

STATE OF INDIANA)
) SS:
COUNTY OF SPENCER)

IN THE SPENCER CIRCUIT COURT

2007 TERM

CAUSE NO: 74C01-0512-MI-0482

SPENCER COUNTY PLAN COMMISSION,)
and SPENCER COUNTY BOARD OF)
COMMISSIONERS,)
Plaintiffs)

vs.)

ROBERT W. ALLEN,)
FUEL IN DALE, LLC and)
PLAZA GROUP PROPERTIES, LLC,)
Defendants)

FILED
SPENCER CIRCUIT COURT

JUN 18 2007

Ann L. Jackson
CLERK SPENCER CIRCUIT COURT

ORDER

This cause is before the Court on the Plaintiff's Information to Show Cause and on the remaining issue regarding the motel.

The Court first wants to attempt again to correct widely reported misconceptions about its prior ruling. In its order of March 9, 2007, this Court did not order that the defendants cease all operations. The Court did grant a permanent injunction against the defendants from operating a sexually oriented business. But under the definition of "sexually oriented business" in Spencer County Ordinance 2005-11, the defendants can operate a commercial establishment that has no more than 35% of its displayed merchandise or no more than 35% of its interior business space consisting of visual representations "which are characterized by their emphasis upon the display of specified sexual activities or specified anatomical areas." The terms within the ordinance are well-defined in Section 2 of said ordinance.

Thus, the defendants may operate their commercial establishment. However, they must operate within the parameters of the ordinance.

Next, the Court must give some specific meaning to the ordinance. As with any law, words are just words and can be subject to one or more sometimes reasonable interpretations. And this Court's interpretation will likely be subject to more interpretation.

A phrase needing interpretation is "at least 35% of its displayed merchandise." This Court knew upon its first reading that this phrase is at best vague. Immediately following in the ordinance are phrases about wholesale value, retail value, revenues and interior business space. Based on a reasonable reading and on what follows, the Court concludes that this clause refers to the actual inventory count. This is a number that can be physically counted. This is a specific number such as the exact number of candy bars or packs of cigarettes or DVD's for sale. Each individual item for sale can be counted. There is no need or no value in someone guessing or hypothesizing about these numbers. To find the defendants in violation of this section, someone is going to have to spend a little time in exacting a count.

The second phrase needing interpretation is the clause "35% of its interior business space." When the retail sales were operated in what was referred to as the C-store, there seemed to be a better understanding of what the phrase meant. But then the retail sales were moved into the main building. The defendants contend that that interior business space refers to space within the main building. In fact, the defendants' investigator testified that the retail sales of sexual material comprised less than 10% of the interior space of the main building. The Court cannot say at this time that that is an unreasonable interpretation of the ordinance.

Because no one has done an inventory count and because the defendants' interpretation of the ordinance is at least arguably reasonable, the Court declines to hold the defendants in

contempt with regard to the retail sales part of its business.

However, for future hearings, the Court is going to, as best it can, give clearer meaning to the phrase “35% of its interior business space.”

The Court will first look at the actual practices of the defendant. At present that actual practice appears to be to divide the main building into three distinct areas of operation. For lack of better terminology, the Court will refer to them as the left area, center area and right area. These refer to the directions upon entering the main building at its principal entrance.

The left area is devoted to retail sales, the center area is an arcade and the right area is a lounge. The left area is all that will be considered in future interpretations of “35% of its interior space.”

However, there still needs to be more specificity. The ordinance means display space. Thus, aisle space is not to be considered. The word space refers to area. Wall space is included if it is utilized as display space. Thus, one would have to mathematically determine the amount of area used as business space and then determine how much of that area is used for the display of sexual material. A question the Court declines to speculate on is whether merchandise which is readily available at more conventional retail establishments should be considered sexual material.

The second part of this decision has to do with the operation of an “adult cabaret.” This is defined by ordinance as a place where persons regularly appear semi-nude. Semi-nude includes the showing of the female breast below a horizontal line across the top of the areola or the showing of buttocks. Specified anatomical areas also includes less than completely and opaquely covered human genitals and the pubic region.

On four separate occasions, dancers either fully exposed their breasts or exposed their buttocks or exposed their vaginal and pubic area. These acts were clear violations of the Spencer County Ordinances and clear violations of the prior order of this Court. For these violations, the Court finds the defendants to be in indirect contempt of this Court.

The Court feels compelled to at least comment on the matter of the term “sexual device shop.” Plaintiffs’ lead counsel is practicing in this Court at the discretion of this Court. It seems remarkable that someone in that position would on the one hand openly show disdain for a prior ruling of this Court and on the other hand ask this Court to award attorney fees. To determine what something is “designed and marketed” for clearly requires testimony – not just the admission into evidence of a bag or box of items. At a prior hearing, plaintiffs’ witness admitted that the items might be gag gifts. At this hearing, plaintiffs’ witness began his remarks with the statement, “Well, I am not an expert...” The Court did not think that it could be any clearer in its prior ruling. Yet, some did not understand.

This hearing also incorporated the issue of the motel. As no evidence was offered in opposition, the Court now finds that the plaintiffs shall be granted a summary judgment that the Spencer County Ordinances apply to any business activity or operation of the motel.

The Court would note that it is appropriate that the level of fines would rise with repeated violations of the ordinances and the order of this Court.

The defendants are hereby found to be in indirect contempt of this Court for their repeated failure to abide by the terms of the Spencer County Ordinances and the prior orders of this Court.

The defendants shall fully cooperate with the plaintiffs with regard to the inspection of any of its operation to verify the complete compliance with all orders of this Court.

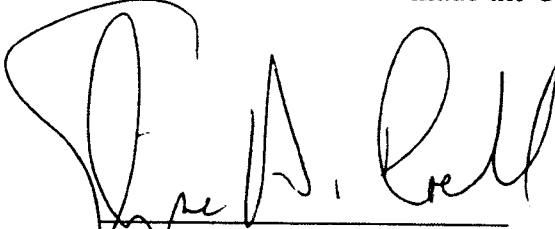
The defendants shall be fined pursuant to Spencer County Ordinance 2006-4 and because of their indirect contempt of this Court in the total amount of Thirty Thousand Dollars (\$30,000).

The defendants shall be responsible for a portion of the plaintiffs' attorney fees in the amount of Nine Thousand Five Hundred Dollars (\$9,500) which shall be paid within 60 days.

The plaintiffs shall be granted a summary judgment that the Spencer County Ordinances are applicable to any operation of the motel.

The Court finds that there is no just reason for delay and the Court directs entry of judgment on all of the issues ruled upon by this Court.

IT IS THEREFORE ORDERED by the Court that all of the above be made the Order of this Court.



Wayne A. Roell
Judge, Spencer Circuit Court