

Encore, Encore!

Has N.W. Enterprises Resurrected Encore Videos v. San Antonio?

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History Lesson¹

Encore Videos, Inc. (“Encore”) is an adult video store in San Antonio, Texas, which sells and rents sexually explicit videos for off-premises-only viewing. In 1995, the City enacted an ordinance that defined “sexually oriented businesses” as those with 20% or more of inventory or floor space devoted to sexually explicit material, and prohibited them from operating within 1,000 feet of each other, residential areas, schools, public parks, and places of worship.

Encore lost its lease on its original location, which happened to conform with this ordinance, in 1996, and moved within 1,000 feet of a residential area. Encore never obtained a certificate of occupancy for its new location, and filed suit against the City of San Antonio challenging the ordinance under the First Amendment.

San Antonio answered the suit with a motion for summary judgment, alleging that the ordinance in question was a “time, place and manner regulation,”² and cited three studies (the 1989 Seattle study; the 1986 Austin study; and the 1991 Garden Grove study) in support of the proposition that off-premises-only adult bookstores produce adverse secondary effects that can be regulated. United States District Judge Fred Biery ultimately granted San Antonio’s motion, and found that the ordinance was narrowly tailored to serve the City’s substantial interest of preventing adverse secondary effects on property values.

Encore appealed to the Fifth Circuit³, arguing that while a city may rely on the experiences of other cities in enacting a “time, place and manner regulation, the evidence relied upon must be reasonably relevant to the problem that the city addresses. The court reversed and remanded, noting that the studies San Antonio relied upon were insufficient because they did not differentiate between subcategories of adult bookstores, and did not specifically address off-premises-only establishments. San Antonio filed a petition for certiorari to the Supreme Court, arguing that cities are entitled to draw “reasonable inferences” from secondary data not directly on point, but its petition was denied. Following denial, the Fifth Circuit clarified its opinion, indicating that the zoning provisions were not sufficiently narrowly tailored to address off-premises-only establishments, and also indicated that the 20% inventory standard was arbitrary, and an improper “prior restraint,” and, therefore, subject to strict scrutiny.

¹ Special thanks go out to Thomas P. Brandt, Stephen D. Henniger, and Joshua A. Skinner of Fanning Harper & Martinson, P.C., Dallas, Texas for their excellent paper entitled, “The First Amendment and Local Government Regulations,” presented at the 17th Annual Suing and Defending Government Entities Course, from which I borrowed liberally for the summary of the current status of the law contained in this article.

² *City of Los Angeles v. Alameda Books*, 535 U.S. 425 at 433-434 (2002); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 at 47 (1986).

³ *Encore Videos, Inc. V. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003).

Here We Go Again. . .

Shortly after handing down the Encore decision, the Fifth Circuit decided *N.W. Enterprises, Inc. v. City of Houston*⁴, in which it held that in determining content-neutrality, the proper inquiry is whether the “predominate concern” of the ordinance is addressing secondary effects, versus banning content. It went to state that a local government can justify the ordinance based on evidence developed prior to the ordinance’s enactment, and that adduced at trial.

Following this decision, Judge Biery ordered the parties to submit a joint advisory requesting an analysis of what effect, if any, this ruling has on the present case. San Antonio argued that it should be allowed to present additional evidence at trial demonstrating negative secondary effects, rather than purely in the context of a hearing seeking pre-litigation injunctive relief. Encore, not surprisingly, disagreed, arguing that the only issue left alive is the amount of attorney’s fees to which it is entitled.

Meanwhile, in litigation in the Northern District of Texas, Fort Worth Division, the City of Kennedale successfully presented testimonial evidence at trial of negative secondary effects of off-premises-only establishments. This result seemingly embraces the approach contemplated by *N.W. Enterprises*, and offers a methodology to cities seeking to regulate these types of businesses for more fully developing evidence of negative secondary effects. Whether or not this is what Judge Biery contemplated when he requested the joint advisory remains to be seen as he has taken no action on the joint advisory as of this date. Nevertheless, the trend in the Fifth Circuit seems clear: as an initial matter, a city’s ordinance should withstand a temporary restraining order so long as the expressed purpose of the “time, place, manner” ordinance is content-neutral; and, cities should be able to present a broad range evidence of negative secondary effects at trial.

Strategy for the Future

The question presented to cities now, and counties for that matter, is whether or not a more formalized study of off-premises-only establishments should be undertaken, or whether localities should proceed as Kennedale did, and offer testimony at trial specifically applicable to the facts of that case. That very question was addressed recently at a meeting of interested cities conducted at the Texas Municipal League on October 14, 2005.

Cities and counties, large and small, attended the meeting and discussed not only the implications of the *N.W. Enterprises* decision, but also whether a formal study funded by multiple cities and counties should be commissioned. A steering committee, composed of Wayne Olson, Mick McKamie, Charles Anderson of Irving, Brad Neighbor of Garland, Doreen McGookey of Dallas, John Grace of the Lubbock County DA's office, and Julie Fort of the Abernathy firm in McKinney was named. This group, with input from all attendees, discussed a

⁴ *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 173 (5th Cir. 2003).

proposal for the study at the TCAA Fall Seminar in Grapevine, Texas on October 28, 2005, and began finalizing plans at the TCAA South Padre Seminar in June of 2006.

STATUS UPDATE - Since this article was originally published, the steering committee has attended a second meeting with experts, who have outlined the general parameters of a study and its anticipated costs. The hypothesis that the study seeks to prove is that off-premise establishments generate negative secondary effects that are statistically quantifiable and demonstrable. The experts consulted feel that this is a realistic goal, and are currently designing scientifically sound study parameters. Their proposal is under consideration, and cities interested in contributing to the cost of the study or simply learning more about it are encouraged to contact Mick McKamie (mick@mckamielaw.com) or Bradford Bullock (bradford@mckamielaw.com) for more information.