

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

THE OASIS OF DESTIN, INC.	*	
d/b/a Oasis, a Florida	*	
corporation and TRIDENT-	*	
OPERATIONS, LLC, a Florida	*	
limited liability company,	*	
	*	
Plaintiffs,	*	CIVIL ACTION FILE
	*	
-vs-	*	NO. _____
	*	
CITY OF DESTIN, FLORIDA,	*	
	*	
Defendant.	*	

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND DAMAGES**

NATURE OF CASE

1.

THE OASIS OF DESTIN, INC. d/b/a Oasis ("Oasis") operates a restaurant and bar that is licensed by the State of Florida to serve alcoholic beverages (i.e., beer and wine) for consumption on premises. Oasis recently entered a management agreement with TRIDENT-OPERATIONS, LLC ("Trident"), which will run the bar but wishes to offer nude dance entertainment. It appears that the CITY OF DESTIN ("the City") has ordinances governing adult entertainment establishments and alcoholic beverages that will prohibit the plaintiffs from offering nude dance entertainment. So long as these ordinances remain in place, should the

plaintiffs offer nude dance entertainment, they risk (1) arrests of their management and employees, and (2) adverse administrative action against Oasis's alcohol license. In this action, the plaintiffs will demonstrate that the City's ordinances governing adult entertainment establishments and nudity in alcohol-licensed venues violate the First Amendment (among other infirmities). For these reasons the plaintiffs are entitled to declaratory and permanent injunctive relief barring the City from enforcing these ordinances, and to compensatory and nominal damages for refraining from offering nude dancing in the interim.

PARTIES

2.

THE OASIS OF DESTIN, INC. ("Oasis") is a Florida corporation in good standing and which is licensed to operate a bar and wine facility at 205 Mountain Drive, Destin, Florida 32541-2317 ("the Premises").

3.

Oasis recently wishes to hire TRIDENT-OPERATIONS, LLC ("Trident") to operate and perform the general management of the Premises. Trident is a Florida limited liability company in good standing.

4.

The CITY OF DESTIN ("the City") is a political

subdivision of the State of Florida and has the capacity to sue and be sued.

VENUE

5.

All acts or omissions alleged in this complaint have occurred, or likely will occur, in the Northern District of Florida and therefore venue is properly within this district under 28 U.S.C. § 1391(b).

JURISDICTION

6.

Jurisdiction for this suit is conferred by 42 U.S.C. § 1983, which provides in part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7.

Attorney's fees are authorized by 42 U.S.C. § 1988.

8.

Under 28 U.S.C. §§ 1331 and 1343(a)(3)&(4), the Court can entertain an action to redress a deprivation of rights guaranteed by the United States Constitution, and the Court

has jurisdiction under 28 U.S.C. § 1367 to hear an action to redress a deprivation of rights guaranteed by the laws and the Constitution of the State of Florida.

REGULATORY FRAMEWORK

Ordinance No. 36: The Alcohol Code

9.

The City regulates businesses that serve or sell alcoholic beverages for consumption on the premises under Chapter 3 of the City of Destin Code of Ordinances.

10.

On January 6, 1986, the City adopted Ordinance No. 36 (see Exhibit A; codified as § 3-2), which provides in part:

Section III. Nudity, sexual conduct prohibited.

- (A) No person shall expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or any simulation thereof in an establishment dealing in alcoholic beverages.
- (B) No female shall expose to public view any portion of her breast below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages.
- (C) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages, shall suffer or permit any person to expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or simulation thereof within the establishment dealing in alcoholic beverages.
- (D) No person maintaining, owning, or operating an establishment dealing in alcoholic

beverages, shall suffer or permit any female person to expose to public view any portion of her breasts below the top of the areola or any simulation thereof within the establishment dealing in alcoholic beverages.

- (E) No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, any sexual act which is prohibited by law, touching, caressing or fondling of the breasts, buttocks, anus or genitals or the simulation thereof within an establishment dealing in alcoholic beverages.

11.

When the City adopted Ordinance No. 36, it recognized that there were "certain establishments within Okaloosa County, Florida, which offer and publicly advertise one or more of the acts prohibited by" Ordinance No. 36. Preamble, ¶ 1. With that understanding, the City stated that "no such establishments presently operate in the City of Destin and it is desired that none should so operate." Id. ¶ 2.

12.

When the City adopted Ordinance No. 36, it stated that it was "desirous of prohibiting the public display of nude conduct or the simulation thereof, and sexual behavior or the simulation thereof in establishments dealing in alcoholic beverages." Id. ¶ 5. The City deemed these acts as encouraging "undesirable morals and conduct." Id. ¶ 3.

13.

The City held readings of Ordinance No. 36 on December 2, 1985 and January 6, 1986. On or before these readings, the City's legislative body did not review evidence suggesting that adult entertainment establishments create adverse secondary effects.

14.

When the City adopted Ordinance No. 36, it did not have before it any evidence showing that "adult entertainment establishments" create adverse secondary effects.

Ordinance No. 390: The Adult Zoning Ordinance

15.

The City regulates zoning under a land development code. See Ordinances 04-23-LC & 07-52-LC (together "the Land Development Code"). The Land Development Code codifies a number of ordinances (some on the books since 1985), but in places the Land Development Code changes the code sections of these previously codified ordinances.

16.

One of the ordinances incorporated by the Land Development Code is Ordinance No. 390 (see Exhibit B), which was adopted on September 16, 2002, among other reasons, to define an adult entertainment establishment.

17.

Section 3 of Ordinance No. 390 (codified as Art. 3, § 3.00.01) defines an "adult entertainment establishment" as:

[O]ne that provides a commercial display nude or semi nude entertainment. Adult entertainment establishments shall not include dealers, stores, galleries, or museums legitimately engaged in the display or artistic works for viewing or sale, and shall not include the non-commercial or incidental display, or display for artistic instruction, of nudity or semi nudity. As used in this definition, nude or semi nude entertainment means either of the following: 1) The actual or simulated display of the genitals, vulva, pubic area, buttocks, anus, or anal cleft or cleavage; and 2) The actual or simulated display by a female or transsexual of the human breast at or below the areola. No Adult Entertainment Establishment may be located within 500 feet of any residential zoning district, place of worship, park or school as measured from the edge of the zoning district boundary line to the closest exterior wall of the establishment. No Adult Entertainment Establishment may be located within 500 feet of any other adult use as measured from the closest exterior wall of one establishment to the closest exterior wall of another such establishment. In cases where an establishment occupies a multi-unit building, the distance separation criteria shall be measured from the wall of the unit in question.

18.

Sections 4 (codified as Art. 7, § 7.12.01 et seq.) and 5 (formerly codified as Appendix I, § 21-187), of Ordinance No. 390 taken together, relegated adult entertainment establishments to protected industrial districts (IP districts).

19.

When the City adopted Ordinance No. 390, it stated that it was "in the public interest to eliminate adult entertainment establishments as allowable use in the City of Destin." Ordinance No. 390, Preamble, ¶ 4.

20.

The City held readings of Ordinance No. 390 on August 19, 2002 and September 16, 2002. On or before these readings, the City's legislative body did not review evidence suggesting that adult entertainment establishments create adverse secondary effects.

21.

When the City adopted Ordinance No. 390, it did not have before it any evidence showing that "adult entertainment establishments" create adverse secondary effects.

22.

In 2004, the City repealed what was Section 5 of Ordinance 390, but it continues to relegate adult entertainment establishments to industrial districts.

23.

When the City adopted the Land Development Code, it did not have before it any evidence showing that adult entertainment establishments create adverse secondary effects.

24.

The Land Development Code adopts and incorporates the City's stated intent to "eliminate" adult entertainment from the City.

The Business License Code

25.

The City regulates local businesses under Chapter 13, Article 2 of its Code of Ordinances ("the Business License Code"). Under § 13-27 of the Business License Code, "[n]o person shall engage in or manage any business, occupation or profession within the corporate limits of the city without first obtaining from the city a license for each business."

26.

A person or entity cannot operate an adult entertainment establishment in the City without first obtaining a tax certificate (i.e., business license) under the Business License Code.

27.

The Business License Code contains no deadlines on the City Manager's decision to issue a business license.

28.

To the extent that a decision to deny a business license is appealable under the procedures laid out under § 2.22.00, et seq. of the Land Development Code, that appeal

procedure places no deadline on the City to set an appeal hearing. The appeal procedure also places the burden on the applicant to show that the decision to deny the business license was in error. It does not preserve the status quo pending judicial review.

FACTS

29.

In Florida nude dance entertainment is traditionally offered in a nightclub setting where alcoholic beverages are served or sold for consumption on premises.

30.

Oasis operates a restaurant and bar, and it wishes to offer nude dance entertainment before a consensual audience, all over 21 years of age.

31.

On October 15, 2008, Oasis and Trident inquired with the City's Community Development Director, Kenrick S. Gallander ("the Zoning Director"), about whether the business could lawfully offer nude dance performances at the Premises. The Zoning Director replied that he did not think so, but that he would inquire with other city officials. He promised to get back with the plaintiffs within 10 business days.

32.

On November 7, 2008, Oasis filed a business license application ("the Application") indicating that it wished to offer "nude dance entertainment" at the Premises.

33.

The City denied the Application on November 12, 2008.

34.

The City's adopting of Ordinance Nos. 36 & 390 was a not-so-thinly-veiled effort to eliminate nude dancing in the City.

35.

The plaintiffs have exhausted whatever administrative remedies exist, and to the extent that it has not exhausted those remedies, pursuing them would be futile.

COUNT 1

42 U.S.C. § 1983: FREE SPEECH CLAUSE VIOLATIONS

36.

The plaintiffs reallege each fact set forth in paragraphs 1 through 35 of this Complaint and incorporate them here by reference.

37.

The City's actions have deprived, and will continue to deprive, the plaintiffs of rights and liberty interests protected by the First Amendment of the Federal

Constitution, in that, inter alia:

- (a) Ordinance Nos. 36 & 390 and the Land Development Code infringe upon expressive conduct (1) without serving a substantial or compelling governmental interest, (2) by censoring based upon disagreement with the message, and (3) without narrowly tailoring their prohibitions to avoid chilling protected expression;
- (c) Ordinance Nos. 36 & 390 and the Land Development Code unjustifiably sweep a substantial amount of protected speech and expression with their purview and are therefore overbroad;
- (d) Ordinance Nos. 36 & 390 and the Land Development Code fail to provide fair warning of what conduct is prohibited and also encourages arbitrary enforcement and is therefore void for vagueness; and
- (e) Ordinance Nos. 36 & 390 and the Land Development Code, taken together, fail to provide for adequate alternative avenues of communication for sexually oriented expression;
- (f) Ordinance Nos. 36 & 390 and the Land Development Code, applied as a practical matter, eliminate accessibility to erotic speech and expression with

the City;

- (h) Ordinance Nos. 36 & 390 and the Land Development Code, by granting unbridled discretion to the City to determine how, when and if a business will and will not be deemed an "adult entertainment establishment," amounts to a content-based discrimination of speech and therefore an impermissible prior restraint; and
- (i) The Business License Code, as applied to the plaintiffs, imposes an impermissible prior restraint because it (1) fails to mandate prompt decision-making by the licensing authority, and (2) vests the City Manager and Zoning Director with unbridled discretion to delay and decide business license applications.

38.

The plaintiffs wish to engage in activities protected under the First Amendment, i.e., offering nude dance entertainment.

39.

By adopting and threatening to enforce Ordinance Nos. 36 & 390 and the Land Development Code, which are content-based on their face, the City has deprived the plaintiffs of the right to offer nude-dance entertainment.

40.

The plaintiffs are entitled to recover their compensatory and nominal damages from the City for the loss of their rights protected under this claim.

COUNT 2

Florida Constitution: Free Speech

41.

The plaintiffs reallege each fact set forth in paragraphs 1 through 35 of this Complaint and incorporate them here by reference.

42.

In ways described in paragraphs 37 through 39 above, the City's actions have deprived, and will continue to deprive, the plaintiffs of rights and liberty interests protected by Article 1, Section 4 of the Florida Constitution.

COUNT 3

42 U.S.C. § 1988: ATTORNEY'S FEES

43.

The plaintiffs reallege each fact set forth in paragraphs 1 through 35 of this Complaint and incorporate them here by reference.

44.

The City's actions, in adopting unconstitutional

regulatory schemes and enforcing those schemes, entitle the plaintiffs to recover their costs and reasonable attorney's fees in an amount to be determined at trial.

WHEREFORE, the plaintiffs pray:

- (a) That as to Count 1 of this Complaint, the Court declare these ordinances unconstitutional under the First Amendment and grant the plaintiffs temporary, preliminary and permanent injunctive relief, and award the plaintiffs compensatory and nominal damages for refraining from offering nude-dance entertainment;
- (b) That as to Count 2 of this Complaint, the Court declare these ordinances unconstitutional under Art. 1, § 4 of the Florida Constitution and exercise supplemental jurisdiction to grant the plaintiffs temporary, preliminary and permanent injunctive relief, and award the plaintiffs compensatory and nominal damages for refraining from offering nude-dance entertainment;
- (c) That as to Count 3 of this Complaint, the Court grants the plaintiffs their reasonable costs and attorney's fees in bringing this action in an amount to be determined at trial;
- (d) That the plaintiffs be granted a trial by jury on

all issues so triable; and

- (e) That the plaintiffs be granted such other and further relief as this Court deems just and proper.

Respectfully submitted,

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