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Pack Shack v. Howard County:
Zoning Ordinance Placing Burdensome Restrictions on Location and Operation of Adult Businesses Violates Article 40 of the Maryland Declaration of Rights and the First Amendment of the United States Constitution

By: Erin Galvin

The Court of Appeals of Maryland held a zoning ordinance placing burdensome restrictions on location and operation of adult businesses violated Article 40 of the Maryland Declaration of Rights and the First Amendment to the United States Constitution. *Pack Shack v. Howard County*, 377 Md. 55, 832 A.2d 170 (2003). The court further held the restrictions, which were beyond those necessary to promote the secondary impacts associated with such businesses, denied adult businesses the reasonable opportunity to operate within the county. *Id.* at 64, 832 A.2d at 176.

On December 1, 1997, the Howard County Council ("Council") passed Bill 65-1997 ("ordinance") amending sections of Howard County zoning regulations by imposing restrictions on the operation of adult businesses. The ordinance restricted interior arrangement of adult businesses, prohibited outside display of adult material, and required a permit for operation. Moreover, the permit process required full disclosure of all parties having a financial interest in the adult business itself, as well as all parties with an interest in the real property where the business is

located. Pack Shack, Inc. ("Pack Shack") was an adult entertainment business located in Howard County and subject to the zoning ordinance.

Pack Shack filed a complaint in the Circuit Court for Howard County seeking injunctive relief and a declaratory judgment claiming the ordinance violated the free speech clause of the First Amendment to the United States Constitution. The trial court granted an injunction ordering Pack Shack to comply with the zoning ordinance. The Court of Special Appeals of Maryland affirmed. Pack Shack petitioned the Court of Appeals of Maryland for certiorari, which was granted.

The court began its analysis by looking to United States Supreme Court decisions addressing similar constitutional issues involving zoning ordinances and adult businesses. *Id.* at 65, 832 A.2d at 176. Reviewing these decisions, the court determined for a content-neutral zoning ordinance to be constitutional, it must satisfy three requirements. *Id.* at 68, 832 A.2d at 178. First, the ordinance must serve an unrelated purpose to the suppression of speech no greater than necessary to further its purpose. *Id.* Second, the ordinance must be designed to minimize the

incidental burden on speech leaving open other avenues of communication. *Id.* Finally, the ordinance must provide for reasonable and adequate procedural safeguards with regard to permit provisions. *Id.* at 68, 832 A.2d at 178.

Before considering factors to determine the ordinance's constitutionality, the court considered whether the ordinance imposed a content-neutral time, place, and manner restriction on adult businesses. *Id.* at 68-69, 832 A.2d at 178. The court analyzed the ordinance's purpose, relying on the trial court's record and Supreme Court cases. *Id.* at 69, 832 A.2d at 179. In so doing, the court concluded one purpose was to limit adverse effects of adult entertainment businesses, which adequately established an independent governmental interest. *Id.* at 69-70, 832 A.2d at 179.

Another purpose the court examined was legislative motive. *Id.* at 70, 832 A.2d at 179. Pack Shack alleged one Council member openly expressed a desire to ban all adult businesses from the county. *Id.* at 69, 832 A.2d at 178. The court reasoned a legislator's alleged motive was not sufficient to invalidate the ordinance. *Id.* at 70,

832 A.2d at 179. As a result, the court concluded the zoning ordinance was content-neutral and, therefore, subject to intermediate scrutiny. *Id.* at 71, 832 A.2d at 180.

Next, the court addressed whether the ordinance permitted alternative avenues of communication to allow adult businesses an opportunity to operate. *Id.* at 80, 832 A.2d at 185. One factor considered was whether other sites within the county were available for adult businesses. *Id.* Another factor was the percentage of land allocable to adult businesses. *Id.* at 83-84, 832 A.2d at 187.

Using these factors, the court determined the ordinance substantially limited availability of sites for adult businesses and the regulation was overbroad. *Id.* at 82, 832 A.2d at 186. The court agreed with *Pack Shack*'s estimate that there was less than one-tenth of one percent of land available for adult businesses. *Id.* at 84, 832 A.2d at 188. The court opined this was too minute to satisfy the requirement of adequate alternative channels of communication. *Id.*

Finally, the court examined the ordinance's permit provision as a prior restraint because obtaining a permit "requires governmental permission to engage in protected speech." *Id.* at 71, 832 A.2d at 180. The court noted an unlawful prior restraint is one that provides too much discretion to the government official and fails to place limits on the time to generate a decision about the permit. *Id.* at 72,

832 A.2d at 180. In this case, the court held the ordinance allowed government officials "considerable room for exercise of judgment" with respect to satisfying permit requirements. *Id.* at 73, 832 A.2d at 181.

Furthermore, the court of appeals listed three procedural safeguards to avoid constitutional problems with respect to the permit process. *Id.* at 72, 832 A.2d at 180. First, brief periods to review any prior restraint must be maintained. *Id.* Second, swift judicial review of any administrative decision must be available. *Id.* Finally, the government must bear the burden to suppress the speech and the burden of proof in court. *Id.*

In this case, the court held the permit process failed to provide a link between the governmental interest of combating adverse effects of adult businesses and the disclosure requirement of all parties with a financial interest in the business. *Id.* at 79, 832 A.2d at 184. The permit requirements encumbered the process itself and restricted *Pack Shack* from reasonably operating in the county. *Id.*, 832 A.2d at 185. As a result, the court held the zoning ordinance unconstitutional because it violated the First Amendment of the United States Constitution and Article 40 of the Maryland Declaration of Rights. *Id.* at 85, 832 A.2d at 188.

The dissent disagreed with the majority as to rendering the entire ordinance unconstitutional. *Id.* Rather, the dissent argued, since Howard County zoning regulations

contain a severability provision, the particular portion addressing the government's discretion could be narrowly construed. *Id.* According to the majority, the distance requirements provided no standard of measurement and left wide discretion to the government officer. *Id.* at 86, 832 A.2d at 188-89. The dissent would have upheld the ordinance and tailored those sections that dealt with the government's discretion. *Id.* at 88, 832 A.2d at 190.

The Court of Appeals of Maryland held a zoning ordinance placing burdensome restrictions on the location and operation of adult businesses violated Article 40 of the Maryland Declaration of Rights and the First Amendment of the United States Constitution. The decision in *Pack Shack v. Howard County* impacts Maryland law by prohibiting local governments from creating broad legislation that imposes onerous burdens on adult businesses. Despite public opposition to these businesses and possibly other unwanted businesses, the court protects Maryland constitutional law by upholding both the adult business' rights and the freedom of speech.