

SUPREME COURT OF ILLINOIS

Springfield, Illinois, March 5, 2007

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

No. 99804 - City of Chicago, appellee, v. Pooh Bah Enterprises, Inc., et al., appellants. Appeal, Appellate Court, First District.
Petition for rehearing denied.
Burke, J., took no part.

Freeman, J., dissenting upon denial of rehearing.

Dissent attached.

Dissent Upon Denial of Rehearing

JUSTICE FREEMAN, dissenting:

I initially joined the majority opinion in this case. I believe, however, that many of the points raised by Pooh Bah in its petition for rehearing merits this court's further consideration. Specifically, I am concerned, as noted by Pooh Bah in its rehearing petition, that this court's opinion "ignores" several substantive first amendment issues, violates the "constitutionally required procedures for intermediate scrutiny *** resulting in a denial of due process to Pooh Bah," and contains "errors, omissions and distortions of the record." Because I believe that this case deserves further reflection, and because this court has not seen fit to use rehearing as a means of addressing these points, I can no longer join the majority in its opinion. Accordingly, I dissent from the court's denial of rehearing in this cause.

First, as Pooh Bah notes in its petition for rehearing, the court's opinion in the matter at bar completely overlooks Pooh Bah's argument that strict scrutiny analysis should be applied to section 4-60-140(d) of the Chicago Municipal Code (the "coverage ordinance"). In its written submissions to this court, Pooh Bah strongly relied upon two decisions from the United States Supreme Court in support of its assertion that strict scrutiny is applicable to the ordinance at issue in this case: *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 152 L. Ed. 2d 403, 122 S. Ct. 1389 (2002). Pooh Bah asserted that the challenged ordinance is content-related, on the basis that the law applies solely to erotic entertainment and because its effect and purpose is to limit erotic expression by regulating the body coverage on erotic performers. According to Pooh Bah, the City's justification for the ordinance rests in part on the alleged *primary* effect of the erotic expression on the audience, *i.e.*, that the combination of alcohol and seminude dancing prompts viewing-and-drinking patrons to commit crime or become victims of crime when they leave the club. Pooh Bah noted that this is the direct opposite of a content-neutral justification. Therefore, Pooh Bah reasoned, because the challenged ordinance was not sought to be justified solely by content-neutral reasons—but also by the putative primary effects of the combination of

alcohol and erotic dancing on the viewers—the City’s proffered justification requires strict scrutiny review.

As stated, in support of this proposition, Pooh Bah relied upon the *Playboy* and *Ashcroft* decisions, in which the United States Supreme Court struck down on first amendment grounds federal statutes which attempted to regulate sexually oriented cable television programming and child pornography. See *Playboy*, 529 U.S. at 826-27, 146 L. Ed. 2d at 887-88, 120 S. Ct. at 1893 (provision of the Telecommunication Act which attempted to prevent “signal bleed” by requiring cable operators either to scramble sexually explicit channels in full or limit programming on such channels to certain hours violated first amendment); *Ashcroft*, 535 U.S. at 258, 152 L. Ed. 2d at 426, 122 S. Ct. at 1406 (certain provisions of the Child Pornography Prevention Act of 1996—including a ban on virtual child pornography—found to violate the first amendment). In both instances, the Court concluded that the challenged statutes were subject to strict scrutiny analysis because they had a content-related intent or purpose. *Playboy*, 529 U.S. at 811-13, 146 L. Ed. 2d at 878-79, 120 S. Ct. at 1885-86; *Ashcroft*, 535 U.S. at 253-54, 152 L. Ed. 2d at 422-23, 122 S. Ct. at 1403. In its petition for rehearing before this court, Pooh Bah contends that this court’s opinion should, at the very least, “distinguish *Playboy* and *Ashcroft* and explain why non-obscene Gentlemen’s Clubs in Illinois get less constitutional protection than graphic sexual activities shown on cable TV or than child molesters under the First Amendment.” I agree.

The opinion of this court overlooks both of these recent United States Supreme Court free speech cases on which the defendants strongly rely for their strict scrutiny argument. Rather than directly address a central argument debated at length by the parties in this case and engage in a thoughtful analysis of these contentions, the court simply relegates this important debate to a brief footnote in the opinion. In footnote 12 of this court’s opinion (slip op. at 20 n.12), this court notes, in passing, that “Pooh Bah argues that the strict scrutiny standard should govern this case.” The footnote further states that “[f]or the reasons set forth later in this opinion, Pooh Bah is incorrect.” This is the extent of the discussion the court provides with respect to the strict scrutiny argument raised in this appeal. The court rejects Pooh Bah’s strict scrutiny argument without further direct

analysis or explanation, despite the fact that, in its written submissions to this court, the City justified its challenged ordinance, in part, on the basis of the claimed effect of the expression—erotic seminaked dancing—on the club’s patrons, in support of the theory that the patrons then are more likely to commit or be victims of crime. Accordingly, by virtue of this argument, the City itself has invited application of the line of cases culminating in the *Playboy* and *Ashcroft* decisions, which apply the higher strict scrutiny standard to laws directed at the impact of speech on its listeners or watchers.

Furthermore, the court rejects Pooh Bah’s assertions that strict scrutiny applies in this case despite the fact that in its opinion the court itself resorts to anecdotal evidence of the supposed *primary* effects of the combination of alcohol and live seminaked dancing on its viewers, noting, *e.g.*, the “customer who exposed himself and began masturbating in the middle of the club.” Slip op. at 33. In addition, the court discusses the testimony of the City’s expert, Dr. Kodish, which focused upon the psychiatric effects on males resulting from the combination of alcohol and sexual stimulation. According to Dr. Kodish, this combination produces an effect “ ‘associated with an increase in violent sexual acting out, acts of criminal behavior.’ ” Slip op. at 29. Because this court justifies the City’s coverage ordinance in part by the supposed effects of the regulated conduct on its audience, this court’s own analysis triggers a discussion of whether strict scrutiny review is applicable in this case.

The court sidesteps any discussion of strict scrutiny review by relying heavily upon the decision of the United States Court of Appeals for the Seventh Circuit in *Ben’s Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003). That decision applies an intermediate scrutiny analysis to the review of a local ordinance regulating “sexually oriented businesses,” without detailed consideration as to whether or not strict scrutiny is triggered by the challenged law or the justification advanced for that law. However, I note that, in *Ben’s Bar*, the applicable level of scrutiny was not at issue and that the parties agreed that intermediate scrutiny was the applicable standard for first amendment review. No party in that case advocated for strict scrutiny analysis, and, therefore, it was appropriate for the court in that case not to address the issue of which standard of review applied. In contrast, in the matter before us, Pooh

Bah has vigorously argued from the moment it filed its petition for leave to appeal with this court that strict scrutiny review applies. This court's opinion, therefore, should address Pooh Bah's arguments with respect to the application of strict scrutiny analysis and either distinguish or apply the *Ashcroft* and *Playboy* decisions—two decisions which remain conspicuously absent from this court's opinion. In its opinion, this court evades the strict scrutiny argument and automatically applies intermediate scrutiny simply because a governmental body claims that the purpose of the challenged ordinance is to attack alleged negative secondary effects.

I am deeply troubled by the court's out-of-hand dismissal of Pooh Bah's strict scrutiny argument for several additional reasons. First, such conduct on the part of this court denies the parties to this action the reassurance that we have carefully considered and deliberated their arguments. What message does this court send to litigants when it does not even bother to address the central arguments raised in their appeals, especially when they are issues of constitutional magnitude? I venture to say that it creates the perception that this court has predetermined the outcome of the appeal and does not deem it necessary to bother with arguments that may cut in the opposite direction. In addition, by failing to address and fully analyze an issue such as whether strict scrutiny applies to the ordinance challenged in this case, this court fails to provide the bench and bar with the guidance needed to deal with similar issues in future cases. Indeed, the legal community "rel[ies] on our opinions to map the evolving course of law." *People v. Jung*, 192 Ill. 2d 1, 17 (2000) (McMorrow, J., specially concurring, joined by Miller and Freeman, JJ.). This court has utterly failed to carry out this mission in the instant cause.

In its petition for rehearing, Pooh Bah also takes issue with this court with respect to several aspects of its intermediate scrutiny review of the City's coverage ordinance. In its opinion, the court uses the following test from the *Ben's Bar* decision to determine whether the challenged coverage ordinance withstands intermediate scrutiny review. Under this test, a challenged law is constitutional if:

“ (1) the State is regulating pursuant to a legitimate governmental power [citation]; (2) the regulation does not completely prohibit adult entertainment [citation]; (3) the regulation is aimed not at the suppression of expression, but

rather at combating the negative secondary effects caused by adult entertainment establishments [citation]; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available [citation]; *or*, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. [Citation.]’ (Emphasis in original.) *Ben’s Bar*, 316 F.3d at 722.” Slip op. at 19-20.

I agree with my colleagues that the weight of precedent requires this court to uphold the City’s coverage ordinance against a facial challenge of its constitutionality. It is well settled that local governments can ban nudity itself, including partial nudity such as topless entertainment. See, *e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991). I am satisfied that the coverage ordinance falls within the ambit of decisions that have upheld government regulations of sexually oriented businesses against facial challenges based upon secondary-effects justifications.

However, Pooh Bah argues on rehearing that this court in its opinion has completely overlooked its argument that the City’s coverage ordinance is violative of the first amendment *as applied* to Pooh Bah’s specific factual situation. I agree with Pooh Bah, and disagree with the court’s conclusion that the first amendment analysis is appropriately ended in this case with its holding that the coverage ordinance withstands a facial challenge. The court declines to fully address Pooh Bah’s as-applied challenge to this ordinance and disregards the incompleteness of the proceedings below with respect to that challenge.

The first of Pooh Bah’s specific points in its petition for rehearing with respect to this court’s intermediate scrutiny analysis is its contention that this court’s opinion violates “the constitutionally required procedures for intermediate scrutiny review,” thereby “resulting in a denial of due process to Pooh Bah.” Pooh Bah takes issue with this court’s denying it an opportunity to complete its attack on the City’s secondary-effects justification for the challenged ordinance on remand. Pooh Bah notes that this court denies it this opportunity not only despite the fact that the circuit court had entered

a directed verdict in Pooh Bah's favor finding that the ordinance was unconstitutional after the City had rested its case in chief and before Pooh Bah had completed presentation of its own evidence in rebuttal, but also despite the fact that the circuit court specifically reserved to Pooh Bah the right to present additional evidence in the event that the court's decision was subsequently overturned on appeal.

The record reflects that the circuit court ruled in Pooh Bah's favor and against the City on January 18, 2001. On that date, the circuit court judge filed a very detailed memorandum opinion and order. However, on May 3, 2001, the circuit court judge—with the agreement of the parties—amended the January 18, 2001, memorandum opinion and order *nunc pro tunc* by entering a series of three additional orders. One order entered on May 3, 2001, was entitled “Partial Judgment Order,” and this order notes that the cases had been before the circuit court on “Pooh Bah's motions for directed findings and for judgment at the conclusion of the City's case-in-chief.” The order further recounts that the parties had entered into a “stipulation submitting the cases for a ruling on the current record,” and that the circuit court's ruling on Pooh Bah's directed verdict motion was “subject to reservations by all parties of their respective rights to present additional evidence if these motions are not finally dispositive.” The order incorporates the circuit court's prior January 18, 2001, memorandum opinion and order, as well as prior rulings it rendered on August 21, 2000, and for the reasons stated in those prior decisions, granted Pooh Bah's motion for directed finding and for judgment against the City. In the May 3 order, the circuit court explicitly “retain[ed] jurisdiction,” *inter alia*, “over the remaining trial of these matters, if any of the judgments herein shall be reversed or vacated.” The court's order also stated that “Pooh Bah has reserved its right to present additional evidence in opposition to Counts I-V and in support of its affirmative defenses and amended counterclaims in No. 99 CH 9682, and in support of its claims in No. 93 CH 4559, if the judgments in this order are not affirmed in a final and non-appealable order.”

Thus, the record reflects that the circuit court entered judgment for Pooh Bah against the City on a motion for entry of a directed verdict and not on a final record at the end of trial. Pooh Bah was midstream in its defense case and was not finished in attacking the

City's *prima facie* case in justification of the coverage ordinance when the circuit court ruled on Pooh Bah's already pending motion for directed verdict. Based upon this procedural posture, the circuit court explicitly reserved the "right" of Pooh Bah to present additional evidence on remand in the event of a reversal and did not limit the scope of such evidence. In its opinion, this court mentions the entry of the May 3, 2001, orders in passing (slip op. at 11), but does so in a general and vague manner, except for specifically noting in footnote 9 of the opinion that one of the agreed orders "reserved to the City the right to present additional evidence regarding the amount of fines that could be imposed by Pooh Bah in the event the City prevailed on the merits." Slip op. at 11 n.9. I question why this court feels compelled to set forth with specificity that the circuit court order provides that the City may present additional evidence with respect to the fines to be levied against Pooh Bah on remand, but remains completely silent with respect to the fact that the order also granted to Pooh Bah "its right to present additional evidence" regarding issues which were cut short by the court as a result of its grant of Pooh Bah's motion for directed verdict. I attach the circuit court's May 3, 2001, "Partial Judgment Order" as an appendix to this dissenting opinion as the best evidence of the intent of the parties and the circuit court with respect to this issue.

In addition, I note that the intermediate scrutiny analysis of the validity of the City's secondary-effects justification in support of the coverage ordinance is a *fact-based* assessment, as the United States Supreme Court has repeatedly noted, particularly in its most recent decisions. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002); see also *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004). In *Alameda Books*, the Court described the proper analytical framework for this inquiry:

"We held [in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)] that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest. [Citations.] This is not to say that a municipality can

get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books*, 535 U.S. at 438-39, 152 L. Ed. 2d at 683, 122 S. Ct. at 1736.

In their opinion, my colleagues do not address this three-part evidentiary procedure set forth by the United States Supreme Court, which requires: (1) justification for the ordinance by the government; (2) challenge and dispute of the ordinance by the challenger; and (3) rebuttal by the government. Instead, they take Pooh Bah to task for requesting that this court recognize its right—under the *Alameda* decision and the May 3, 2001, circuit court order—to complete presentation of its evidence at trial:

“The sole reason Pooh Bah seeks to present [additional evidence on the question of whether the ordinance actually creates the secondary effects claimed by the City] is to renew and bolster its contention that the ordinance violates constitutional standards. For purposes of this appeal, however, the constitutionality of the ordinance is no longer subject to dispute. Our holding that the ordinance does not violate the United States or Illinois constitution is conclusive of the issue and shall be binding on the parties and on the circuit court on remand.” Slip op. at 48.

I disagree. This court's opinion fails to explain why, since the circuit court judge's directed findings on a half-completed record are now reversed, the rebuttal cases of both the challengers and the government should be cut off, not only despite the fact that the constitutional procedures mandated for intermediate scrutiny review require that both sides have these opportunities, but also despite the fact that the circuit court's May 3, 2001, order explicitly reserved to

Pooh Bah this right in light of the procedural posture of the case at the time that order was entered.¹

In addition, this court’s opinion reverses a fact-based decision of the trial court and, in doing so, reweighs the sufficiency and credibility of the City’s “justification” evidence to conclude that the City has adequately established that the coverage ordinance was enacted to combat secondary effects. As a general matter, it is not for this court, as a court of review, to substitute its judgment for that of the trial court on issues of fact, as the trial court judge is in the best position to observe the conduct and demeanor of the parties and the witnesses. *Best v. Best*, 223 Ill. 2d 342, 350-51 (2006). This court’s actions are particularly troubling in this case, in light of the following excerpt from the memorandum opinion and order of the circuit court, written after a parade of witnesses were called by the City in support of its secondary-effects justification: “The court finds the record devoid of any proof of the existence of even potentially harmful secondary effects. Indeed, it finds that the City was successful in merely positing the possibility that those secondary effects could hypothetically exist.”

Unless this court can say with 100% certainty that, as a *matter of law*, there is no possible further evidence that may cast any doubt on the City’s two main theories of justification—patron-generated crime and outside-generated crime—or that might refute those theories, this case should be allowed to play out in the trial court on remand, like any other case where a directed finding is reversed. The court’s opinion leads to the conclusion that the majority is unfairly holding Pooh Bah to an unprecedented and heretofore-not-announced

¹⁹As Pooh Bah states in its petition for rehearing:

“[T]he opinion prematurely makes a ‘final’ determination of the constitutionality of the coverage ordinance on the fact-sensitive intermediate scrutiny review—even though the most that can properly be determined on appeal on that review (by reversing the trial judge’s findings) is that the City made a *prima facie* case to justify the ordinance. Particularly on the as-applied challenge, the case was not over. But the opinion improperly cuts off the attack on the City’s proffered secondary effects justifications, thus barring this litigant from *ever* finishing its constitutional attack on the ordinance.” (Emphasis in original.)

standard that mandates a proffer of evidence on appeal to obtain a remand after reversal of a directed finding.

In addition, Pooh Bah also asserts on rehearing that the opinion filed by this court overlooks, as part of its intermediate scrutiny analysis, the issue of multiple, overlapping and cumulative legislative remedies in this case. As the court notes in its opinion, the challenged coverage ordinance was passed by the Chicago city council in 1978. Subsequently, in 1993 the city council passed an anticoncentration adult use zoning ordinance which adopted location and dispersion regulations for adult uses in the city, and which was enacted to combat the same perceived problem as allegedly targeted by the coverage ordinance: the so-called secondary effects of liquor-serving adult-dancing venues.

As early as in its petition for leave to appeal filed with this court, Pooh Bah raised the validity of these overlapping regulations as a central issue for this court's review, and noted that its club complies with the requirements of the later-enacted adult use ordinance. In its petition for leave to appeal, Pooh Bah questioned whether, in the specific factual context of this case, the City must show whether the coverage ordinance has, or will have, some substantial impact on the targeted secondary effects above and beyond that provided by the subsequent adult use zoning ordinance. Pooh Bah made the point that, if this query is answered in the negative, there is a danger that restrictions on free speech and expression can cumulate, "with the latest legislative 'solution' piled on top of yesterday's solution, and on and on without genuine judicial review of their individual justifications—or lack of justification." The significance of the interplay between these regulatory remedies as applied to Pooh Bah was one of the reasons that this court accepted this appeal for review. However, in its opinion, the court has failed to address this issue, which is relevant in determining the validity of the City's secondary-effects justification.

Along these lines, Pooh Bah also asserts that this court improperly overlooked in its opinion that, as a result of the City's 1993 enactment of the adult use zoning ordinance, Pooh Bah's club is legally mandated to be physically isolated from any other adult venues. According to Pooh Bah's rehearing petition, the court's opinion "ignores the industrial, non-residential character (and associated limited pedestrian

traffic patterns) of the Club's area," facts which, in Pooh Bah's view, are "especially pertinent to the as-applied challenge, which the court does not take up in its opinion."

In my view, the facts concerning the physical isolation of Pooh Bah's club are relevant to two issues. First is the general "justification" for the coverage ordinance with respect to incidents of crime in the vicinity of the club generated from outside sources. The City and most of the case law relies heavily on this justification. In addition, this argument was supported by the various "studies" from other cities that the City's expert witnesses described in the circuit court. Pooh Bah, however, countered that most or all of that evidence is based on concentrations of adult businesses or concentrations of liquor establishments. If so, then the absence of concentration in this case is a factor that undermines the relevance of those studies. Indeed, this is one of the obvious disputes in this case that is appropriate for further evidence on remand.

Second, the physical isolation of the club is relevant to Pooh Bah's as-applied challenge to the coverage ordinance based on the later-enacted adult zoning ordinance, which, as stated, mandates physical separation between adult establishments and which, Pooh Bah claims, has solved any crime-in-the-vicinity problem (based upon the absence of crime in the area). Pooh Bah asserts that this state of affairs requires from the City some additional or different justification for the coverage ordinance beyond the usual anticrime justification. It is my view that the coverage ordinance of the 1970s may be archaic and unnecessary by virtue of the City's own superseding adult use zoning legislation. The City's burden of justifying the older coverage ordinance under the immediate scrutiny analysis should include the burden of demonstrating the marginal need for the older law in addition to the anticoncentration efforts in the newer zoning law. These are points which are completely overlooked by the court in its opinion, and which would be appropriate for further consideration.

In a related argument, Pooh Bah asserts in its petition for rehearing that this court engaged in "clear and plain error" in its consideration of the intermediate scrutiny issues by incorrectly citing the legislative history and preambles of the City's 1993 adult use zoning ordinance as if that were the legislative history and original city council intent of the challenged coverage ordinance, which was

enacted 15 years earlier. See slip op. at 24-26. I agree. The findings on which this court's opinion relies focus on the City's justification for enacting the *zoning* restrictions, rather than for the earlier-enacted coverage ordinance. As Pooh Bah states in its rehearing petition, "the opinion erroneously treats the City's announced policies supporting its 1993 adult use *zoning* remedy (which were not addressed to liquor venues) as if it were the original expressed intention for the 1978 'coverage' requirements—which had no preamble or announced intentions other than the Committee Report, which the opinion disregards." (Emphasis in original.)

In sum, with respect to this court's treatment of the intermediate scrutiny issues in this appeal, I agree with Pooh Bah that it is untenable precedent to reserve a directed finding and then not allow the former winner to finish presenting its evidence on remand, especially on an appeal from an injunction hearing without full discovery. As Pooh Bah validly points out in its rehearing petition:

"Why would any Illinois lawyer now move for (or accept) a directed verdict or finding—which is *now* a waiver of the right to present the rest of his/her case if the appellate courts disagree with the trial judge? When, as here, the reviewing courts reweigh the evidence with nary a mention of the deferential manifest weight or clear error standards, there is a palpable sense of arbitrariness that will constrain Illinois litigants to make an *entire* record—even when the trial judge finds more hearings unnecessary." (Emphases in original.)

The precedent set by this court's refusal to allow completion of evidence on the intermediate scrutiny first amendment issues following the reversal of a directed finding undermines the integrity of the directed-verdict procedure, and strongly discourages Illinois litigants from employing this judicial time-saving device for fear of losing their rights to complete their record if their directed verdict is upset on appeal. The fact that this litigation has a protracted history should be of no moment in this consideration, and is not a reason to short-circuit our own well-settled laws of civil procedure.

As a final matter, Pooh Bah contends in its petition for rehearing that this court's opinion contains "errors, omissions and distortions of the record" which serve to inject "irrelevant," "misleading," and

“consistently one-sided” information into this case. I agree with Pooh Bah that these points merit further consideration by this court.

First, at page 33 of the slip opinion, the court discusses the evidence presented by the City in the circuit court with respect to the historical negative secondary effects caused by strip clubs licensed to sell alcohol in the Rush Street area of Chicago during the late 1970s and early 1980s. Testimony in the circuit court indicated that during that time period, strippers and waitresses associated with those Rush Street establishments accounted for a large number of the prostitution arrests in that geographic area, and, this court states, “[n]egative secondary effects were serious and pervasive.” This court then turns to the present state of affairs and observes that, with respect to Pooh Bah’s club, “[s]uch widespread effects may not have recurred *yet*.” (Emphasis added.) This court also notes in footnote 14 on the same page of the slip opinion that although the City in this litigation had initially alleged that incidents of prostitution occurred at Pooh Bah’s club, “it does not appear that any dancer or patron has *yet* been charged with prostitution or prostitution-related offenses.” (Emphasis added.)

The insertion of the word “yet” into these statements amounts to an unjustified judicial forecast that, even though the historic negative secondary effects associated with strip clubs selling alcohol have not been proven with respect to Pooh Bah’s club, and, even though the City failed to establish that incidents of prostitution occurred at or could be connected to the club, they simply have not “yet” occurred and will likely appear in the future. This is particularly inappropriate in light of the litigation below where the City attempted to prove solicitation and/or prostitution and failed completely in establishing its case. In his memorandum opinion and order, the circuit court judge below—who had the opportunity to assess the demeanor and credibility of the witnesses who testified on behalf of the City—described the failings in the City’s evidence as follows:

“Undercover police officers *** tried to entrap the dancers in an attempt to show prostitution and solicitation. According to the clear evidence presented at the trial, the dancers were not interested. The police tried using video cameras planted in their neckties—James Bond style—to show violations. That failed too. The simplest thing that could have been done by the

City would have been to produce residents who were affected by the existence of [the Club]. None were brought forth. At least five police officers, a minimum of five assistant corporation counsels and the latest in modern technology were used to present a case that was totally devoid of proof.”

The circuit court judge further wrote that “the City did not produce any neighbors—either commercial or residential owners or tenants—who complained about the existence of or the effects of [the Club]. No Testimony was offered by the City that [the Club] operated in a manner which unreasonably interferes with the health, safety, peace, comfort of convenience of the general public.”

Accordingly, the record affirmatively refutes the allegation of the City that there was solicitation and/or prostitution in—or associated with—Pooh Bah’s club. It is blatantly improper for this court on review to intimate that it is only a matter of time before the historical negative secondary effects, including prostitution, occur—despite the fact that the record in this case is completely devoid of such evidence. This court unjustly places its imprimatur in a published opinion on the suggestion that Pooh Bah’s club has in the past and/or will in the future be connected to these types of illegal and undesirable activities.

In addition, Pooh Bah also states in its petition for rehearing that this court has selectively reached outside the record to inject “facts” into its opinion which are not only “irrelevant, defamatory and consistently one-sided,” but also which occurred *subsequent* to the proceedings in the circuit court below, in an effort to support its ruling in favor of the City and against Pooh Bah. According to Pooh Bah’s rehearing petition:

“[T]he Court has expended extraordinary *sua sponte* effort to inject irrelevant and tertiary references to other’s criminal conduct and associations, as well as baseless accusations of ‘prostitution’ to taint the Club and its ownership. This is not only completely unnecessary to the decision in this case, but misrepresents the facts and relationships involved. It is also unfair. Pooh Bah has no opportunity here or on remand (under the current order) to present rebuttal evidence. *** Such guilt by association has no place in a judicial opinion.”

I agree.

In its rehearing petition, Pooh Bah points to the information contained within footnotes 2 and 3 of this court's opinion as being particularly egregious. Both of these footnotes contain outside-the-record information which is blatantly unfair to defendants and irrelevant to this court's decision. For example, footnote 2 maligns Joe Pascente—one of four assistant managers at the Club—as the son of a convicted defrauder, and impliedly paints him with that same brush. As far as this record reflects, Joe Pascente has not been convicted of any crime, and is not “associated” with any other criminals. In addition, the statement in the footnote that the Chicago police department “fired [him] for failing to disclose that he was a subject of an FBI investigation into insurance fraud involving his father” is improper. The record below reflects that Joe Pascente denied that he was ever a subject of an FBI investigation, there is no judicial finding on this issue, and there is no evidence in this record—nor any cited in the challenged footnotes—to confirm that he was such a subject. The City's police personnel file (on which the City attorney said that she based her accusation during the hearings in the circuit court) is not contained in this record. Nevertheless, this court's footnote treats that hearsay allegation as a fact in a published opinion, with respect to a person who has not been convicted of any wrongdoing. This is improper and sets a disturbing precedent.

In addition, with respect to Joe's father, Fred Pascente, the record reflects that he was a retired Chicago police detective who was an employee of the Club, but had no management authority. Footnote 2, however, insinuates that Fred Pascente was running the Club, and that there is an association between the Club and nefarious criminals because Fred Pascente is *now* listed in the Nevada Gaming Commission's “Black Book.” I note that this listing occurred *subsequent* to the conclusion of the protracted litigation below, and that this information was drawn by this court from sources outside the record on appeal.

Similar concerns exist with respect to footnote 3 in the opinion. In this footnote, the court has provided a detailed resume of the legal problems faced by Fred Rizzolo which apparently have occurred *subsequent* to his involvement with the Club, and which have been gleaned, once again, from sources outside the record on appeal. The record in this case reflects that in 1995 the Club's owner, Perry

Mandera, entered into management and licensing agreements with Rizzolo, who owned a Las Vegas strip club known as the “Crazy Horse Too.” Mandera stated that he wanted to license the nationally recognized “Crazy Horse Too” name for his Chicago Club because it would be a name known to Chicago conventioners and, therefore, work as a benefit to the business. As this court’s opinion notes, the Club operated under the “Crazy Horse Too” name until 2003. Footnote 3 of the court’s opinion, however, focuses on Rizzolo’s legal difficulties in 2006 with respect to the operation of his Las Vegas club, with no indication that any difficulties arose with respect to his association with Mandera’s Chicago Club, or that this played any part in the proceedings below. Because the City did not allege criminal infiltration of Pooh Bah’s business, Pooh Bah had no reason to rebut such claimed associations in the circuit court below, as they were first emphasized in this opinion on appeal.

As a court of review, it is our role to examine the record below and review the validity of the judgments below. It is not our role to *supplement* the record on appeal. Will litigants now expect that in every case this court will comb the Internet or other outside-the-record sources of information—whether reliable or not—to gather up-to-the-minute information irrelevant to the disposition of the legal issues in their case on appeal, but prurient enough to include as tantalizing side-pieces of information contained within the footnotes of this court’s opinions? After the opinion filed in the matter at bar, they would be justified in so believing.

It is unclear to me why, at the very least, this particular portion of Pooh Bah’s petition for rehearing has not generated any type of response from my colleagues in the majority. Do they not agree that such errors, omissions and distortions of the record in this case warrant a correction?

Because I am troubled by the points raised by Pooh Bah in its petition for rehearing, I believe that this matter merits further reflection by this court on rehearing. Accordingly, I respectfully dissent from the denial of rehearing in this cause.

APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CITY OF CHICAGO, an Illinois municipal corporation,)

Plaintiff-Counterdefendant,)

v.)

No. 99 CH 9682

POOH BAH ENTERPRISES, INC., an Illinois corporation,)
and PERRY MANDERA,)

Defendants-Counterplaintiffs.)

POOH BAH ENTERPRISES, INC., an Illinois corporation;)
ACE ENTERTAINMENT CO., INC., an Illinois corporation;)
PERRY MANDERA, Pooh Bah president and Ace)
Entertainment Co., Inc. president; LISA D. SIMS,)
CHRISTEN E. HADSALL, and SUSAN L. LJENQUIST,)
entertainers and dancers; and PETER ABRUZZO,)

Plaintiffs,)

v.)

No. 93 CH 4559

CITY OF CHICAGO, an Illinois municipal corporation;)
RICHARD M. DALEY, in his official capacity as Mayor of)
the City of Chicago; WINSTON MARDIS, in his official)
capacity as Director of the Mayor's License Commission;)
LICENSE APPEAL COMMISSION; WILLIAM D.)
O'DONAGHUE, Chairman; ALBERT D. MCCOY and)
IRVING J. KOPPEL, Commissioners,)

Defendants.)

PARTIAL JUDGMENT ORDER¹

These cases are before the court on Pooh Bah's motions for directed findings and for judgment at the conclusion of the City's case-in-chief on the City's Counts I-V in No. 99 CH 9682 and on Pooh Bah's Counts VI and VII in No. 93 CH 4559, and on the parties' stipulation submitting the cases for a ruling on the current record, along with the record on administrative review, subject

¹ In this order, "City" refers to plaintiff in No. 99 CH 9682 and, collectively, to defendants in No. 93 CH 4559; and "Pooh Bah" refers, collectively, to defendants in No. 99 CH 9682 and to plaintiffs in No. 93 CH 4559.

to reservations by all parties of their respective rights to present additional evidence if these motions are not finally dispositive; and the court, being fully advised in the premises, does now FIND:

1. The City has rested on its following claims and defenses, which are ripe for a ruling on Pooh Bah's motions for directed findings and for judgment:
 - (a) Counts I-III of its complaint in No. 99 CH 9682 (seeking injunctive relief);
 - (b) the liability issues in Counts IV and V of its complaint in No. 99 CH 9682 (seeking fines); and
 - (c) its defense against Pooh Bah's facial constitutional attack on § 4-60-140(d) of the Chicago Municipal Code;
2. The court reaffirms the rulings set forth in its Memorandum Opinion and Order issued January 18, 2001 ("January 18th Memorandum Opinion") and in the transcript of proceedings in this case dated August 21, 2000 ("August 21st Rulings"); and
3. Appellate review of this court's decision, as set forth in the January 18th Memorandum Opinion and the August 21st Rulings, will expedite the ultimate resolution of this matter and conserve judicial resources;

WHEREFORE, IT IS HEREBY ORDERED:

1. For the reasons stated in the January 18th Memorandum Opinion and the August 21st Rulings, Pooh Bah's motions for directed findings and for judgment are granted, and therefore:
 - (a) in case No. 99 CH 9682, judgment is entered for Pooh Bah and against the City on Counts I-V of the complaint; and
 - (b) in case No. 93 CH 4559, judgment is entered for Pooh Bah and against the City on Counts VI and VII, and the order of the Chicago License Appeal Commission in No. 93 LA 11, affirming the order of revocation entered by the Mayor's License Commission in No. 93 LR 32, is reversed; charges 1-22 in No. 93 LR 32 are dismissed; and the revocation of Pooh Bah's City licenses is vacated and set aside;
2. The January 18th Memorandum Opinion and the August 21st Rulings are incorporated into and made a part of this order;

3. The court retains jurisdiction:

- (a) in No. 99 CH 9682, over Pooh Bah's pending amended counterclaims and the City's affirmative defenses thereto;
 - (b) in No. 93 CH 4559, over Pooh Bah's remaining claims and the City's affirmative defenses thereto;
 - (c) over the remaining trial of these matters, if any of the judgments herein shall be reversed or vacated, for which purpose:
 - (i) the City has reserved its right to present additional evidence on the amount of the fines to be assessed on Counts IV and V in 99 CH 9682; and
 - (ii) Pooh Bah has reserved its right to present additional evidence in opposition to Counts I-V and in support of its affirmative defenses and amended counterclaims in No. 99 CH 9682, and in support of its claims in No. 93 CH 4559, if the judgments in this order are not affirmed in a final and non-appealable order;
4. All proceedings in these two cases shall be stayed pending a final order on the appeal from this order;
 5. There is no just reason for delaying enforcement or appeal of the judgments in this order; and
 6. This order shall be entered in both No. 99 CH 9682 and No. 93 CH 4559.

ENTERED

ENTER:

MAY 01 2001

AGREED:



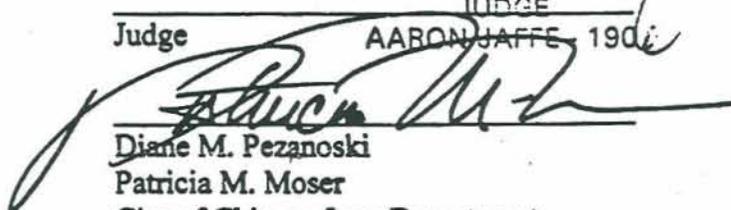
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Judge

JUDGE

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DATED: April __, 2001.