IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PALMETTO, PROPERTIES, INC., an Illinois corporation; and GREGORY A. SCHIRMER,	)	
Plaintiffs,	)	
	)	Case No. 99 C 2980
vs.	)	
	)	Judge David H. Coar
COUNTY OF DuPAGE, a body politic and corporate, FOREST PRESERVE DISTRICT OF DuPAGE COUNTY, a body politic and corporate; JOSEPH E. BIRKETT, in his official capacity as DuPage County State's Attorney; and JIM E. RYAN, in his official capacity as Illinois Attorney General,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOW COME the Plaintiffs in the above-captioned case, Palmetto Properties, Inc. and Gregory A. Schirmer (collectively "Palmetto"), by and through their attorneys, J. D. Obenberger and Associates, and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully request that this Court grant summary judgment to them and against the Defendants County of DuPage ("County"), Joseph E. Birkett ("Birkett"), who is sued only in his official capacity, and the Forest Preserve District of DuPage County ("District"). This Court has previously dismissed Palmetto's claims against the other named Defendant, Illinois Attorney General Ryan, and nothing in this motion, including any further references to the "Defendants" or the "parties," applies to him. In support of the foregoing motion, Palmetto states as follows:

1. The Palmetto has challenged the constitutionality of an Illinois statute regulating the location of so-called "adult entertainment facilities," both on its face, (Third Amended Complaint "Complaint" count 1), and as applied, (*Id*. count 2), and it has sought declaratory and injunctive relief concerning that statute against all of the Defendants. Palmetto has also challenged the constitutionality of the provisions of DuPage County's zoning ordinance regulating

so-called "adult business uses," both on their face, (*Id*. count 1, 3), and as applied, (*Id*. count 2), and it has sought declaratory and injunctive relief concerning those provisions against the County. Finally Palmetto has challenged DuPage County's requirement that adult business uses obtain conditional use approval before locating in certain zoning districts as an unconstitutional prior restrain upon the expression which adult business uses disseminate. (*Id*. count 4). Palmetto predicates its constitutional challenges upon the First Amendment to the United States Constitution, which applies to the Defendants under the due process clause of the Fourteenth Amendment thereto. Palmetto has also asserted that the statute and ordinance provisions violate Sections 2 and 4 of the Illinois Constitution of 1970.

2. The parties have stipulated to the truth of a comprehensive set of facts, and they have also stipulated to the authenticity of certain documents. Those stipulations have been reduced to writing and appear as Joint Exhibit 1 in the parties' joint submission, filed herewith, under this Court's Local Rule 56.1(a)(1). Each of the stipulated documents appears as a subsequent numbered Joint Exhibit in that same submission. In light of those materials and stipulations, Palmetto contends that there is no genuine issue as to any material fact, and therefore no need for a trial in this matter. Pursuant to this Court's Local Rule 56.1(a)(3), Palmetto has filed herewith a statement of uncontested material facts, with references to the stipulations and materials contained in the parties' joint submission under Local Rule 56.1(a)(1).

3. Palmetto is entitled to judgment as a matter of law on its claim that the challenged Illinois Statute, Section 5-1097.5 of the Illinois Counties Code, as amended, 55 ILCS 5-1097.5 (1998), is unconstitutional both on its face and as applied. In the first place, no valid governmental purpose is served by the inclusion of all portions of forest preserves as uses from which adult business uses must be protected by a separation requirement, and no existing study supports a concern over secondary effects of adult business uses – blight and crime – in all areas of forest preserves. The inclusion in the statute of the unrestricted term "forest preserve" is not narrowly tailored to serve any proper governmental purpose and renders the statute unconstitutionally overbroad. Second, because the only reason under the statute why Palmetto cannot locate its adult entertainment facility on its property is that the property lies within 1000 feet of a portion of the Pratt's Wayne Woods Forest Preserved dedicated, not to any kind of public recreation, but to preservation of natural wetland flora and fauna, (Joint Exhibit 1 ¶¶ 23, 29-32), it is unconstitutional to apply the 1000-foot separation requirement against Palmetto in this case.

4. Shortly before Palmetto began searching for a site for an adult business use in DuPage County, the County modified the provisions of its zoning ordinance regulating adult business uses. (Joint Exhibit 1 ¶¶ 7, 39). Under adult business use regulations which had been in effect for a dozen years, Palmetto could have located an adult business use on its property. (*Id*. ¶¶ 3, 4, 16). The County had modified its adult business use zoning provisions solely to conform to the Illinois statute addressed in paragraph 3 of this motion. (*Id*. ¶ 7). The County's adult business use zoning provisions are thus unconstitutional, on their face and as applied, for all of the reasons recited in paragraph 3 of this motion. In addition, those provisions are facially unconstitutional because they fail to allow adult business uses to locate anywhere within the County's zoning jurisdiction, (*Id*. Joint Exhibit 1 ¶¶ 36, 37)**,** and they thus fail to provide reasonable alternate avenues for dissemination of the expression which adult business uses disseminate.

5. Finally, the County's requirement that adult business uses obtain prior County approval as conditional zoning uses before locating in any of its light industrial districts imposes an unconstitutional prior restraint upon the expression which adult business uses disseminate. The ordinance allows the County's officials too much time to process a conditional use application concerning a prospective adult business use. Indeed, since the County Board's Development Committee must review such an application, and since no time limit at all is placed upon that review, (Joint Exh. 1 ¶¶ 9, 10), the County can indefinitely delay the processing of an adult business use's conditional use application. Even apart from this unconstrained time period, the cumulative effect of the two prescribed time periods permits County officials to take 270 days to evaluate a conditional use application for a prospective adult business use. (*Id*. ¶ 10). This is too long to wait before disseminating expression or before seeking judicial review of a denial of conditional zoning use permission. In addition, the zoning ordinance vests too much substantive discretion in the County's officials for the conditional use scheme to pass constitutional muster as a prior restraint.

6. For all of the foregoing reasons, Palmetto is entitled to judgment as a matter of law against all of the Defendants under counts 1 and 2 of its complaint and against the County under counts 3 and 4.

WHEREFORE the Plaintiffs, Palmetto Properties and Gregory Schirmer respectfully request that this Court grant summary judgment a) to them and against the Defendants County,

Birkett, and District under counts 1 and 2 of the third amended complaint, and b) to them and against the County on counts 3 and 4 of that complaint. This Court should award both declaratory and injunctive relief under each of the counts, and it should also award reasonable attorney's fees to the Plaintiffs and against the Defendants County, Birkett, and District.

Respectfully submitted,
Palmetto Properties, Inc.
and Gregory A. Schirmer,

By:_____
Reed Lee, Esq.

Of Counsel:

J. D. Obenberger and Associates
Three First National Plaza
70 West Madison Street
Suite 3700
Chicago, Illinois 60602

(312) 558-6420

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Notice of Filing

To: Anthony Hayman, Esq.
Assistant State's Attorney
County of DuPage
505 North County Farm Road
Third Floor
Wheaton, Illinois 60187

Mary Dickson, Esq.
Bond, Mork & Dickson, P.C.
203 East Liberty Drive
Wheaton, Illinois 60187

PLEASE TAKE NOTICE that, on Wednesday, June 21, 2000, we filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, the following Plaintiffs' Motion for Summary Judgment, together with the supporting materials required by Local Rule 56.1(a), copies of which are herewith served upon you for your records.

J. D. Obenberger and Associates
Three First National Plaza
70 West Madison Street
Suite 3700
Chicago, Illinois 60602

(312) 558-6420

_____
Reed Lee, Esq.

Certificate of Service

I certify that on Wednesday, June 21, 2000, I served a true and correct copy of the foregoing Plaintiffs' Motion for Summary Judgment, together with true and correct copies of the supporting materials required under Local Rule 56.1(a), upon each of the following-named attorneys for the remaining Defendants by depositing the same in the United States Postal Service mailbox located at 70 West Madison Street in Chicago, Illinois, in a sealed envelope with proper first class postage prepaid and addressed as indicated below.

Anthony Hayman, Esq.
Assistant State's Attorney
County of DuPage
505 North County Farm Road
Third Floor
Wheaton, Illinois 60187
(630) 682-7048

Mary Dickson, Esq.
Bond, Mork & Dickson, P.C.
203 East Liberty Drive
Wheaton, Illinois 60187
(630) 681-1020

_____
Reed Lee