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' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

On July 11, 2000, the Defendants County of DuPage and Joseph E. Birkett (collectively "the County"), filed their brief and materials in opposition to the motion for summary judgment and supporting materials, *cf*. Local Rule 56.1(a), previously filed by the Plaintiffs, Palmetto Properties, Inc. and Gregory A. Schirmer (collectively "Palmetto"). Palmetto now submits the following reply memorandum of law in support of its motion for summary judgment. In what follows, "Pl Br." refers to Palmetto's memorandum of law in support of its motion for summary judgment, while "Def. Resp." refers to the County's opposing memorandum. "Jnt. Exh. _" once again refers to the exhibits appearing in the parties' joint submission under this Court's Local Rule 56.1(a)(1). Where the County's opposing memorandum has cited the June 20, 2000 memorandum which it filed in support of its own separate motion for summary judgment, "Def. Br., Cross-Mtn," Palmetto avoids undue repetition here by incorporating the responsive portions of the memorandum of law which it filed in opposition to the County's motion for summary judgment, "Pl. Resp., Cross-Mtn").

Argument

I. The Defendants Have Altogether Failed to Justify the Challenged Requirement That Adult Entertainment Facilities Separate by at Least 1000 Feet from All Portions of a Forest Preserve.

The County expressly admits that, under the First Amendment, it bears the burden of justifying the challenged regulations here, (Def. Resp. at 2-3), as the applicable law plainly requires. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), *citing City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1552 (7th Cir. 1986), *aff'd* 479 U.S. 1048 (1987). It then proceeds to ignore the settled constitutional requirements concerning that burden. It completely ignores, for instance, the Seventh Circuit's recent decision in *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), which Palmetto had expressly cited, (Pl. Br. at 3, 4), for the proposition that, at least by the time of summary judgment, a government defending challenged adult business use regulations must make a factual record supported by some reasonably relevant objective studies which show that the regulations actually serve a proper governmental purpose. *Id*. at 830-31. The County does not dispute Palmetto's observation that "[n]either 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." Pl. Br. at 3-4. Instead, the County forsakes all effort at this sort of proper justification and substitutes instead its own unsupported speculation and conjecture.

The cases which the County cites do not even remotely establish the sufficiency of its effort. The County is simply wrong, for instance, in suggesting that challenged adult business use regulations can be supported by "common sense inferences . . . draw[n] upon personal experiences, without the aid of a study or report." (Def. Resp. at 4). What *Thames Enterprises, Inc. City of St. Louis*, 851 F.2d 199 (7th Cir. 1988), actually *says* is that "[p]ersonal observations and judgments of a legislator, *together* with the results of *research* of other sources, can have substantial weight." *Id*. at 202. (emphasis added). While the two might even be jointly sufficient in some cases, the County has offered neither here. None of the drafters or other legislators – State or County – offered any testimony at all in this case, and the County's own expert admits

that no "research" has identified any secondary effects of adult business uses upon nature preserve areas, Jnt. Exh. 14 at 316, ln 17 through 317, ln 12. The other cases which the County "specifically urge[s]" this Court to follow offer it no more support. *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992), and *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997), stand for the proposition that legislators need not review reports or studies at the time of enactment *so long as* their legislation can be justified by such materials during litigation over a challenge. *See*, *e.g.*, *Keyport* at 172-73 (government bears burden, "when challenged," of producing "evidence of incidental adverse social effects" justifying its adult business use regulations).

The County could perhaps have established this much by citing some authority which is actually *controlling* here, but the County would run into one big problem in citing *DiMa*: that case not only holds that legislators need not actually see justifying materials at the time they promulgate a challenged regulation, it also goes on to expressly establish that their lawyers must produce such a justification by the time of summary judgment and that the strength of the necessary justification depends upon the size of the burden which the challenged regulation imposes. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999)("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"). In this case, Palmetto challenges, *inter alia*, a 1000-foot separation requirement which applies to land 90 per cent of which is dedicated by ordinance to passive, preservation use, Jnt. Exh. 1 ¶ 22, and which, together with other applicable zoning and separation requirements, legally eliminates *all* of the land within County's zoning jurisdiction from use by adult business uses, Jnt. Exh 1 ¶ 35-37. On this record, the County tries to defend this separation requirement without ever having produced, even for this Court, any study at all showing that such areas would suffer from the secondary effects of adult business uses. *DiMa* simply does not permit that. Palmetto does not complain that the State and County legislators simply overlooked some materials which might have supported the challenged requirement or even that the defense attorneys have overlooked such materials in the course of this litigation. Palmetto's complaint is that no such studies exist. *Cf.* Jnt. Exh. 14 at 316, ln 17 through 317, ln 12. And, Palmetto submits, no such studies exist because nature preserve areas are not, in fact, subject to secondary blighting and crime effects.

The County speculates at some length, (Def. Resp. at 3-4, 5, 6), about crime and blight in an area like Fern Marsh South, *cf*. Jnt Exh. 1 ¶¶ 28-33, but it offers nothing but its attorneys' own imagination in support of its conjecture. It claims, for instance, that sex crimes are more likely to take place in secluded areas than in more public places, (Def. Resp. at 3),[1] but since this record does not establish that anyone, except perhaps an occasional environmental researcher, *cf*. Jnt. Exh. 1 ¶ 23, 29-30, ever actually *visits* Fern Marsh South, the County is hard pressed to explain how criminal predators will find any victims there. Similarly, since the present record shows that public access to Fern Meadow is quite difficult, Jnt. Exh. 1 ¶ 31, the County cannot reasonably explain how such predators might drag their victims from more public areas like the adjacent heavily traveled highway overpass into Fern Marsh South. This same difficulty of access even makes crimes between willing persons, such as the prostitution which the County posits, (Def. Resp. at 4, 5), highly unlikely in Fern Marsh South.[2] Indeed, while the County willingly offers information about prostitution arrests, (Def. Rule 56.1(b)(1) submission), for the wholly irrelevant purposes addressed at 8 n. 4 *infra*, it apparently has *nothing* similar to offer in support of its suggestion that prostitution might be a problem in preserved primordial wetlands, Jnt. Exh. 1 ¶ 29, colloquially called "swamps." The present record also establishes that the County's concerns about "a near-empty forest preserve," (Def. Resp. at 4) are fanciful at best. In the first place, sites like Fern Meadows South are *supposed* to remain "near-empty" – they are nature preserves, not playgrounds. Jnt. Exh. 1 ¶¶ 29, 32. Any active use areas in Pratt's Wayne Woods Forest Preserve are miles from the Palmetto Parcel, Jnt. Exh. 1 ¶¶ 26, 33, and one look at the aerial photograph of the forest preserve and the parcel, Jnt. Exh. 16, establishes how irrational it would be to judge the entire forest preserve by one corner of Fern Marsh South. Finally, the

[1] The same reasoning, of course, applies to alley ways in industrial zones, but the County leaves these altogether unprotected from the secondary crime menace which it imagines. This observation reveals a fundamental problem with the County's efforts: a government is not entitled to apply adult uses separation requirements to ensure against all imaginable sex crimes in a particular area, but only to guard against secondary effects reasonably established by studies from similar areas. *City of Renton v. Playtime Theatre, Inc.*, 475 U.S. 41, 51-52 (1986).

[2] The County's citation of the arieal photograph, Jnt. Exh. 16, in support of its suggestion that one merely needs to run across a busy multi-lane highway in order to enter Fern Marsh South, (Def. Resp. at 6-7), obscures the fact that this is an above-grade highway overpass, Jnt. Exh. 1 ¶ 3. A considerable climb would be required as well. And even if one were to go to the required trouble, the County never explains how the marsh is at all hospitable to the criminal activities which it fears. If the County has any evidence that prostitutes and their patrons enjoy engaging in their activities while getting their legs wet, it has certainly failed to offer it here.

County's suggestion that "merely a perception" associating crime with a location or activity, (Def. Resp. at 3), can justify a time, place, and manner regulation of expression has been expressly rejected by the Seventh Circuit. *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1252 n. 2 (7th Cir. 1985)("If the fears [of crime] are not justified, then they cannot independently support" hours restriction on residential solicitations). In each of the foregoing respects, the County can provide no objective basis at all for its "common sense." (Def. Resp. at 3). The County asserts that Palmetto's challenge is predicated upon a "whimsical assumption," (Def. Resp. at 3), but it offers nothing more than whim of its own. But since it bears the burden of justification here, *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999); *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996), its duty is to offer more.

Nor has the County established that the challenged separation requirement "on it face, mirrors a multitude of zoning restrictions that other courts routinely uphold . . .." (Def. Resp. 7-8). It doesn't. While the County claims that the challenged separation requirement is not "unusual," (Def. Resp. at 4), it has cited no case upholding a separation requirement from forest preserve areas used to preserve native flora and fauna, and Palmetto is aware of no such case. No doubt the County would rather avoid the specific issue in favor of the general, (Def. Resp. at 5), but it must show that the challenged separation requirement actually serves a proper governmental purpose. That *does* require addressing "whether the restriction is necessary to protect wilderness areas," (Def. Resp. at 5) – the very land at issue under the challenged separation requirement. Furthermore, the County must address this issue on a "substantial record in support of summary judgment." *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999). For this reason, the County's discussion of the "limitless combination of subtle distinctions" confronting public planners (Def. Resp. at 5-6), is legally groundless here. Both the County's zoning administrator and its planning expert were deposed in this case, yet the County can draw no record support from them or anyone else for its suggestions in this regard. It fails, for instance, even to imagine – let alone support – a reason why separation requirements cannot be modified to take account of intervening structures which provide substantial *de facto* barriers between nearby land uses. (*Cf*. Def. Resp. at 6). Nor can the County's somewhat contradictory suggestions that Fern Marsh South is at once too close and too far away to be effected by Palmetto's planned adult business use, (*compare* Def. Resp. at 5, *with Id*. *passim*), be properly resolved or

evaluated on the present record. Finally, although neither Palmetto nor this Court is under any obligation to advise the County on how it might repair the challenged separation requirement, the County's invitation to do so, (Def. Resp. at 5), is easy to satisfy in this case. Palmetto's challenge to "the inclusion of the *unmodified* term 'forest preserve' in the" enumerations of protected uses, (Pl. Br. at 3 (emphasis added)), readily suggests one simple answer: modify the term "forest preserve" by "active use area" or some equivalent term. The parties have stipulated that the District's land classification system is not subject to First Amendment challenge, Jnt. Exh. 1 ¶ 23, and any legislature bothering to study the situation could easily adopt it to more narrowly tailor the challenged separation requirement.

In any event, since the County has altogether failed to justify the challenged separation requirement on a substantial summary judgment record, that regulation fails to pass constitutional muster whether it is evaluated under narrow-tailoring requirements, under the overbreadth doctrine, or simply as applied in this case. (*See* Pl. Br. at 2-5).

II. The County Has Failed to Establish That Its Adult Business Use Zoning Regulations Are Narrowly Tailored and That They Leave Reasonable Alternate Avenues Available For the Expression Disseminated by Adult Business Uses.

The County does not dispute that, as a matter of law, the overall effect of its current adult business use zoning requirements is that no land within the County's zoning jurisdiction is actually or even potentially available for location by adult business uses. *See* Jnt. Exh. 1 ¶¶ 35-37. For this reason, Palmetto challenges those provisions as failing to leave open ample alternate avenues for the expression which adult business uses disseminate, (Pl. Br. at 5-7), as required by the applicable constitutional test for legislation regulating the time, place, and manner of expression. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444 (7th Cir. 1996). Against this challenge, the County attempts to defend its adult business use zoning provisions on several grounds. (Def. Resp. at 8-13). Each is seriously flawed.

To begin with, the County repeatedly but erroneously assumes that its December 1998 adult business use zoning amendment, *see* Jnt. Exh. 6, did nothing more than adopt, at the County level, what it repeatedly refers to as a "statewide standard," (*e.g.* Def. Resp. at 6, 9, 12), which had been recently established for adult entertainment facilities by a new Illinois statute: the same statute which Palmetto challenges here. Indeed, the December 1998 amendments

incorporated the provisions of the new state statute into the County's zoning ordinance, and the parties have stipulated that the County's sole and actual purpose in doing so was to avoid confusion between the statutory locational standards for adult entertainment facilities and the County's zoning standards for adult business uses. Jnt. Exh. 1 ¶ 7. Palmetto does not challenge the County's interest in avoiding such confusion, although it has observed, (Pl. Br. at 5-6), without contrary response from the County, that regardless of its purpose in incorporating the state statutory standards into its ordinance, its ordinance provisions were rendered unconstitutional by that incorporation to the extent that the incorporated standard is unconstitutional. Thus even if the County were correct in assuming that the challenged ordinance provisions are no more restrictive that the challenged statute, the County could claim no immunity from Palmetto's constitutional challenge. When it voluntarily incorporated the statutory standards without studying or evaluating their constitutionality, it undertook the risk that its was incorporating unconstitutional standards, as Palmetto has indeed demonstrated at 2-6 *supra*.

Beyond this, the County's assumption that its current adult business use zoning provisions do nothing more than "mirror" the state statutory standard in its own local legislation, (Def. Resp. at 9), is very seriously flawed. The December 1998 adult business use zoning amendments did not repeal the preexisting adult business use zoning provisions, *see* Jnt. Exh. 2, and entirely replace them with the state statutory provisions. Rather, that amendment expressly *added* the state statutory restrictions to the preexisting ordinance restrictions.[3] Jnt. Exh. 6. As a result, the County's current adult business use locational requirements are stricter than the statewide statutory requirements in at least three respects. First, the County's provisions restrict adult business uses to the County's industrial zones thus depriving them of all access to the business zoning districts left entirely open by the statute. Jnt. Exh. 7 §§ 37-10.1-2(v); 37-10.2-1(c)(29). Second, the County requires adult business uses to separate by 1000 feet from more uses than are enumerated in the state statute, *compare* Jnt. Exh. 7 § 37-4.16-2, *with* Jnt Exh. 5 at 1, thus legally disqualifying land for use by adult business uses which the state statute leaves available to adult entertainment facilities. Finally, the County's ordinance provisions apply to more uses than the

[3] This is not to say that the 1000-foot statutory separation requirements were added to the preexisting 500-foot separation requirements to total 1500 feet. Where statutory and preexisting ordinance requirements overlapped, the County merely adopted the more restrictive version. Where the statute or the preexisting ordinance contained a requirement not contained in the other, however, it was effectively added to all of the other overlapping and non-overlapping requirements.

state statute, *compare* Jnt. Exh. 7 § 37-3.2, *with* Jnt Exh. 5 at 1, forcing adult nightclubs, such as the one which Palmetto plans to operate, to compete with more uses for scarce legally available sites.[4] In each of these respects, the County has done considerably more than merely adopt some statewide standard: it has effectively added its own standards to those imposed by the state. Moreover, the instant summary judgment record does not support the County's assumption, (Def. Resp. at 12), that the state statute alone legally eliminates all of the land currently within its zoning jurisdiction from use by Palmetto or other adult businesses. It does establish that the total effect of the *County's* current adult use provisions does this, Jnt. Exh 1 ¶¶ 35-37, but this is far different than saying, (Def. Resp. at 11) that, merely in light of its loss of industrially zoned land to annexation, the state statute itself deprived the County of the ability to discharge the obligations which the First Amendment imposes when the County undertakes to zone specially adult business uses as such. The County has simply failed to bear its the burden of factually supporting its assumption in this regard.

Palmetto's facial challenge to the County's adult business use zoning provisions reaches, of course, *all* of the applicable County restrictions, including those which the County imposes over and above those contained in the challenged statute. It is the totality of the County's restrictions which deprives Palmetto and other prospective adult business uses of any opportunity to locate in unincorporated DuPage County. Jnt. Exh. 1 ¶¶ 35-37. The fact that the challenged County provisions are stricter than the state statutory provisions poses the first major problem for the County's suggestion, (Def. Resp. at 12), that this Court must evaluate an effectively statewide zoning scheme. As the instant record shows, the County has done considerably more than merely mirror an otherwise applicable statewide standard. So may other local governments. For

[4] The County is wrong to suggest as it does, (Def. Resp. at 12), that Palmetto must argue here that what the County now identifies as massage establishments disseminate expression. Nothing in the County's new factual submissions, (Def. Rule 56.1(b)(1) submission), forecloses the distinct possibility that some of the named establishments disseminate adult expression *in addition* to offering massages, but that is of no particular concern to Palmetto. What is important for present purposes is that the *County* has chosen to lump massage establishment together with adult bookstores and adult entertainment cabarets, forcing each to compete for scarce sites. Indeed, if the County were correct in suggesting that it has categorized entirely non-expressive uses with expressive ones, it would seriously complicate, rather than relieve, the County's burden of justification. Under these circumstances, even if the County had left a few sites legally available to adult business uses, it would have to show that it had protected the *expressive* adult uses against being effectively shut out by the non-expressive ones. The First Amendment is concerned with expression, of course, and the County cannot bury its zoning obligations in this area by allowing non-expressive uses to squeeze out all adult expression in the competition for sites which its own ordinances have rendered extremely scarce.

this reason, it would not suffice to establish that the Illinois statute leaves plenty of available sites legally open to adult uses.[5] Local governments could easily close them just as the County has done here. This is plainly not what the United States Supreme Court contemplated when it suggested that the scope of an overresrictiveness analysis should be identical to the scope of the relevant zoning authority. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 75-77 (1981); *see also Boss Capital, Inc. v. City of Castleberry*, 187 F.2d 1251, 1254 (11th Cir. 1999)(recognizing *Schad* contemplated county-wide analysis under certain circumstance but refusing, on the record before it, to engage in broader inquiry); *Phillips v. Borough of Keyport*, 107 F.3d 164, 175-76 n. 4 (3rd Cir. 1997)(recognizing that *Schad* contemplated county-analysis under county-wide zoning scheme). The Court was obviously addressing a possible zoning scheme which could effectively guarantee that sites would actually remain open to adult uses. *See Schad* at 76 (rejecting county-wide analysis because "[t]here is no county-wide zoning in Camden County, and Mt. Ephraim *is free to impose its own zoning restrictions* within constitutional limits" (emphasis added)). Otherwise, states, counties, and municipalities could trap prospective adult use in a multi-layered shell game, with the state content to leave some land available – as far as it is concerned – while each unit of local government competes to make sure that that land is 'not in my back yard' and none shoulders responsibility for the inevitably exclusionary overall effect. Thus, the first problem with the County's suggestion that it can rely on some regional distribution of sites – within incorporated municipalities and/or in other counties – is that the state has not, in fact, established a genuine state-wide zoning scheme for adult uses, it has merely established a minimally restrictive floor which, as in *Schad*, local governments are free to raise without any state imposed limit.

The next substantial problem with the County's suggestion arises from the other, independent reason why the *Schad* Court rejected a county-wide analysis. That Court observed that "there is no evidence in the record to support the proposition that the kind of entertainment appellants wish to provide is available in *reasonably nearby* areas." *Schad* at 76 (emphasis added). If the County's repeated suggestion here of a state-wide analysis, (*e.g.* Def. Resp. at 9, 12), means that DuPage County and other metropolitan Chicago local governments should be relieved of their constitutional obligations simply because the state has left some land legally

[5] Even if this were relevant to justifying the challenged legislation, the County would bear the burden of presenting this analysis, not Palmetto or this Court, as the County suggests. (Def. Resp. at 9).

available to adult uses near East St. Louis or Cairo, then that suggestion will plainly fail any reasonable proximity requirement. Perhaps for this reason, the County also suggests a "regional" analysis, (Def. Resp. at 10, 11), although it does not base this rather artificial suggestion on any assertion that it has adopted any "regional" adult business use zoning policy. It also remains coy about just how large are "region" it contemplates, and it says nothing about how a court and litigants might define and manage a broad regional analysis. The County's "regional" suggestion is suggestion is, of course, merely another effort to remove the analysis from where it properly belongs: on the County's own zoning jurisdiction. Beyond this, the County's physical size and the one study which it actually conducted combine to limit the size of any regional approach to an area considerably smaller than the County itself. The County is roughly a square 18 miles on a side, Jnt. Exh. 1 ¶ 41, and the County's automobile license plate study, Jnt. Exh. 3, establishes that from between 5 and 10 miles away, an adult business use customer is only about two-thirds to one-third as likely to patronize a given adult business use. Jnt. Exh. 3 at 2.[6] This means that a resident living in an unincorporated area near the center of the County is *considerably* less than half as likely to patronize an adult business use three miles outside of the County, *cf*. Jnt Exh. 1 ¶ 41,[7] as one within much closer to home. Yet the United States Supreme Court has very recently held that a time, place, and manner regulation which effectively eliminates 30 to 50 per cent of an audience must be analyzed as a total ban, subject to strict scrutiny, including a least restrictive means analysis! *United States v. Playboy Entertainment Group*, 120 S.Ct. 1878, 1886 (2000). No Court has ever suggested that traditional adult use zoning regulations can survive strict scrutiny, and the outcome in *Schad* would have been different if they could. Thus in order to keep customer drop-off under 30 per cent, adult business use sites should be available approximately every five miles. For this reason, any proper "regional" analysis will cover regions which are much *smaller*, not larger, than DuPage County itself.

Palmetto has already addressed many of the remaining difficulties with the County's argument, (Pl. Br., Cross-Mtn at 7-12), and it adopts that discussion here in the interest of avoiding repetition. The County's continued reliance upon *David Vincent, Inc. v. Broward County*,

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[6] On August 15-16, thirty-nine per cent of the adult business uses' customers came from less than five miles away. Very nearly two-thirds came from less than ten miles away. Subtracting these percentages from the 100 per cent total gives the drop-off specified in the text.

[7] The nine miles from the center of the county to the nearest border plus the three additional miles outside the county equals eleven miles under a *best* case analysis.

200 F.3d 1325 (11th Cir. 2000), is misplaced for the reasons which Palmetto has already identified. (Pl. Br., Cross-Mtn at 9 n.8). Beyond that, since the County itself invites comparison to Broward County here, it is worth noting just how poorly, relative to Broward, DuPage County has done in maintaining legally available land for adult business uses in the face of the annexations which both counties have experienced. Broward County has been able to maintain its initial ratio of legally available land to its unincorporated area. *David Vincent* at 1336. Had DuPage County done so here, it would still have some 1,500 acres of land available to adult business uses, Jnt. Exh. 1 ¶ 5 (4.7 per cent of non-forest preserve unincorporated land legally available to adult business uses in 1986) ¶ 48 (89,796 unincorporated acres in 1986, and 66,102 now):[8] a far cry from its current zero, Jnt. Exh. 1 ¶¶ 35-37. In addition, the County has failed here, too, to meet its burden of establishing a "substantial record in support of summary judgment," *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999), in support of the factual claims underlying its defense. Beyond displaying a West Chicago zoning map, Jnt. Exh. 13, for instance, the County has altogether failed to specify the number, location, and nature of the sites which it claims exist in other jurisdictions. Here again, comparison with other governments defending their adult use zoning regulations shows just how poorly the County has done here. When the City of El Paso defended its adult use regulations, for instance, it was able to identify 50 specific legally available sites, enabling careful consideration of the actual suitability of its claimed alternate avenues for adult use expression. *Woodall v. City of El Paso*, 49 F.3d 1121, 1125 (5th Cir. 1995). The County offers nothing like that here. Similarly, while the County suggests that its "unincorporated area has diminished to the point where there is no longer any area within its territorial jurisdiction that is compatible with adult uses . . .," (Def. Resp. at 10), it offers no study to support this claim. The current zoning maps depicts many commercial zones remaining in the County's unincorporated areas, Jnt. Exh. 9, and the County has not even tried to show that each of these is actually incompatible with an adult business use. In fact, it has never actually studied adult use land compatibility issues in any way since 1986. At that time, it was able to strike a balance which left 4.7 per cent of its non-forest preserve land, including the Palmetto Parcel, available to adult business uses. Jnt. Exh. 1 ¶¶ 5, 16. Just as the United States Supreme Court repeatedly rejected Mt. Ephraim's unsupported factual claims,

[8] This figure assumes that over half of the County's unincorporated land was and is forest preserve – an assumption which is surely generous to the County in this context.

Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 72-73, 76 (1981), this Court should reject the County's suggestions here.

In the end the County complains that, unless it can jettison its own constitutional obligations to leave ample alternate avenues of expression open for adult business uses (by relying on other zoning jurisdictions to do a better job of fulfilling theirs'), it will have to "periodically rezone land or lessen its zoning requirements. . .." (Def. Resp. at 13). Yet there is nothing particularly unusual about that. Like other jurisdictions, the County periodically amends its zoning ordinance. *See*, *e.g.*, Jnt. Exh. 6 (amending adult business use and other zoning provisions). There is no reason why it cannot continue to pay attention to its adult use zoning provisions so long as it chooses to maintain them. The Constitution requires nothing more than that, in its on-going zoning and planning efforts, the County keep current with its obligation to afford adult business uses a reasonable opportunity to open and operate within its jurisdiction, *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986), at least while it has remaining commercial land, *cf*. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 72-73 (1981). Since the County admits that it has failed to do this, this Court should grant Palmetto summary judgment.

III. The County Has Failed to Overcome The Presumption That the Prior Restraint Imposed by Its Requirement that Adult Business Uses Obtain Conditional Zoning Use Approval Is Unconstitutional.

The County makes absolutely no effort to justify, under the constitutional standards applicable to prior restraints on expression, its requirement that adult business uses obtain prior conditional zoning use approval before disseminating their expression in any I-1 zoning district. (Def. Resp. at 13-16 (failing to cite any prior restraint case whatsoever)). Instead the County attempts to altogether avoid prior restrain analysis, unquestionably fatal here (Pl. Br. at 7-14), in several ways. None of them succeeds.

First, the County suggests that Palmetto's prior restraint challenge is "moot" because the challenged Illinois statute, 55 ILCS 5/5-1097.5 (1998), flatly prohibits Palmetto from locating its proposed adult entertainment facility within 1000 feet of any portion of Pratt's Wayne Woods Forest Preserve. (Def. Resp. at 13-14). This suggestion assumes, of course, that the challenged statute is constitutionally valid both on its face and as applied to Palmetto, for the County does not and cannot support any suggestion that an unconstitutional statute could "moot" Palmetto's prior restraint challenge in this fashion. Beyond this, the County's suggestion ignores the

substantial chilling effects and self-censorship which unfettered prior restraints impose upon potential speakers. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-62 (1988). Since, as noted at 8, *supra*, the County has *not* established that all of its I-1 zoning districts are rendered unavailable for adult business uses by the separation requirements derived from the challenged statute, there is no reason why this recognized chilling effect should not provide it usual support to an overbreadth challenge, which Palmetto would be entitled to assert even if the challenged statute were constitutional valid both on its face and as applied. *See Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-801 (1984)(discussing "third party standing" aspect of overbreadth doctrine); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

Second, the County once again, (*cf*. Def Br., Cross-Mtn at 6-7, 21-22), suggests that, when Palmetto is finally allowed to present its nude or partially nude performance dancing, that dancing might turn out to be unprotected by the First Amendment, (Def. Resp. at 14-15). This suggestion reverses the well-settled constitutional presumption and ignores a long line of United States Supreme Court decisions which have deliberately applied standard First Amendment scrutiny in evaluating challenges to legislation regulating nude or partially nude performance dancing. Since Palmetto has already responded at some length, (Pl. Resp., Cross-Mtn at 4-7), to the County's general suggestions in this regard, as well as to the County's *mis*citation of *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997), Palmetto adopts that discussion here in order to avoid needless repetition. The County does, however, add here to its argument concerning the specifics of the future performance dancing by suggesting that this dancing might be legally obscene. (Def. Resp. at 14-15). Apart from the fact that absolutely nothing in the present summary judgment record contradicts the contrary allegation in the complaint, (Complaint ¶ 5), the County's effort to presume future obscenity runs into numerous constitutional obstacles. There is simply no such thing in our law as presumptive obscenity. *See*, *e.g.*, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981)(recognizing presumptive protection for nude performance dancing without regard to possible future obscenity); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980)(invalidating injunction against future expression predicated only on ground that past expression had been found obscene). Rather, the government must prove obscenity on a case-by-case basis according to the established constitutional and statutory standards. *Cf. Miller v. State of California*, 413 U.S. 15 (1973). Indeed, this point was most forcefully made in a prior

restraint case. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). The City of Chattanooga had denied the use of a municipal auditorium for a performance of the musical "Hair," which, in some of its performances, might have been obscene under state or local law. *Cf*. *Id*. at 547, 552. But because that possibility could not be established in advance of performance (because the performances changed from time to time and place to place, *Id*. at 561 n. 11), the City's action amounted to an unconstitutional prior restraint. *Id*. at 560-62.

> Any system of prior restraint . . . "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Near v. State of Minnesota ex rel. Olsen*, 283 U.S. 697, 716 (1931). The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law [rather] than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. *See Speiser v. Randall*, 357 U.S. 513 (1958).

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975)(emphasis in original). Unless and until the County proves that each and every one of Palmetto's performances dances *have been* legally obscene, it has no business asserting such obscenity, let alone relying upon it to avoid standard and well settled prior restraint scrutiny.

Finally, the County suggests that it can avoid prior restraint analysis of its conditional use requirement for adult business uses because some other jurisdictions allow them to locate as of right.[9] (Def. Resp. at 15). Yet no American court has ever recognized that a government may justify presumptively unconstitutional prior restraints merely by suggesting that a speaker may avoid the restraint altogether simply by deciding to speak elsewhere. In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), for instance, Birmingham's constitutional task would have been simple indeed if it could have sent Rev. Shuttlesworth to New York to march in protest

[9] This suggestion suffers from the same flaws as the County's similar suggestion with respect to alternate avenues of expression. Nothing prevents these other jurisdictions from *changing* their own rules to adopt requirement like the County's. The County has, throughout this litigation, altogether failed to established why it should be privileged to adopt policies which it can defend only on the ground that other government agencies will *not* adopt them.

against racial segregation in Alabama. Similar observations could be made about Dallas in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), or indeed about virtually any governmental agency which purports to require prior permission for expression. Furthermore, the County's unsupported allegations that Palmetto could avoid the conditional use requirement merely by requiring its performers to were g-strings and pasties, (Def. Resp. at *citing*), is incorrect as a matter of fact and as a matter of law. With respect to the latter, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), establishes that a government cannot impose an otherwise invalid prior restraint even on expression – such as the use of sidewalk newsracks to disseminate newspapers – which it could entirely prohibit under a valid time, place, and manner regulation. With respect to the matter of fact, the County offers nothing to suggest that it has definitively and authoritatively construed, *cf*. *Lakewood* at 770, its adult business use zoning provisions, to apply only to cabarets which present *totally* nude performance dancers. Should it ever do so, many if not all of Palmetto's disputes specifically with the County of DuPage might well evaporate. Until that time, the County's requirement that adult business uses obtain conditional zoning use approval before disseminating any expression in an I-1 zone is subject to standard prior restraint scrutiny, which the County does not deny is fatal in this case.

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.

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