P.2d at 961. In contrast, the form of expression A-Action seeks to protect is that which is conveyed by nude dancing. Despite A-Action's contention that “it is uncontroverted that nude dance performances . . . are protected expression under the First and Fourteenth Amendments to the United States Constitution,” the United States Supreme Court has strongly indicated that nude dancing does not rise to the same level as other forms of protected expression. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

In *Barnes*, the Glen Theatre supplied adult entertainment consisting of nude and seminude performances and displays of the female body through glass window panels. In a manner similar to that

planned by A-Action, Glen Theatre patrons sat in private booths and inserted coins into a timing mechanism that permitted them to observe live nude and seminude dancers for a specified period of time. *Id.* at 563. The Glen Theatre proprietors and dancers objected to a state “public indecency law,” which required the dancers to wear G-string panties and pasties on their

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breasts, on the grounds that the law impeded their First Amendment rights of freely expressing an erotic message. *Id.* at 565.

The *Barnes* court conceded that several of the high court's opinions contain language which suggests that nude dancing is expressive conduct protected by the First Amendment, but the court made clear its view that such dancing was only a marginally protected form of expression:

In *Doran v. Salem Inn, Inc.*, we said: “[A]lthough the customary ‘barroom’ type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue* that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.” In *Schad v. Mount Ephraim*, we said that “[f]urthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation.” These statements support the conclusion of the Court of Appeals *that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.*

Id. at 565-66 (citations omitted; emphasis added).

[Headnote 4]

Accordingly, we reject A-Action's invitation to view LVMC 19.74.040 as a form of prior restraint unable to withstand the heavy presumption of unconstitutionality. Instead, we consider nude dancing for what it is: prurient entertainment only *marginally* within the outer perimeters of First Amendment protection.²

[Headnote 5]

A-Action's primary complaint with LVMC 19.74.040 is that the word “altered” is so vague that

it provides an unfettered discretion in City officials who are charged with its administration. We are not persuaded that the term “altered,” which in this context connotes any structural or functional form of modification or change, is beyond the ken of persons of ordinary intelligence; nor do we see ambiguity in the context surrounding the term “altered” (“increased, enlarged, extended or altered”) that facilitates an opportunity for arbitrary and discriminatory enforcement. In fact, the phrase is carefully crafted in order to *prevent*

² In any event, a presumptively invalid ordinance authorizing officials to license certain activity will be upheld if it establishes precise, narrowly-drawn standards to guide and limit enforcement. *North Nevada Co. v. Menicucci*, 96 Nev. 533, 536, 611 P.2d 1068, 1069 (1980) Likewise, a zoning regulation with an incidental impact upon marginally protected expression will be upheld if it meets the same exacting standards.

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such discretionary enforcement. The word “altered” conveys a clear meaning when standing on its own, and when coupled with other words of limitation, as it is here, its meaning is not rationally susceptible to an attack on grounds of vagueness.

Having concluded that LVMC 19.74.040 withstands constitutional challenge, we next consider A-Action's alternate contention that its nude dancing activity does not constitute an “alteration,” and should therefore be viewed as conforming to the ordinance. LVMC 19.74.020 sets forth ten precisely defined categories of sexually-oriented businesses. Of particular importance to us are the following two categories:

Adult Motion Picture Arcade.

“Adult motion picture arcade” 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 maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis on depicting or describing sexual conduct or specified anatomical areas.

Nude Show.

“Nude show” means any establishment which provides or permits sexual conduct or the display of specified anatomical areas upon its premises as entertainment or an attraction for business.

[Headnote 6]

As we understand the record, A-Action's use of twenty-one coin-operated devices to provide sexually-oriented video falls within the category of an "adult motion picture arcade," which requires "still or motion picture machines, projectors, or other image producing devices" that are either electronic, electric, or operated by coin or slug. We fail to see how nine of those twenty-one coin-operated machines, which are now used to simply open and close access to glass windows, constitute "image producing devices" that fall within the definition of a motion picture arcade. Instead, A-Action's modification of its booths to provide visual access to a live nude dancer changes the category in which the booths are used to that of a "nude show." Such a change is clearly an "alteration" prohibited by LVMC 19.74.040. Under the circumstances presented here, we reject A-Action's argument that a change in what a patron *views* when using a coin-operated device is not an alteration prohibited by LVMC 19.74.040.

[Headnote 7]

With respect to A-Action's equal protection argument, we note

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↓ 110 Nev. 1227, 1235 (1994) *City of Las Vegas v. 1017 S. Main Corp.* ↓

that a facially valid ordinance may be the vehicle for unequal protection of the law when applied in an arbitrary or discriminatory manner. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). More particularly, we have noted that "[e]qual protection of the law has long been recognized to mean that no class of persons shall be denied the same protection of the law which is enjoyed by other classes in *like circumstances*." *Allen v. State*, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984) (emphasis added).

[Headnote 8]

A-Action successfully argued below that the City arbitrarily enforced LVMC 19.74.040 when it retroactively licensed Talk of the Town, yet denied A-Action's application to modify the nine viewing booths and add live nude dancing. We disagree with the district court's ruling and conclude that the two establishments presented factually and significantly distinguishable requests to the City. Talk of the Town received zoning approval prior to the effective date of LVMC 19.74.030 and was retroactively licensed because of a delay in fire inspection and approval. Unlike A-Action, Talk of the Town has not attempted to increase, enlarge, extend or alter the scope of its nonconforming business, and we have no

reason to believe that any such attempt by Talk of the Town would be received favorably by the City.

CONCLUSION

For the reasons discussed above, we conclude that LVMC 19.74.040(B)(1) is not unconstitutionally vague and that it was not applied in a disparate, discriminatory or otherwise unconstitutional manner. The order of the district court is in all aspects reversed, and its injunctive provisions against the City vacated.
