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' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On December 18, 2000, this Court granted the Defendants County of DuPage and Joseph E. Birkett (collectively "the County") leave to file their Supplemental Memorandum of Law ("Def. Supp. Br."), discussing two decisions entered after August 1, 2000, when the parties completed their briefing on the pending cross-motions for summary judgment. Pursuant to this Court's order, the Plaintiffs now file the following memorandum of law in response thereto.

Argument

I. The County's First New Decision Does Not Apply Any First Amendment Analysis at All Because the Illinois Appellate Court Saw No Presumptively Protected Expression in Any of the Challengers' Activities.

The County's citation of *Wright v. County of DuPage*, 736 N.E.2d 651 (Ill. 2nd Dist. 2000), (Def. Supp. Br. at 1-4), is particularly inapt because, as the County itself recognizes, (*Id*. at 2-3), the Illinois Appellate Court resolved that case without considering any Fist Amendment

arguments at all. Although Wright had advanced several such arguments at trial and on appeal, *Wright*, 736 N.E.2d at 653, the Illinois Appellate Court saw no need to consider them, *Id*. at 662,[1] because it concluded that the "erotic encounters," *Id*. at 655, offered by the "massage parlors," *Id*. at 659, 661, in that case consisted of nothing more than massage and other conduct which is devoid of First Amendment protection, *Id*. at 661-62. In this respect, the Illinois Appellate Court's decision is no different than the United States Supreme Court's refusal to accept the proposition that activities occurring at so-called "sexual encounter centers" involved no substantial expressive or associational interest and were thus constitutionally unprotected. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990).

Although the County has previously argued here, (*see*, *e.g.*, Def. Reply Br. [8-1-00] at 6-8) that the nude or partially nude performance dancing which Palmetto seeks to present to its willing adult patrons, (*see* Third Amended Complaint ¶¶ 5, 11-12), is also unprotected by the First Amendment, *Shultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), discussed at 3-5, *infra*, drives yet another nail into the coffin of that assertion.[2] Indeed, even the County recognizes, (Def. Supp. Br. at 3), that the *Wright* Court *distinguished* the nude performance dancing cases in reaching its conclusions concerning the legal status of Wright's activities, *cf. Wright* at 661 ("The activity occurring at the Spas was not in any manner similar to that occurring in *Barnes* or *Schad*"). Beyond this, the County's own current reference to *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), (Def. Supp. Br. at 3) – where the issue was the proper *level* of First Amendment scrutiny, not whether the First Amendment applied at all – further confounds its desperate but baseless efforts to escape First Amendment scrutiny in this case.

The best that the County can now do in this regard is to suggest that since its adult business use zoning regulations apparently regulate *some* non-expressive operations, they should escape any sort of First Amendment scrutiny, (Def. Supp. Br. at 3-4), even on a challenge by someone, like Palmetto, who plans to disseminate expression which is plainly presumptively

[1] "As the activities occurring at the [S]pas do not constitute expression protected under the first amendment, we need not consider the Spas' assertion that the ordinance is unconstitutional as overly restrictive and a prior restraint on freedom of speech." *Id*. at 662. For this reason, the Illinois Appellate Court did accept the trial court's First Amendment analysis, described by the County here, (Def. Supp. Br. at 2), which, in any event, involved the *1986* version of the County's adult use ordinance, *Wright* at 654, 659, not the post-December 1998 version which Palmetto challenges here.

[2] For this reason, the County cites no reason for this Court to reconsider the reasoning it adopted when rejecting the County's initial motion to dismiss.

protected. But even this suggestion is flatly at odds with settled law. Without belaboring arguments previously articulated, Palmetto here notes only that, if the County's argument accurately stated the law, the Supreme Court would not have decided either *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), or *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), as it did. The fact, already noted at 2 *surpa*, that the challenged Dallas ordinance applied to some non-expressive operations as well as to expressive ones did not keep the *FW/PBS* Court from applying the otherwise appropriate First Amendment scrutiny to invalidate the challenged provisions because they "largely target[ed] businesses purveying sexually explicit speech." *FW/PBS* at 224. Similarly, the challenged Indiana statutory provisions permitting pretrial attachment of potentially forfeitable property were invalidated insofar as they permitted pretrial seizure of expressive materials, *Fort Wayne Books* at 62-67, even though they plainly permitted the same sort of seizure of a great deal of non-expressive matter. For these reasons, the County cannot even prevail on the last vestige of its argument on this score. Its adult business use zoning provisions are plainly subject to First Amendment scrutiny on Palmetto's challenge.

II. The County's Second New Decision Did Not Involve Adult Business Use Zoning Provisions at All and Upheld Only Provisions Which Are Materially Different From Those Challenged Here.

Insofar as it is relevant here, the County's second new case, *Shultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), seriously undercuts its position in this case. While the County understandably prefers to focus on the ordinance provisions which the Seventh Circuit upheld, (Def. Supp. Br. at 4-6), it cannot explain why the *Schultz* Court struck down portions of the licensing provisions and of the operation requirements, *Schultz* at 847-48,851-53, if, as the County argues, nude or partially nude performance dancing is unprotected by the First Amendment. Indeed, the Seventh Circuit's actions in this regard make sense only in light of its express recognition that performance dancing is, in fact, presumptively protected expression. *Cf. Id*. at 839, 847. Furthermore, it is important to note at the outset what *Shultz* did not involve. It did not involve any claim that Cumberland had used its zoning authority to define a group of overwhelmingly expressive enterprises and then to restrict them in such a way that not one single zoning lot could be formed to house such an enterprise within Cumberland's jurisdiction. On the contrary, the very fact that Shultz had been actively presenting nude or partially nude perfor-

mance dancing, *Id*. at 835, 839, indicates that he was simply not faced with the predicament with which the County has confronted Palmetto in this case.

Beyond this, the County either misunderstands the nudity restrictions at issue in *Shultz* or willfully ignores the plain language of its own ordinance definitions – language for which it has never even attempted to offer any narrowing administrative construction. It is certainly correct to say that *Schultz* upheld a ban against what the Seventh Circuit repeatedly referred to as "full nudity." *See*, *e.g.*, *Shultz* at 847, 849. It did so by following United States Supreme Court decisions in which pluralities agreed that anti-nudity restrictions burdening "that portion of the expression that occurs when the last stitch is dropped" impose only a *de minimis* restriction on nude performance dancing. *Id*. at 847, *quoting City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Following those decisions, the Seventh Circuit expressly considered that the ban on "full nudity" would permit performance dancers to appear in "pasties and G-strings." *Shultz* at 847. This construction is plainly consistent with Cumberland's own definition of "a state of nudity." *Id*. at 837 ("showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, the showing of the female breast with less than fully opaque covering of any part of the nipple . . .").

Neither *Shultz* nor any other reported decision upholds a complete ban on partial nudity in performance dancing. Indeed, the Cumberland ordinance also defined "semi-nude condition," *Shultz* at 837, but the Seventh Circuit certainly did not uphold a ban on performance dancing in a "semi-nude condition." The City of Cumberland evidently knew better than even to try to impose such a ban. This is what confuses the County here: Cumberland's definition of "a state of nudity" is simply *narrower* than the County's definition of "specified anatomical areas." Indeed, the County's definition of "specified anatomical areas" looks very much like Cumberland's definition of "semi-nude condition." So the fact that *Shultz* upheld as *de minimis* a ban on performance dancing in "a state of nudity" rather than in a "semi-nude condition" deprives the County of any logical connection between an outright ban on narrowly defined "full nudity" and a regulation of the places where performance dancing can expose more broadly defined "specified anatomical areas." No American court has ever held that a government can completely ban all performances which reveal "specified anatomical areas" as the County has defined them, and Palmetto has alleged nothing more than that it wants to present performance dancing which will expose those areas. (*See* Third Amended Complaint ¶ 12). For these reasons, *Shultz* cannot help

the County avoid the constitutional problem it faces here. Indeed, a proper understanding of what the Seventh Circuit *actually* upheld in *Shultz* underscores just how confused the County's reading of that decision really is.

The County's confusion between "specified anatomical areas" (as it defines them) and "full nudity," (as the Seventh Circuit understood it) is problematic even apart from the plain language which the County chose to use in its ordinance definition. For the purposes of its adult business use zoning provisions, the "specified anatomical areas" definition applies not only to live performances but to video tape, film, photographic, artistic, and magazine images as well. The County's theory, then, would justify not only a ban on partially nude performance dancing but also a total ban on Playboy magazine, many R-rated motion pictures, and probably the display of replicas of the Venus di Milo as well. There is absolutely no indication that the County's legislature intended to ensnare the County in the constitutional difficulties which *that* sort of ban would raise. *See generally United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878 (2000)(invalidating restrictions on cable television broadcasts of Playboy's video productions). Indeed, the County never even tried to promulgate a total live nudity ban of the sort reviewed in *Shultz*. Rather, these difficulties arise because the County's lawyers have simply failed to think through the ramifications of their last desperate attempt, (Def. Supp. Br. at 5-6; Def. Reply [8-1-00] at 13-15), to avoid the appropriate First Amendment scrutiny, under which the County's hopelessly overrestrictive adult business use zoning provisions clearly fail.

Conclusion

For all of the foregoing reasons, this Court should grant Palmetto's and deny the remaining cross motions for summary judgment.

Respectfully submitted,
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and Gregory A. Schirmer,

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