IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PALMETTO, PROPERTIES, INC., an Illinois corporation; and GREGORY A. SCHIRMER,	)	
Plaintiffs,	)	
	)	Case No. 99 C 2980
vs.	)	
	)	Judge David H. Coar
COUNTY OF DuPAGE, a body politic and corporate, FOREST PRESERVE DISTRICT OF DuPAGE COUNTY, a body politic and corporate; JOSEPH E. BIRKETT, in his official capacity as DuPage County State's Attorney; and JIM E. RYAN, in his official capacity as Illinois Attorney General,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT

On February 17, 2000, the Plaintiffs in the above-captioned case, Palmetto Properties, Inc. and Gregory A. Schirmer (collectively "Palmetto"), filed their third amended complaint challenging provisions of an Illinois statute and of the DuPage County zoning ordinance. The challenged provisions purport to regulate the location of "adult entertainment facilities" or "adult business uses" such as the cabaret which Palmetto plans to operate on the site which it has purchased for that purpose in unincorporated DuPage County. With the exception of Illinois Attorney General Ryan, who has been dismissed from this action, the Defendants have answered, and the parties have conducted discovery. On June 20, 2000, Palmetto filed its dispositive motion for summary judgment; and it now files this memorandum, together with a statement of uncontested material facts, in support of that motion. The materials required by Local Rule 56.1(a)(1) have been filed jointly by the parties. That filing consists of a written stipulation and fifteen additional joint exhibits. Record references *infra*, *i.e.* "Joint Exh. _," are to the exhibits as designated in the joint Local Rule 56.1(a)(1) submission.

Argument

I. The Requirement that Adult Entertainment Facilities Separate by at Least 1000 Feet from All Portions of a Forest Preserve is Unconstitutional, Both on Its Face and as Applied, Because, *Inter Alia*, It Is Not Narrowly Tailored to Serve Any Proper Governmental Purpose.

A recently enacted Illinois statute purports to regulate the location, within unincorporated areas of any county,[1] of "adult entertainment facilities," which are expressly defined according to the content of the expression which they disseminate. 55 ILCS 5/5-1097.5 (1998); *see generally* Joint Exh. 1 ¶ 6; Joint Exh. 4, 5. That statute forbids the location of, *inter alia*, a "striptease club," such as the one which Palmetto plans to operate, Joint Exh. 1 ¶ 13, within 1000 feet of, *inter alia*, a forest preserve. Joint Exh. 5. Although the statute prescribes other separation requirements, *Ibid*, they would not prohibit Palmetto's intended use of its property. Joint Exh. 1 ¶¶ 16, 17. Palmetto's lot is, however, approximately 735 feet from Pratt's Wayne Woods Forest Preserve, Joint Exh. 1 ¶¶ 17, 18, as measured between the nearest boundary lines and without regard to intervening structures, *Id*. ¶¶ 17, 35. Palmetto's constitutional challenge to the statute thus focuses on the separation requirement concerning forest preserves. If the statute had been left as originally enacted, without prescribing separation from forest preserves, *cf*. Joint Exh. 4, Palmetto would have no need to challenge it here.

A government may impose locational restrictions such as those prescribed by the challenged statute if, but *only if*, it can justify[2] its legislation as a constitutionally permissible time, place, and manner regulation of the expression which the regulated businesses disseminate.

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[1] Although the legislative sponsor expressly intended the statute to apply only in counties which, unlike DuPage County, *cf*. Joint Exh. 7, have no comprehensive zoning ordinance, Joint Exh. 4 at 223, 225, 33, nothing in the statue's language so restricts its application.

[2] There is no doubt that the government bears the burden of justifying the separation requirements challenged here. *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996). The United States Supreme Court has recognized that zoning restrictions which regulate expression must satisfy the appropriate First Amendment Standards, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68-73 (1981); *see also Id*. at 77 (Balckmun, J., concurring)("presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight when the zoning regulation trenches on rights of free expression protected under the First Amendment"). Indeed, the ink was hardly dry on the opinion in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), before the United States Supreme Court cited it as an example of a case where the government carried the burden of justifying its regulation of expression. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Just as in *Renton*, the government bears the burden here.

Under the applicable constitutional test as it is usually articulated, permissible time, place, and manner regulations must 1) be content neutral, 2) be narrowly tailored to serve a significant government interest, and 3) leave open ample alternate channels for the regulated communication. *See United States v. Grace*, 461 U.S. 171, 177 (1983); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 828 (7th Cir. 1999). For the purposes of this motion, Palmetto agrees that governments have a significant interest in protecting public recreation areas, such as a traditional municipal park, from adult entertainment facilities and that that interest is "content-neutral" if the government's concern actually focuses upon truly *secondary* effects of the expression which those facilities disseminate. *But see United States v. Playboy Entertainment Group, Inc.*, 68 USLW 4409, 4412 (May 22, 2000)(children's exposure to adult entertainment is primary effect, as opposed to related blight and crime, which, to the extent they exist, are secondary effects of adult entertainment establishments). Even so, the government must adopt a regulation which is "narrowly tailored" to its proper interests if the regulation is to survive the intermediate scrutiny, *DiMa*, at 827, applied to time, place, and manner regulations. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance it goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)(footnote omitted).

But, in light of the character of forest preserves in Illinois, the inclusion of the unmodified term "forest preserve" in the challenged statue imposes just such an impermissible burden. By its own ordinance, for instance, the Defendant District has deliberately and expressly declared that no more than 10 per cent of the land in its forest preserves will be developed for active use, Joint Exh. 1 ¶ 22, including for the sort of recreational activities associated with a traditional public park or even with an established campground, *see Id*. ¶¶ 26, 32. The rest of the forest preserve land is to be set aside for another purpose of forest preserves: literally preserving forests and other natural wilderness areas. *Id*. ¶ 23. This should come as absolutely no surprise to anyone, given very name "forest preserve" and given the full statutory mission of Forest Preserve Districts. *Id*. ¶ 20. Yet the legislature gave no consideration whatsoever to this matter, either when it originally enacted the challenged statute, *see* Joint Exh. 4 (brief, but complete, legislative history), or when it deliberately added the unmodified term "forest preserve" to the enumeration of uses to be protected from adult entertainment facilities, *see* Joint Exh. 5 (same). Neither the legislature nor the Defendants have relied upon or produced any studies or other reports indicating that the flora and fauna found in preserved natural habitats suffer from the

blight or crime which might be engendered by a nearby adult entertainment facility. *See*, *e.g.*, Joint Exh. 14 at 316, ln 17 through 317, ln 12. Without some such factual basis suggesting the need to protect forest preserves in their entirety, the government cannot justify its regulation under the applicable constitutional test. *Cf*. *Hallie* at 829-31 ("We would expect a [government] defending a more substantial set of regulations [than a 2:00 to 8:00 a.m. closing requirement] to create a more substantial record in support of summary judgment"). Under the challenged statute, then, at least 90 per cent of the land in forest preserves imposes (because of the 1000-foot separation requirement) a burden on expression which does not serve an established governmental goal of combating the secondary effects of adult entertainment facilities. That is a "substantial portion," *cf*. *Ward* at 799, and the statute's provision concerning forest preserves in invalid on its face.[3]

The statute's unmodified "forest preserve" language fares no better when challenged as applied in this case. The only portion of Pratt's Wayne Woods Forest Preserve lying within 1000 feet of any portion of Palmetto's property is the Fern Marsh South area, Joint Exh. 1 ¶¶ 29, 31, which the District itself has categorized as a "nature conservancy area," *Id*. ¶¶ 23, 29, as opposed to "active use . . ." or "passive use open land" or even to an "accessible nature conservancy area," *Id*. ¶ 23. As such, Fern Marsh South is altogether unsuitable for recreational uses. *Id*. ¶ 32 (formal recreational use "not allowed under District policy"). It will not contain any part of the multi-purpose trail system established in other areas of the Forest Preserve. *Id*. ¶ 27. Any trail established within Fern Marsh South will be "a narrow footpath for research or educational purposes . . .." *Id*. ¶ 30. There is no developed public access to Fern Marsh at all from the general direction of Palmetto's property. *Id*. ¶ 31. Fern Marsh South preserves "key natural remnants of the mid-western landscape." *Id*. ¶ 29. This is an important area to be sure, but it is nothing like the traditional municipal park which might well support a governmental interest in keeping adult entertainment facilities away. Even Fern Marsh South is screened from Palmetto's property by above-grade railroad tracks and a busy highway overpass. *Id*. ¶ 31. Beyond this, Palmetto's property is miles from any active use recreation area within Pratt's Wayne Woods

[3] The result is no different if, instead of focusing on the narrow tailoring requirement of the time, place, and manner test, the challenged statute is subjected to standard overbreadth scrutiny. Given the nine-to-one ratio of nonrecreational to potentially recreational land, the overbreadth of the unmodified term "forest preserve" is "not only . . . real, but substantial as well, judged in relation to the [term's] plainly legitimate sweep." *Broadrick v. State of Oklahoma*, 413 U.S. 601, 615 (1973).

Forest Preserve. *Id*. ¶ 33. While Pratt's Wayne Woods offers the public a wide variety of active and passive recreational activities, *Id*. ¶¶ 26-28, , none take place within 1000 feet of Palmetto's property. Given its geographical relationship to Pratt's Wayne Woods Forest Preserve, Palmetto and its property pose no realistic danger of generating untoward secondary effect in the Forest Preserve: all park-like areas are too far way and no nearby land will suffer any blighting or crime which might be presumed to result, in a more developed area, from an adult entertainment facility's operation.

For all of the foregoing reasons, the challenged statute's inclusion of the unmodified term "forest preserve" is unconstitutional on its face and as applied. The Defendants cannot enforce it against Palmetto.

II. DuPage County's Adult Business Use Zoning Regulations Are Unconstitutional for the Foregoing Reasons and Because They Fail to Leave Reasonable Alternate Avenues Available For the Expression Disseminated by Adult Business Uses.

Like the challenged Illinois statute, the County defines "adult business use[s]" on the basis of the content of the expression which they disseminate. Joint Exh. 1 ¶ 3; Joint Exh. 7 § 37-3.2. And like the challenged statue, the County's adult business use zoning provisions suffer from all of the defects addressed at 2-5, *supra*. Indeed, those provisions were deliberately amended in late 1998 specifically to include the statutory "forest preserve" language challenged here. Joint Exh. 1 ¶ 7. In addition, that amendment extended the separation distance which the County requires between adult business uses and certain other enumerated uses from 500 to 1000 feet. *Ibid*.; Joint Exh. 6. These changes were implemented solely because the State of Illinois had promulgated the challenged statute, Joint Exh. 1 ¶ 7, but they upset the careful balance which the County had initially struck between regulation of adult business uses and the right of consenting adults to disseminate and receive sexually oriented expression, *cf*. *Id*. ¶¶ 4, 5; Joint Exh. 2. Although the County had earlier relied upon studies of the secondary effects engendered by adult business uses, Joint Exh. 1 ¶ 5; Joint Exh. 3 – studies which arguably supported the original 500-foot separation requirements from a more limited set of enumerated uses – it adopted these amendments without conducting or considering any new studies at all. *Cf*. Joint Exh. 1 ¶ 7. Nor did the Illinois legislature consider any studies in promulgating the statute which prompted the County's amendments. Joint Exh. 4, 5 (complete legislative history referencing no studies justifying statewide 1000-foot separation requirement from expanded set of protected

uses). As a result of the County's own deliberate action in late 1998, its adult business use zoning provisions now suffer from the same defects, addressed at 2-5, *supra*, as the challenged statute. For that reason alone, the County's adult use zoning provisions are unconstitutional and the County cannot enforce them against Palmetto.

Matters become still worse for the County's adult business use zoning provisions when their overall effect is considered in light of the zoning geography of unincorporated DuPage County. *Cf. North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996) (proper focus is on the effect of ordinance on overall dissemination and consumption of sexually oriented expression within the jurisdiction). Those provisions purport to restrict all adult business uses to the industrial zones of the unincorporated County. Joint Exh. 1 ¶ 8. Even there, adult business uses must satisfy all of the prescribed separation requirements, as measured between the closest lot lines. *Id*. ¶¶ 8, 35. But because of the proximity of the industrial zones to uses from which adult business uses must separate, there is no available lot upon which an adult business use may locate. *Id*. ¶ 36. Indeed, no such lot can be created by the division and/or combination of existing lots, at least not without the construction of new public streets, *Id*. ¶ 37, and the record reflects no plan by the County to build new streets to accommodate even one adult business use, let alone the 9 such uses which the County has or is attempting to force to relocate, *Id*. ¶¶ 42-44.

Thus the County does not now provide enough legally available sites to house the adult business uses which currently operate, or which recently have operated, in unincorporated DuPage County to serve the demand for the expression which they disseminate. Yet this is precisely what the County *must* do if it wants to regulate adult business uses by imposing upon them differentially restrictive zoning requirements in order to combat the "secondary effects" which their expression might generate. *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996). In the context of zoning restrictions such as those at issue here, this last element of the time, place and manner test, *see* at 3 *supra*, requires that suitable relocation sites be left available for those adult business uses which are operating in violation of the requirements in question. *See generally Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532-33 (9th Cir. 1993); *Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995). The fact that the County lacks any existing or potential relocation sites within its zoning jurisdiction, *Id*. ¶¶ 36-37, means that County simply cannot succeed in justifying the challenged

zoning restrictions as mere time, place, and manner regulations of the expression which adult business uses disseminate. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)(zoning ordinance may not effectively ban all live entertainment, or all sexually oriented entertainment from community). Under these circumstances the County is "effectively denying [Palmetto] a reasonable opportunity to open and operate" within it zoning jurisdiction. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986). For this reason, too, the County's adult business use zoning provisions are facially unconstitutional. The County cannot enforce them against Palmetto.

III. The County's Requirement that Adult Business Uses Obtain Conditional Zoning Use Approval Prior to Disseminating Their Presumptively Protected Expression Imposes an Unconstitutional Prior Restraint Upon that Expression Because the County's Conditional Use Process Vests Too Much Substantive and Procedural Discretion in County Officials.

The County's zoning ordinance provides that no adult business use may locate in the County's I-1, Light Industrial Districts, unless it first obtains conditional use approval from the County Board. Joint Exh. 7 § 37-10.1-2(v). This means that each individual adult business use seeking to locate in any I-1 zoning district must apply to the County in advance for permission to do so. *See generally Id*. §§ 37-14.13-1 through 37- 14.13-11. Since adult business uses are defined according to the amount and character of the presumptively protected expression which they disseminate, *cf*. *Id*. § 37-3.2, it is well settled that such a conditional use requirement imposes a prior restraint upon that expression, *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980). It is also quite clear that the expression disseminated by adult business uses is fully protected by the stringent constitutional standards which apply to prior restraints on expression. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-30, 238 (1990) (invalidating adult use licensing ordinance because it failed to limit the amount of time City had to process license application).[4]

[4] Even where a prior restraint is imposed solely in order to administer a time, place, and manner regulation of expression, as with a parade permit requirement, *e.g. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969), or, arguably, a special or conditional zoning approval requirement for adult uses, *cf. City of Renton v. Playtime Theatre, Inc.*, 475 U.S. 41 (1986) (absolute locational restrictions on adult uses impose time, place, and manner regulation on expression), the prior approval requirement is properly subject to prior restraint review. In such a case, challenged legislation must pass muster under *both* prior restraint scrutiny *and* time, place, and manner scrutiny. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

While not necessarily unconstitutional *per se*, any prior restraint on expression comes to the courts "bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), *quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). In order to pass constitutional muster, legislation imposing a prior restraint on expression must closely constrain both the substantive and the procedural discretion left in the hands of the officials who administer it. *See generally City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-62, 769-73 (1988). Thus whenever prior permission is required for expression, the statute or ordinance requiring it must contain "narrow, objective, and definite standards" to guide the evaluation of any application for that permission. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). Similarly, strict procedural standards must require the prompt administrative processing of any request for such permission, and they must also provide for prompt judicial review of any denial of permission to speak. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-30, 238 (1990); *Freedman v. State of Maryland*, 380 U.S. 51, 58-60 (1965). Even when applied to a zoning ordinance regulating adult uses as special or conditional uses, the constitutional prior restraint scrutiny remains very strict indeed. *See Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 504 (7th Cir. 1980)("We doubt that any special use scheme for regulation of adult movie theatres would be constitutionally valid because of the prior restraint involved").

The parties have stipulated, with detailed citations to the zoning ordinance, to the procedures which the County has adopted for assessing applications for conditional zoning use approval by a prospective adult business use. Joint Exh. 1 ¶ 10. That conditional use scheme leaves the County's officials with too much procedural discretion to pass constitutional muster as a prior restraint. Indeed, the County's requirement that adult business obtain conditional use approval prior to disseminating their expression suffers from exactly the same procedural defect which was fatal to the adult use licensing scheme at issue in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In that case, the City defined "sexually oriented business" in a manner identical in relevant respects to the way in which the County has defined "adult business uses" here. There, too, the government subjected adult uses to a prior permission requirement: Dallas required that sexually oriented businesses obtain a license before they could disseminate their expression. *Id*. at 221, 223. While the licensing ordinance there at issue attempted to establish a

very short time period for the processing of an adult use application, it failed to limit the time for certain required inspections.

> Although the ordinance states that "the chief of police shall approve the issuance of a license by the assessor and collector of taxes within 30 days after receipt of the application," the license may not issue if the "premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." § 41A-5(a)(6). Moreover, the ordinance does not set a time limit within which the inspections must occur. . . . Thus, the city's regulatory scheme allows indefinite postponement of the issuance of a license.

Id. at 227. That defect alone sufficed to invalidate the city's adult use licensing ordinance. *Id*. at 229, 238.

Yet the County's procedures governing the administrative processing of conditional use applications for adult business uses suffer from *precisely* the same defect: they allow indefinite postponement of a decision on a conditional use application for a prospective adult business use. Just as certain municipal inspections were required but unlimited as to time in *FW/PBS*, the County here expressly requires review of a conditional use application by the County Development Committee, Joint Exh. 7 § 37-14.13-7, but it has altogether failed to place any limit whatsoever on the length of time that review may take. Since the required review by the County Development Committee is in the direct administrative processing line, it is even more clear here than it was in *FW/PBS* that any delay before the County Development Committee will delay final action on an application for conditional use approval while the prospective adult use waits to begin disseminating its expression. Just as the city did in *FW/PBS*, the County here has made *some* effort to constrain some of the administrative time periods involved, *cf*. Joint Exh. 7 §§ 37-14.13-7, 37-14.13-9, but it has done an incomplete job in that respect, and it has left at least one necessary time period altogether unconstrained. Just as that oversight was fatal to the entire licensing scheme in *FW/PBS*, it is constitutionally fatal here. The unconstrained time period for review by the County Development Committee renders the County's requirement that prospective adult business uses unconstitutional on its face.

Even apart from the wholly unconstrained time period for the required County Development Committee review of a conditional use application concerning a prospective adult use, the challenged ordinance provisions simply allow the County's administrative agencies too much

time to process such applications. Again, according to the County's zoning ordinance, a prospective adult business use must await final conditional use approval before commencing its expression in a light industrial zone. Joint Exh. 7 § 37-10.1-2. Even assuming that the County Development Committee took no time at all to review a conditional use application[5] and passed the application along to the full County Board on the same day the Zoning Board of Appeals reported it out, the challenged provisions would *still* force a prospective adult business use to wait for up to 270 days before it could begin disseminating its expression. This is a far cry from the "specified, brief period" within which an administrative apparatus must render a final decision on an application for approval necessary for expression. *Freedman v. State of Maryland*, 380 U.S. 51, 59 (1965). Indeed, in the context of licensing or zoning of adult uses, it is three times longer than any period which has been upheld under a prior restraint challenge, *see Wolff v. City of Monticello*, 803 F. Supp. 1568, 1568 (D. Minn. 1992)(holding 90-day period not unconstitutional *per se*); *see also Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1008, 1012 (4th Cir. 1995)(44-day period sustained in itself but invalidated because of absence of prompt judicial review); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir. 1994)(60-day prior upheld), and it is nearly twice as long as a special use processing period which has been invalidated as too long! *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 998, 996-98 (4th Cir. 1995)(invalidating 150-day time limit on special use consideration involving prospective adult use).

The maximum time period which the County has imposed in this case suffers from the same defects as the unconstitutional period invalidated in *Prince George's County*. The prescribed administrative process is not composed of a series of time periods each reasonably short and necessarily serial by their nature.[6] Rather, it is composed of only two very large blocks of time. First, the Zoning Board of Appeals has fully 180 days – nearly half a year – to evaluate a conditional use application concerning a prospective adult business use. Joint Exh. 7 § 37-

[5] This assumption is itself unrealistic because it ignores the zoning ordinance provision expressly requiring the Committee's "review and recommendation." Joint Exh. 7 § 37-14.13-7.

[6] For instance, an administrative evaluation period which is expressly composed of an inspection period, an investigation period, a specified minimum public notice period, a discovery period, a hearing period, an initial decision period, an administrative appeal period, and a time for initiating judicial review – each on the order of a few days or weeks – might, by making clear the need for the total time expended, pass constitutional muster even where a single block of time of equal aggregate length would fail to justify its length.

14.13-7. To be sure, the Board must hold a public hearing on each such application, and some minimum notice is surely appropriate if that hearing is to be meaningful. Yet the applicable ordinance provisions impose no minimum notice period at all. Instead, they require that, in all cases, the hearing must commence within 60 days of the receipt of an application for a conditional use. *Id*. § 37-14.15(a). The ordinance provides not a clue about what is supposed to justify the remaining 120 days of the specified period. The second constrained time period – this one 90 days – is for final action by the County Board. *Id*. § 37-14.13-9. Thus the County Board might take nearly one quarter of a year to take final action on an application even after the Zoning Board of Appeals has taken very nearly half a year reviewing it. Again, nothing justifies this lengthy period for final action, especially in light of the prior review required by the Zoning Board of Appeals and the County Development Committee. If that prior administrative review has any purpose at all – other than to impose delay for the sake of delay – it should be to shorten the time required for final County Board action. Nothing appearing on the face of the ordinance justifies these very lengthy periods for administrative processing. Indeed, there is no apparent reason why the County needs so much longer than other local governments to evaluate prospective adult uses. *Cf. Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1008, 1012 (4th Cir. 1995)(44 days); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir. 1994)(60 days); *Wolff v. City of Monticello*, 803 F. Supp. 1568, 1568 (D. Minn. 1992)(90 days). The County has recognized, at least implicitly, that it may be required to give a certain priority to conditional use applications involving expression, Joint Exh. 7 § 37-14.13-7, but it has utterly failed to come to grips with the "specified, brief period" required by the First Amendment.

The 270-day administrative processing period is even more unreasonable because of what it does *not* encompass. For instance, it does not cover the time necessary for judicial review of any decision denying conditional use approval.[7] Even where an administrative agency which denies a license necessary for expression is not required to go to court to restrain the expression, *compare FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990), *with Freedman v. State of Maryland*, 380 U.S. 51, 59 (1965), the availability of prompt judicial review remains an important constitutional consideration, *FW/PBS* at 229-30 (indicating absence of prompt judicial

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[7] This is especially troubling in light of the fact that the County's ordinance provisions leave it entirely unclear whether the Zoning Board of Appeals may consider constitutional objections to the County's scheme for zoning adult business uses during the 180-day period provided for its review.

review as second independent reason why licensing scheme was unconstitutional). The absence here of any provision promoting prompt judicial review of conditional use denial – such as provisions requiring the prompt filing of the administrative record after a court proceeding is commenced or permitting an adult business use to commence its expression unless the reviewing court restrains it within a specified time thereafter – seriously exacerbates the constitutional problems engendered by the lengthy administrative evaluation periods. Indeed, since the Zoning Board of Appeals' findings of fact and recommendations, *cf*. Joint Exh. 7 § 37-14.13-4, have no effect at all apart from subsequent Development Committee and County Board action, *Id*. §§ 37-14.13-7 through 37-14.13-10, they do not "affect the legal rights, duties or privileges" of the applicant, *cf*. 735 ILCS 5/3-101 (1998), and therefore do not constitute a final administrative decision reviewable under the Illinois Administrative Review Law, as amended 735 ILCS 5/3-101 through 3-113 (1998).[8] Once the County Board has finally acted, an aggrieved conditional use applicant may file a declaratory judgment action, but not an action sounding in administrative review. *Yusef v. Village of Villa Park*, 120 Ill. App. 3d 533, 543-44, 458 N.E.2d 575, 583 (2nd Dist. 1983); *Smith v. County Board of Madison Co.*, 86 Ill. App. 3d 705, 715, 408 N.E.2d 452, 459 (5th Dist. 1980). The disappointed applicant is thus entirely deprived of any expedited judicial review resulting from a direct 'appellate' evaluation of an established administrative record. The applicant is essentially forced to proceed in court *de novo* and reintroduce favorable evidence and reconfront unfavorable evidence[9] – all without any express time constraints at all. *Cf. Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980)(invalidating statute which permitted indefinite restraint on expression prior to final judicial evaluation of that expression).

Whether or not the sexually oriented expression disseminated by adult business uses is as timely as the news of the day, *cf. New York Times Co. v. United States*, 403 U.S. 713 (1971), it is plainly protected against unreasonable delays resulting from prior restraints, *FW/PBS, Inc. v.*

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[8] Where a zoning board of appeals holds a hearing, finds facts, and transmits a recommendation to a local legislative body, its decision is not subject to immediate judicial review. *Constantine v. Village of Glen Ellyn*, 217 Ill. App. 3d 4, 13-15, 575 N.E.2d 1363, 1370-71 (2nd Dist. 1991); *Traders Development Corp. v. Zoning Board of Appeals*, 20 Ill. App. 2d 383, 388-91, 156 N.E.2d 274, 276-78 (2nd Dist. 1959).

[9] In these respects, the judicial review available here is very different and less effectual than the essentially direct appellate review considered in *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993)(plurality opinion); *Id*. 1340-41 (Cummings, J., joined by Bauer and Fairchild, JJ., dissenting).

City of Dallas, 493 U.S. 215 (1990), and 270 days, plus the time necessary for judicial review, is plainly and simply much too long for even that expression it to wait in silence, *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 998, 996-98 (4th Cir. 1995).

Furthermore, the County's ordinance unconstitutionally fails to provide that the County or its agencies must bear the burden of justifying any denial of conditional use approval sought by a prospective adult business use before any reviewing court.[10] In *FW/PBS*, the Court relieved the city of "the burden of proof once in court" – as distinct from "the burden of going to court" – only because it had earlier concluded that the city was not permitted to evaluate the content or effect of the adult uses' expression in any way. Rather, the city was permitted only to "review[] the qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30 (1990). That determination turned solely upon objective, nonexpression-related considerations such as past felony convictions. Here in contrast, the County's administrative agencies must make determinations concerning the permissible locations for uses which are defined by the content of the expression which they disseminate and those determinations will be made in light of the expected effects of that expression. Just as the government bears the burden of justifying those special locational decisions when it makes them generally and unconditionally, *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441 (7th Cir. 1996); *see also*, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)(citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) as case where government had burden of justifying regulation), so must its agencies also bear that burden when effectively making locational decisions on a case-by-case basis.

Finally, the County has also failed to provide the "narrow, objective, and definite standards" required to guide the Zoning Board of Appeals, the County Development Committee, and the County Board in processing a conditional use application concerning a prospective adult business use. *Cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). Although the County has apparently recognized the need for substantive standards specifically tailored to the evaluation of prospective adult business uses, Joint Exh. 7 § 37-14.13-5(b), it has fallen short of the constitutional mark in attempting to provide them. In particular, most of the applicable standards fail to specify in any way the quantum of the proscribed effect which will be sufficient

[10] This is not to say that either the County or its administrative agencies must bear the burden of initiating judicial review. *Cf. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990).

to warrant denial of a conditional use application concerning a prospective adult business use. *Id*. § 37-14.13-5(b)(1) through (6). In addition, at least one of the standards appears to single out adult business uses to bear the burden of reducing secondary neighborhood effects produced in equal or greater measure by other uses, such as taverns. *Id*. § 37-14.13-5(b)(7). Furthermore, none of the enumerated standards specify who bears the burden of establishing their presence or absence and by what quantum of proof. Indeed, there is no suggestion whatsoever concerning how the prospective adult business use, any objectors, and the County's administrative agencies might accurately predict the effects, secondary or otherwise, of the expression to be disseminated by an adult business use which has not yet disseminated any expression at all. Furthermore, closely related to this last point, the applicable standards fail to specify the extent to which they differ from the general considerations which led the County Board to adopt the differentially restrictive locational requirements governing adult business uses in the first place. *Cf*. Joint Exh. 2. If the applicable standards are no different than those general considerations, then the County Board is unlikely *ever* to approve an adult business use in an I-1 zoning district because it has already accepted those considerations in adopting the adult business use zoning regulations. If, on the other hand, the conditional use standards are supposed to differ from the general considerations in some respect, then the ordinance leaves that difference altogether unclear in a context requiring considerable precision of regulation. *See*, *e.g.*, *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1365 (C.D. Cal. 1995); *Bukaka, Inc. v. County of Benton*, 852 F. Supp. 807, 812 (D. Minn. 1993); *Dease v. City of Anaheim*, 826 F. Supp. 336 (C.D. Cal. 1993).

For all of these reasons, the County's imposition of a conditional use requirement upon prospective adult business uses seeking to locate in an I-1 zoning district imposes a presumptively unconstitutional prior restraint, *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 998 (4th Cir. 1995), which the County has failed to rescue by establishing that the constitutionally required substantive and procedural standards actually fetter its agencies' discretion. *See*, *e.g.*, *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980).

Conclusion

For all of the foregoing reasons, this Court should grant Palmetto's motion for summary judgment and, as specified in that motion, declare the challenged provisions unconstitutional and restrain the Defendants from enforcing them against Palmetto.

Respectfully submitted,
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