

**DuPAGE COUNTY, ILLINOIS**

**BEFORE THE *AD-HOC* COMMITTEE ON ADULT  
BUSINESS**

**SUBMISSION ON BEHALF OF ZEBULON  
ENTERPRISES, INC.**

**For the Tuesday, May 14, 2019, 12:00 Noon Meeting**

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## BACKGROUND

For over four decades, Zebulon Enterprises, Inc. (“Zebulon”) has operated as a lawful, constitutionally protected adult entertainment business in unincorporated DuPage County. It now faces official hostility and an apparent existential threat from the County’s announced intention “to get these businesses out of our community,” the “community” presumably being that over which the Committee has authority, unincorporated DuPage County.

From the very outset, when it received last-minute notice of this endeavor several months after this *Ad Hoc* Committee commenced its proceedings, Zebulon Enterprises has objected that an apparent ambush was afoot. The Committee refused Zebulon’s eminently reasonable request for more time before it was scheduled to appear at a hearing, mere days later. It has since come to light that the Committee’s mandate has been to forward hasty recommended enactments of as-yet-undisclosed nature to the County Commission by April or May of this year. Meanwhile, Zebulon has been denied access to Committee hearing transcripts and any materials submitted at three subsequent Committee sessions – without which its counsel cannot be expected to formulate an adequate response. In light of the County’s tactics, and what it has learned of the Committee’s proceedings, Zebulon can only conclude that the County has a poorly concealed agenda of using current alarm over prostitution operations in the area as a pretext for eliminating the only actual, legal adult entertainment business in DuPage County.

The County has managed to eliminate all other adult entertainment venues: “As a result of the zoning changes, the County has successful[ly] reduced the number of adult business uses to one legal adult business use in the unincorporated jurisdiction, the Zebulon Bookstore,” Mr. Hoss stated, further noting that Zebulon has legally operated for decades, since a federal decree in 1986. (Hoss Statement, 1/29/19 Tr. at 19-20)

Given the time constraints the Committee has imposed, and the lack of access to transcripts of several Committee meetings and other key materials that may have been presented at those hearings, what follows is the best Zebulon is reasonably able to submit to this Committee at this time.

## PROCEDURAL/HISTORICAL BACKGROUND

### a) Formation of the Ad Hoc Committee and its Proceedings

Information provided by Mr. Hoss, and gleaned from public records, has somewhat illuminated the Committee's background and proclivities. According to Mr. Hoss, the Ad Hoc Committee was created at the regular meeting of the County Board of Commissioners on December 11, 2018.<sup>1</sup> The materials associated with that meeting include only a statement by the Chair and the minutes of the meeting; no written resolution or other comparable document.

The video recording of the Chairman's Report reflects Commission Chairman Cronin stating the following:

"I also propose the creation of an Ad Hoc Committee on Adult Businesses. The purpose of this committee – the Adult Businesses Committee – is to examine the issues – the difficult issues and troubling issues – related to adult businesses in the unincorporated areas of DuPage County, then utilize that information and testimony offered to the committee to propose reasonable licensing regulations designed to mitigate the negative secondary impacts these businesses have on the community. *We'll do the best we can to get these businesses out of our community.* In accordance with the Rules, an *ad hoc* committee shall last no longer than the term of the current Board and is to be assigned to a Standing Committee." (Emphasis added.)

Notably, the minutes of the meeting reflect an almost verbatim recitation of what Chairman Cronin said, with the glaring omission of the crucial sentence, "We'll do the best we can to get these businesses out of our community." Although the recitation in the minutes of what was said has minor inconsistencies, that is the only omission that represents a substantive change in what Chairman Cronin said.

That inconsistency is very important: The minutes recite only that the Committee was "to propose reasonable licensing regulations designed to mitigate the

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<sup>1</sup> Apparently such ad hoc committees are authorized by the DuPage County Code: § 2-300.1-201 recognizes a "Standing or Ad-Hoc committee established by the DuPage County Board with specific agency jurisdiction and responsibilities."

negative secondary impacts these businesses have on the community,” while the deleted portion of Chairman Cronin’s statement expresses an intention to get all adult businesses out of the community – clearly an unconstitutional objective.

Licensing of adult businesses can be constitutionally acceptable if the licensing regulations include proper procedural safeguards, *see, e.g., FW/PBS v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Entirely prohibiting them, on the other hand, is not. *See, e.g., City of Renton v. Playtime Theater, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (First Amendment prohibits a municipality “from effectively denying [the adult business operator] a reasonable opportunity to open and operate an adult theater within the city.”), and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77, 78, 101 S.Ct. 217, 668 L.Ed.2d 671 (1981) (Rejecting the argument that it was permissible to entirely outlaw exotic dancing in the town because such entertainment was available in neighboring Philadelphia.).

Moreover, licensing schemes are analyzed as prior restraints, and unduly burdensome measures will be strictly scrutinized as presumptively violating the First Amendment. *See, e.g., Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301 (11th Cir. 2003) (City failed to meet its First Amendment burden to show that its \$1250 licensing fee was reasonable and not a tax on free expression.).

Commissioner Cronin’s statement is a smoking gun of the County’s censorial intent to violate the First Amendment.

#### **b) Zebulon’s experience with the Committee**

On Friday, March 29, 2019, an unknown individual (presumably a County functionary) dropped off at Zebulon’s business a letter dated March 28, 2019, inviting it and/or its employees to appear before the *Ad Hoc* Committee at its next meeting on Tuesday, April 9, 2019, which was seven business days later. That was the first notice that Zebulon had ever received of the existence of the Committee, much less of the fast-approaching dates on which the Committee was to meet for consideration of any industry submission and for its expected draft ordinance.

The letter was signed by Mr. Paul Hoss, Planning and Zoning Administration Coordinator and included his contact information. On Tuesday, April 2, 2019, Zebulon forwarded a copy of the letter was forwarded by email to its undersigned

counsel, Clyde DeWitt, an attorney who has represented Zebulon and its principal for over 20 years. He immediately sought local counsel, retaining Mr. Jeff Fawell.

Given the urgency (the meeting being a week away), Mr. DeWitt contacted Mr. Hoss by email, requesting further information. The following day (late morning Pacific Time; early afternoon Central Time), after an opportunity for Zebulon to cobble together more information about the Committee and some inconsequential interaction among Mr. DeWitt, Mr. Fawell and Mr. Hoss, Mr. DeWitt sent an email to Mr. Hoss, requesting additional time to review and analyze the and respond to the massive amounts of information that was before the Committee.

Mr. Hoss promptly responded by email, explaining that he would forward counsel's request to the Committee. The Committee having refused to extend the time for Zebulon to respond, Mr. Fawell appeared at the April 9, 2019 hearing, presenting essentially the same request expressed in Mr. DeWitt's April 3, 2019 email to Mr. Hoss. The Committee responded that it would allow Zebulon until the final meeting, scheduled for May 14, to submit anything it wished.

*However, to this day, Zebulon has not had access to any of the hearing transcripts from the Committee's meetings of March 26, April 9, or April 23, nor to any materials the Committee may have received at those meetings. Despite counsel's repeated requests, those transcripts and evidentiary submissions have neither been posted on the Committee's webpage, nor provided to Zebulon in any other form.*

Zebulon's FOIA requests to the County of April 11 and as resubmitted on — have been met with evasion and stonewalling.

## **PROSTITUTION AS A PRETEXT FOR UNRELATED INITIATIVE TARGETING ZEBULON BOOKSTORE**

The Committee has held meetings on January 29, February 12 and 26, March 12 and 26, April 9 and 23, with the final meeting scheduled for May 14, 2019. Since the March 12 meeting, no transcripts or evidentiary submissions to the Committee have been posted on the designated website, nor has Zebulon been afforded access to them in any other form.

Reviewing the Committee's record insofar as it has been made available, a curious disjuncture emerges. On the surface, every indication is that this initiative has sprung primarily from public outcry regarding prostitution activity in the County, particularly at the "adult photography" business "Hot Shots" (which apparently has now been shut down through readily available prosecutorial methods).

As should be clear from Mr. Cronin's slip, however, these proceedings are largely theater intended to reach a preordained result. From the very start of the hearings, County officials have obviously agreed to refer inaccurately to prostitution operations as "adult business uses," so as to tar Zebulon with the same brush.<sup>2</sup> (1/26/19 Tr. at 4-5 [Renehan], 25 [Hoss], and 30-31 [Hayman].) Along with his opening statement, Mr. Hoss presented the Committee with a handy chart of "Talking Points" to support predetermined conclusions.

In short, these hearings have not been an honest inquiry, but rather a calculated use of the public's concern with prostitution as a pretext for implementing an altogether different agenda. Every spontaneous citizen witness appearing at the hearings has focused exclusively on that sort of concern. Mr. Zay of the Committee stated the problem as "these things [massage parlors, Hot Shots, etc.] have been popping up all over the place." (1/26/19 Tr. at 28.)

Immediately following Mr. Zay's remark, County Attorney Hayman testified at some length about the challenges of dealing with such prostitution fronts, and maintained that "the real objective of our regulatory scheme" is to address this problem of "concealed business operations." (1/26/19 Tr. at 31-32.) However, he then oddly shifted gears and focused his remarks specifically on Zebulon, with a brief lecture on First Amendment law and the relative benefits of operational regulations over zoning. He touted the former as offering the advantages of no grandfathering (Zebulon being the only relevant target), and affording the County the power *to quickly shut down the business*. (1/26/19 Tr. at 44-45.) Given that prostitution activity can always be quickly shut down via arrests and injunction, Hayman's clear suggestion is that Zebulon is centrally in the County's cross-hairs – the pretext of concealed prostitution operations is simply misdirection.

The testimony of other live witnesses who have appeared at the Ad Hoc

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<sup>2</sup> That conflation of terms is simply intended to mislead. Undersigned counsel has never before heard of prostitution being referred to as an "adult business use."

Committee hearings is most interesting. These witnesses seem to fall into two discrete categories. The spontaneous testimony of unrehearsed citizens has centered entirely around the problem of prostitution occurring in DuPage County, at the Hot Spots location and elsewhere. Then there are the witnesses who appear to have been solicited and cultivated by the County and the Committee, and who have an agenda hostile to adult material in general and to Zebulon in particular.

In the former category are local residents who are understandably concerned about prostitution activity, particularly in close proximity to homes and schools. The first such witness was Pastor Kelly Brady, who voiced concern about human trafficking and about the Hot Shots business located near schools. None of his comments pertained to Zebulon's longstanding business in an appropriate commercial district. (1/29/19 Tr. at 6-8.) Subsequent witnesses included DuPage County residents living near Hot Shots and concerned about crime and harm to property values from its suspected prostitution activities. (2/12/19 Tr. at 5-7.). At the February 26 hearing, the Committee heard from two school officials and two other local residents, all of whom expressed concern about school children near the Hot Shots business, with an exclusive emphasis on prostitution and trafficking. (2/26/19 Tr. at 24-40, 56-71.) An attorney dealing with prostitution and trafficking indicated no connection with adult bookstores at all, and in fact urged measures like posting hotline numbers that are already in place at Zebulon's store. (3/12/19 Tr. at 49.)

In the latter category are officials and other witnesses who clearly came with an agenda other than combating prostitution. Assistant County Attorney McCarthy again set a tone early on by misleadingly referring to prostitution as "the adult business trade." (2/12/19 Tr. at 27.) Much as Mr. Hayman had done, he then deftly segued from prostitution to previewing testimony "from appraisers and real estate professionals talking about the impact of property values [and] being able to get other businesses to be viable in the area where there is adult business uses located ." (2/12/19 Tr. at 28.)

At the next Committee meeting, Mayor Maglio of Roselle similarly referred to "detriment to business owners" from "these adult bookstores" – although Zebulon is the only such bookstore, and although nothing ties Zebulon to "two fatal shootings" and other prostitution-related crime and nuisances such as trespass. He bent over backwards to lump Zebulon with now-defunct massage parlors, with no justification for doing so. (2/26/19 Tr. at 8-13.)

The Mayor was followed directly by Roselle Community Development Director Watkins, who cut right to the chase: having adult businesses in the locale creates a “negative image.” He related a double-hearsay report that other businesses will not relocate to the area, and existing ones have left. (2/26/19 Tr. at 14-17.) A Committee member then opined that the area is an “eyesore” in need of redevelopment, again proceeding to mention Zebulon in the same breath as “massage parlors popping up all over.” (2/26/19 Tr. at 18-21.)

Similar confusion – coupled with outright ideological *hostility to the content* of adult materials – pervaded the testimony of Ralph and Ken Mariotti, local business owners. They complained about a now-closed massage parlor as the cause of trespassing and excessive police presence – but then quickly pivoted to “an adult bookstore” as objectionable because “we’re a Christian company.” Prompted by a leading question from Chair Renehan, they opined that adult businesses are a “blight” and that the area needs redevelopment. (2/26/19 Tr. at 43-50.) Very curiously, they specifically complained about the grandfathered status which could only relate to Zebulon: “If that grandfather clause can get removed, I’m sure that would change things quickly.” (2/26/19 Tr. at 54). Complete with this rather technical point about grandfathering, that testimony gives every indication of coaching by County officials with an agenda of eradicating Zebulon.

The March 12 hearing began with an announcement from Chair Renehan that although Hot Shots had been shut down, the Committee was resolute regarding the need to regulate “current and future adult businesses.” She then introduced a panel of five women social services workers who were all involved in combating the ills of prostitution and trafficking. (3/12/19 Tr. at 4-5.) Both Renehan and these five speakers programmatically referred to prostitution and trafficking as “the adult business industry” – although that is not a commonly accepted use of the term “adult business,” at all.<sup>3</sup> Witness Simone Halpin, director of a women’s shelter, removed all pretense and openly editorialized that erotic materials create “an addiction” that leads directly to involvement with prostitution and trafficking – an absurd proposition in light of the widespread popularity of erotic fare, and one with no credible support.

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<sup>3</sup> In both common and legal parlance, “adult business industry” refers to bookstores, theaters, and adult clubs. Again, in over four decades of practicing in this area, undersigned counsel has never before heard of prostitution being referred to as “the adult business industry.” It certainly appears that the Committee and a number of its witnesses have agreed to use that term in a manner calculated to conflate the two.

(3/12/19 Tr. at 38-39.) Legal Aid worker Garrido followed up with a ludicrous conflation of “constitutionally protected content” with the recent high-profile raid on human traffickers in Florida (who needless to say enjoy no First Amendment protection), asking, “how can we find creative ways to . . . regulate the businesses that are supposed to be constitutionally-protected speech?” (3/12/19 Tr. at 54-55.)

In short, despite the lack of any connection between Zebulon and criminal prostitution operations, these latter witnesses have attempted to blur that distinction, creating a false equation between “adult business” and “prostitution/trafficking.” The intentional misdirection, and antipathy to adult content, pervade these hearings.

To be clear, prostitution rings are not “adult businesses” – they are criminal enterprises. As such, they are subject to criminal prosecution and injunction – swiftly available measures that were apparently employed in the case of Hot Shots.

Indeed, an ordinance imposing business licensing requirements and “operational” regulations would have no impact whatsoever on a prostitution ring attempting to conceal itself behind a legitimate business facade. If miscreants intend to create a front for prostitution, they would not apply for an “adult business license.” Rather, there would be continued subterfuge, such as opening “Joe’s Machine Shop,” with concealed facilities for the unlawful activity.

As the only legal adult business in this locality, Zebulon is the only entity that would foreseeably be required to obtain an “adult business license” and be subjected to as-yet-undisclosed but presumably onerous regulations. The Committee and local law enforcement would be well advised to focus on measures more logically and practically designed to combat the scourge of prostitution, rather than scapegoating Zebulon to create an appearance of “doing something.” Unless the something they are doing is to close down Zebulon so the property can be turned over to local real estate developers – a patently unconstitutional objective.

With regard to the missing materials for all hearings after March 12 – there is reason to believe that at least one of these hearings has focused on property values and possibly on the plans for redevelopment – which obviously would be of great interest. Zebulon would certainly challenge any such testimony – based on long experience with such litigation, wherein even veteran anti-adult business expert witnesses have

been forced to admit that attempting to prove causation is “a fool’s errand.”<sup>4</sup>

In light of what Zebulon does know of these proceedings, given that the planned licensing and operations strictures would fall exclusively on Zebulon and would do nothing to address the announced problem of prostitution – clearly another agenda is at work here. Counsel has learned that the municipality of Roselle has plans to incorporate the area that includes Zebulon. Those plans would certainly explain why two Roselle officials were so avid to appear and misleadingly complain about Zebulon. A rational assessment would be that the Committee’s agenda is that of real estate interests and redevelopment plans – the real thrust behind the County’s barely-concealed intention to regulate Zebulon to extinction.

### **AS A LAWFUL NONCONFORMING USE, ZEBULON HAS BOTH FIRST AMENDMENT AND DUE PROCESS PROTECTIONS**

Contrary to the aspiration Chairman Cronin expressed at the December 11, 2018 meeting, the County cannot extinguish, limit, or relocate Zebulon’s existing business by way of zoning regulations, nor can the County enact pretextual regulations and use them as a fulcrum to eliminate the business.

Zebulon is a grandfathered, lawful use in its present location. The business long ago prevailed in its lawsuit challenging the County’s special use permit requirement as unconstitutional, in *Zebulon Enterprises, Inc. v. County of DuPage*, 146 Ill. App. 3d 515, 496 N.E.2d 1256 (1986). The upshot of that litigation has been Zebulon’s lawful operation in its present location for almost four decades.

Not only is Zebulon protected by First Amendment principles of which the County is well aware – it also enjoys Due Process protection of its property rights. Indeed, Illinois decisional law is very clear that the rights of nonconforming uses are broadly protected and grounded in constitutional due process guarantees.

Illinois law is extremely protective of such property rights, and expansive in its interpretation of the scope of nonconforming rights protected. A leading case from

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<sup>4</sup> Deposition of Dr. Richard McCleary, in *Fantasyland Video, Inc. v. County of San Diego*, 373 F.Supp.2d 1094 (S.D. Cal. 2005). Indeed, this Committee relies upon some of Dr. McCleary’s writings, as they were part of the submissions.

DuPage County is typical of the nonconforming use rights caselaw, explicitly grounded in constitutional rights. In *DuPage County v. Elmhurst-Chicago Stone Co.*, 18 Ill.2d 479, 485, 165 N.E.2d 310, 313 (1960), the Illinois Supreme Court held:

“This court has long recognized that it would be manifestly unjust to deprive an owner of property of the use to which it was lawfully devoted when the ordinance became effective. . . . The present ordinance also recognizes the right to continue a nonconforming use, and . . . it is the duty of a court to give it such construction as will prevent its running counter to constitutional provisions.”

The court upheld a mining company’s nonconforming use rights even though it was not actively using the land for that purpose when the zoning law went into effect – that it contemplated the use was enough. *See also Bainter v. Village of Algonquin*, 285 Ill.App.3d 745, 675 N.E.2d 120 (Ill. App. 2 Dist. 1996).

**ZEBULON WOULD PREFER TO CONTINUE ON THE PATH OF  
PEACEFUL COEXISTENCE IT HAS FOLLOWED FOR DECADES,  
BUT WILL DEFEND ITS LEGAL RIGHTS  
AS MAY BECOME NECESSARY**

Litigation is costly, but Zebulon’s principal is not averse to doing battle, and its counsel has been at the forefront of adult business litigation since the 1980s.

Undersigned counsel is no stranger to adult business litigation – he and his previous law firm have been at the forefront of that field for over four decades. Counsel’s former law partner argued the landmark case of *Young v. American Mini Theatres* (1976) in the Supreme Court. After Mr. DeWitt joined the small, specialized firm of six attorneys in Beverly Hills, they litigated numerous other cases in the Supreme Court: *Fort Wayne Books v. Indiana* (1989), *FW/PBS v. City of Dallas* (1990); *Alexander v. United States* (1993) (the first case in which the Supreme Court ever invoked the Excessive Fines Clause of the Eighth Amendment); *City of Erie v. Pap’s A.M.* (2000), as well as countless other cases in state and federal courts across the country.

And, perhaps most instructive here is the cautionary tale of *City of Los Angeles v. Alameda Books* (2002), another adult zoning case which has proved disastrous for

the municipality. That ill-advised Los Angeles ordinance has eventuated in decades of litigation; the City has lost round after round in federal district court and the Ninth Circuit, as the case has made its way to the Supreme Court and back. Representing Alameda Books, undersigned counsel and his colleagues have expended upwards of 1000 hours, and the City has become liable for millions of dollars in attorneys fees.<sup>5</sup>

## **ZEBULON CAN BE A PARTNER IN COMBATING SEX TRAFFICKING**

Zebulon's principal and employees understand and share the concern, widespread in the community, about the proliferation of "pop-up massage parlors" and other business premises that are merely fronts for prostitution. The business has long been aware of, and proactive about, the terrible problem of women being trafficked and coerced into the sex trade. Its management has posted notices in the store, and has trained the staff to be on the lookout for any evidence of such, and to react appropriately if they have suspicions.

In addition, Zebulon is affiliated, through counsel, with an organization known as COAST, an initiative developed to combat human trafficking, under the auspices of the Association of Club Executives (ACE), and headquartered in Washington, D.C. COAST has trained more than 14,000 club operators and employees in the prevention and intercession of trafficking situations. Zebulon would be happy to facilitate COAST's working with this community to address current problems.

## **THE COMMITTEE SHOULD ADHERE TO ITS STATED OBJECTIVE**

If the committee is to maintain its stated, legitimate objective – to explore the possibility of enacting licensing regulations to address secondary effects of adult businesses – then that is what the Committee should discuss. As noted, licensing of adult businesses can be permissible given proper procedural safeguards. *See, e.g., FW/PBS v Dallas, supra.*

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<sup>5</sup> It may have been a while since DuPage County has been called upon to defend a §1983 lawsuit. Times have changed in the world of specialized litigation. *See: Legal Fees Cross New Mark: \$1500 an Hour, THE WALL STREET JOURNAL* (February 9, 2016); *Meet the Texas lawyers whose rates now exceed \$1000 an hour, DALLAS NEWS* (June 2015).

However, the Committee must bear in mind that any regulation, licensing or whatever it may be, that treats one category of speech differently than another – usually sexually oriented speech compared to others – must survive intermediate constitutional scrutiny. E.g., *City of Renton v. Playtime Theatres, Inc.*, *supra*. Accordingly, what the Committee should be examining is whether there are adult-business **licensing** regulations that would stand to mitigate identified secondary effects of adult businesses.

Anything further would be *ultra vires*.

## CONCLUSION

Although the courts may have granted municipalities considerable leeway in regulating adult businesses upon an honest appraisal of secondary effects, that leeway crashes headlong into the First Amendment upon a showing that the locality has simply produced “a secondary-effects rationale as pretextual justification.” *Schultz v. City of Cumberland*, 228 F.3d 831, 844 (7th Cir. 2000). Here, the County can easily resort to arrests, criminal fines, and injunctions to address prostitution, a problem which would not be affected at all by “adult business” regulations.

The County has overtly announced its intention simply to eradicate the one lawful adult media outlet in the entire, large jurisdiction. The pretext of combating prostitution and trafficking is transparent fig leaf for the County’s actual agenda. Roselle is planning to annex the area in which Zebulon is located, and wants Zebulon closed so that it can turn the area over to real estate interests and redevelopers. The federal courts will likely have something to say about those plans.