II. PROBLEMS OF GEOGRAPHY AND SOVEREIGNTY

A. Application of Local Zoning Ordinances to Online Activity

VOYEUR DORM, L.C. v. CITY OF TAMPA
265 F.3d 1232 (11th Cir. 2001)

DUBINA, Circuit Judge:

This appeal arises from Voyeur Dorm L.C.'s ("Voyeur Dorm") alleged violation of Tampa's City Code based on the district court's characterization of Voyeur Dorm as an adult entertainment facility. Because we conclude the district court misapplied Tampa's City Code when it erroneously found that Voyeur Dorm offered adult entertainment to the public at the residence in question, we reverse the judgment of the district court.

I. BACKGROUND

As alleged in its complaint, Voyeur Dorm is a Florida limited liability company that maintains offices and conducts its business in Hillsborough County, Florida. Voyeur Dorm operates an internet based web site that provides a 24 hour a day internet transmission portraying the lives of the residents of 2312 West Farwell Drive, Tampa, Florida. Throughout its existence, Voyeur Dorm has employed 25 to 30 different women, most of whom entered into a contract that specifies, among other things, that they are "employees," on a "stage and filming location," with "no reasonable expectation of privacy," for "entertainment purposes." Subscribers to "voyeurdorm.com" pay a subscription fee of $ 34.95 a month to watch the women employed at the premises and pay an added fee of $ 16.00 per month to "chat" with the women. From August 1998 to June 2000, Voyeur Dorm generated subscriptions and sales totaling $ 3,166,551.35.

In 1998, Voyeur Dorm learned that local law enforcement agencies had initiated an investigation into its business. In response, counsel for Voyeur Dorm sent a letter to Tampa's Zoning Coordinator requesting her interpretation of the City Code as it applied to the activities occurring at 2312 West Farwell Drive. In February of 1999, Tampa's Zoning Coordinator, Gloria Moreda, replied to counsel's request and issued her interpretation of the City Code, concluding in relevant part:

> The following generally describes the activities occurring on the property:
>
> 1. 5 unrelated women are residing on the premises.
>
> 2. 30 Internet cameras are located in various rooms in the house; such as the bedrooms, bathrooms, living rooms, shower and kitchen.
>
> 3. For a fee, internet viewers are able to monitor the activities in the different rooms.
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> 4. The web page address is http://www.voyeurdorm.com/
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> 5. The web page shows various scenes from the house, including a woman with exposed buttocks. Statements on the page describe activities that can be viewed such as "the girls of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch

them in the most intimate acts of youthful indiscretion."

The web page can be found by going to Yahoo! and entering 'Voyeurdorm' on the search. The name of the website is, itself, advertising the adult nature of the entertainment. Voyeur is defined in the American Heritage Dictionary, Second College Edition as "A [sic] person who derives sexual gratification from observing the sex organs or sexual acts of others, especially from a secret vantage point."

It is my determination that the use occurring at 2312 W. Farwell Dr., as described in your letter, is an adult use. Section 27-523 defines adult entertainment as: "Any [sic] premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances distinguished by their display or depiction of specified anatomical areas or specified anatomical activities, as defined in this section."

Please be aware that the property is zoned RS-60 Residential Single Family, and an adult use business is not permitted use. You should advise your client to cease operation at that location.

Thereafter, in April of 1999, Dan and Sharon Gold Marshlack[1] appealed the Zoning Coordinator's decision to Tampa's Variance Review Board. The Variance Review Board conducted a hearing. At the hearing, Voyeur Dorm's counsel conceded the following: that five women live in the house; that there are cameras in the corners of all the rooms of the house; that for a fee a person can join a membership to a web site wherein a member can view the women 24 hours a day, seven days a week; that a member, at times, can see someone disrobed; that the women receive free room and board; that the women are part of a business enterprise; and that the women are paid. At the conclusion of the hearing, the Variance Review Board unanimously upheld the Zoning Coordinator's determination that the use occurring at 2312 West Farwell Drive was an adult use. Subsequently, Mr. and Mrs. Marshlack filed an appeal to the City Council. The Tampa City Council held a hearing in August of 1999, at the conclusion of which the City Council unanimously affirmed the decision of the Variance Review Board.

Voyeur Dorm filed this action in the middle district of Florida. The City of Tampa and Voyeur Dorm then filed cross-motions for summary judgment. The district court granted Tampa's motion for summary judgment, from which Voyeur Dorm now appeals.

II. ISSUES

1. Whether the district court properly determined that the alleged activities

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[1] Mr. and Mrs. Marshlack are the owners of the real property located at 2312 West Farwell Drive. They lease the subject property to Voyeur Dorm.

occurring at 2312 West Farwell Drive constitute a public offering of adult entertainment as contemplated by Tampa's zoning restrictions.

2. Whether the district court properly relied on the negative secondary effects doctrine in determining the constitutionality of Tampa's zoning restrictions as applied to 2312 West Farwell Drive.

3. Whether the predicate evidence that Tampa relied upon to adopt its adult use restrictions must contemplate internet forms of communication in order to restrict internet forms of communication.

III. STANDARD OF REVIEW

This court reviews the district court's grant of a motion for summary judgment *de novo*, applying the same legal standards used by the district court.

IV. DISCUSSION

The threshold inquiry is whether section 27-523 of Tampa's City Code applies to the alleged activities occurring at 2312 West Farwell Drive. Because of the way we answer that inquiry, it will not be necessary for us to analyze the thorny constitutional issues presented in this case.

Section 27-523 defines adult entertainment establishments as

> any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.

Tampa argues that Voyeur Dorm is an adult use business pursuant to the express and unambiguous language of section 27-523 and, as such, cannot operate in a residential neighborhood. In that regard, Tampa points out: that members of the public pay to watch women employed on the premises; that the Employment Agreement refers to the premises as "a stage and filming location"; that certain anatomical areas and sexual activities are displayed for entertainment; and that the entertainers are paid accordingly. Most importantly, Tampa asserts that nothing in the City Code limits its applicability to premises where the adult entertainment is actually consumed.

In accord with Tampa's arguments, the district court specifically determined that the "plain and unambiguous language of the City Code . . . does not expressly state a requirement that the members of the public paying consideration be *on* the premises viewing the adult entertainment." *Voyeur Dorm, L.C., et al., v. City of Tampa*, 121 F. Supp. 2d 1373 (M.D. Fla. 2000) (order

granting summary judgment to Tampa). While the public does not congregate to a specific edifice or location in order to enjoy the entertainment provided by Voyeur Dorm, the district court found 2312 West Farwell Drive to be "a premises on which is offered to members of the public for consideration entertainment featuring specified sexual activities within the plain meaning of the City Code."

Moreover, the district court relied on Supreme Court and Eleventh Circuit precedent that trumpets a city's entitlement to protect and improve the quality of residential neighborhoods. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) ("[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'") (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996-97 (11th Cir. 1998) (noting that it is well established that the regulation of public health, safety and morals is a valid and substantial state interest); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1375 (11th Cir. 1993) (noting that the "Supreme Court has held [that] restrictions may be imposed to protect 'family values, youth values and the blessings of quiet seclusion'") (internal citations omitted).

In opposition, Voyeur Dorm argues that it is not an adult use business. Specifically, Voyeur Dorm contends that section 27-523 applies to locations or premises wherein adult entertainment is actually offered to the public. Because the public does not, indeed cannot, physically attend 2312 West Farwell Drive to enjoy the adult entertainment, 2312 West Farwell Drive does not fall within the purview of Tampa's zoning ordinance. We agree with this argument.

The residence of 2312 West Farwell Drive provides no "offering [of adult entertainment] to members of the public." The offering occurs when the videotaped images are dispersed over the internet and into the public eye for consumption. The City Code cannot be applied to a location that does not, itself, offer adult entertainment to the public. As a practical matter, zoning restrictions are indelibly anchored in particular geographic locations. Residential areas are often cordoned off from business districts in order to promote a State's interest. *See e.g., City of Renton*, 475 U.S. at 50 ("A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."). It does not follow, then, that a zoning ordinance designed to restrict facilities that offer adult entertainment can be applied to a particular location that does not, at that location, offer adult entertainment. Moreover, the case law relied upon by Tampa and the district court concerns adult entertainment in which customers *physically attend* the premises wherein the entertainment is performed.[2] Here, the audience or consumers of the adult

[2] The body of case law applying legislative restrictions to adult entertainment establishments relies on adverse effects that debase adjacent properties. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (relying on the negative secondary effects doctrine to uphold a city's ordinance as applied to an erotic dancing establishment); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a zoning ordinance that prohibited adult motion picture theaters from operating in certain locations based upon the negative secondary effects created by such theaters); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Flanigan's Enter., Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001) (holding that a local ordinance failed to further the county's purported concern with negative secondary effects and was thus unconstitutionally applied).

entertainment do not go to 2312 West Farwell Drive or congregate anywhere else in Tampa to enjoy the entertainment. Indeed, the public offering occurs over the Internet in "virtual space."[3] While the district court read section 27-523 in a literal sense, finding no requirement that the paying public be *on the premises*, we hold that section 27-523 does not apply to a residence at which there is no public offering of adult entertainment. Accordingly, because the district court misapplied section 27-523 to the residence of 2312 West Farwell Drive, we reverse the district court's order granting summary judgment to Tampa. Since the resolution of this threshold issue obviates the need for further analysis, we do not reach the remaining issues regarding the constitutionality of Tampa's zoning restrictions as applied to Voyeur Dorm. REVERSED.

FLAVA WORKS, INC. v. CITY OF MIAMI
609 F.3d 1233 (11th Cir. 2010)

OPINION

FAY, Circuit Judge:

This appeal arises out of a zoning dispute between an online adult entertainment business and the City of Miami regarding the use of a privately owned residence. Angel Barrios and Flava Works, Inc. seek to quash the Miami Code Enforcement Board's final administrative ruling that they were engaged in "adult entertainment" in an inappropriate zone and "illegally operating a business in a residential zone." The district court held that Flava Works was neither operating an adult entertainment establishment nor a business at the residence. We reverse and render a partial judgment in favor of the City of Miami on the state law claim that Flava Works was operating a business at the residence. We remand for further proceedings on the constitutional claims.

BACKGROUND

A. Factual Background

Flava Works, Inc. is a Florida corporation doing business as CocoDorm.com, which operates an internet-based website of the same name. The CocoDorm website transmits images, via webcam, of the residents of 503 Northeast 27th Street, Miami, Florida, over the internet. This residence, which is zoned multifamily high-density residential (R-4), is owned by Angel Barrios and leased to Flava Works, Inc. The persons residing at the 27th Street residence are independent contractors of Flava Works, and, in exchange for $ 1,200 per month plus free room and board, are expected to engage in sexual relations which are captured by the webcams located throughout the house. Individual subscribers pay Flava Works, through the CocoDorm website, for access to live or recorded video feeds, including sexually explicit conduct, from the webcams in the 27th Street residence.

[3] *See Reno v. ACLU,* 521 U.S. 844, 851 (1997) (stating that internet communication is "a unique medium - known to its users as 'cyberspace' - located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet").

Flava Works's principal place of business, as designated with the Florida Secretary of State, is 2610 North Miami Avenue, where the accounting and financial aspects of the business are conducted. Flava Works holds city and county occupational licenses to operate a video and graphics business at this address. In addition to distributing digital content through the internet, Flava Works distributes physical media, such as videos and magazines, to locations around the world. The computer servers, which house the digital content and provide access to the CocoDorm website, are not located at either the 27th Street residence or the Miami Avenue office.

Flava Works does not disclose the location of the 27th Street residence on its website or in any of its videos or magazines. None of the webcams are located outside of the residence and no external images of the home are broadcast over the internet. Neither customers nor vendors ever physically go to the 27th Street residence.

B. Procedural Background

In June 2007, the City of Miami posted a notice of violation on the 27th Street residence, informing the owner, Angel Barrios, that Flava Works was, *inter alia*, engaged in adult entertainment not permitted in that zone and illegally operating a business in a residential zone. The City of Miami Code Enforcement Board held several hearings and on August 13, 2007 found Barrios and Flava Works guilty of violating the following zoning ordinances:

> -1537 Adult entertainment not permitted in C-1 zone property.
>
> -1572 Illegally operating a business in a residential zone.

On August 23, 2007, the Code Enforcement Board entered a Final Administrative Enforcement Order.

In September 2007, Barrios and Flava Works filed the underlying action in federal district court. The lawsuit included a state law petition for writ of certiorari, as well as constitutional claims, seeking to quash the administrative decision of the Code Enforcement Board. Thereafter, the parties filed cross-motions for summary judgment.

In January 2009, the district court granted Barrios and Flava Works's motion for summary judgment finding the facts to be "materially indistinguishable" from this Court's opinion in *Voyeur Dorm, L.C. v. City of Tampa, Fla.*, 265 F.3d 1232 (11th Cir. 2001). Consequently, the district court denied the City of Miami's motion for summary judgment. The district court held that "since the Miami zoning ordinance is designed to restrict establishments that offer adult entertainment services to the public at their physical location, that ordinance cannot be 'applied to a particular location that does not, at that location, offer adult entertainment' or services to the public." The district court also held that "the activities taking place at [the 27th Street] residence do not amount to the unlawful operation of a business in a residential zone." The City of Miami filed this appeal.

DISCUSSION

On appeal, the City of Miami does not challenge the district court's conclusion that the Miami zoning ordinance regarding "adult entertainment" does not apply to the activities taking place at the 27th Street residence. The City of Miami confines its arguments to whether Flava Works was

illegally operating a business in a residential zone. It is undisputed by the parties that the 27th Street residence is zoned R-4, a residential zoning category of the Miami Zoning Ordinance. Thus, the issue on appeal is whether the activities taking place at the 27th Street residence amount to the operation of a business.

The City of Miami contends that the district court erroneously relied on this Court's decision in *Voyeur Dorm*, which does not address a prohibition against operating a business in a residential zone.

Did the district court erroneously rely on Voyeur Dorm

In *Voyeur Dorm*, this Court held that section 27-523 of Tampa's City Code, which defines "adult entertainment establishments," did not apply to a residence engaged in activities that were nearly identical to the activities taking place in the instant case. The only difference was the gender of the residents. This Court found that section 27-523 only applied to locations where adult entertainment is actually offered to the public. Because the public did not physically attend the Tampa residence to enjoy the adult entertainment, the residence was not a business *establishment* and section 27-523 did not apply.

The City of Miami has abandoned any argument that the district court erred when it concluded that *Voyeur Dorm* is controlling authority over the issue of whether Flava Works was operating an "adult entertainment establishment." On appeal, the City of Miami only contends that *Voyeur Dorm* does not address the operation of a generic business in a residential zone. The City of Miami argues that *Voyeur Dorm* is distinguishable because it was limited to a determination of whether or not the appellant had operated an adult business *establishment* in a residential zone.

Conversely, Flava Works insists that "*Voyeur Dorm* controls every aspect of the case." Flava Works argues that it "cannot be an adult business without first being a business" and "[i]f Voyeur Dorm had been operating something which could be considered a business, there is no question that it would also have been considered an adult business given the undisputed nature of the communications streaming over the internet."

Relying on *Voyeur Dorm*, the district court held that Flava Works was not operating a business at the 27th Street residence. In reaching its conclusion, the district court reasoned that "the Tampa ordinance, which defined an adult entertainment establishment as '[a]ny premises . . . on which is offered . . . for a consideration,' --otherwise known as a business--did not apply." Furthermore, the district court noted that neither the financial and accounting activities nor the computer systems necessary to transmit images to subscribers are located at the 27th Street residence. The district court conceded that "the business . . . would not likely exist without the activities taking place within the [27th Street] residence" but concluded "that does not make the activities into a business."

The district court's reliance on *Voyeur Dorm* in concluding that Flava Works was not operating a business at the 27th Street residence is misguided. Just because the Tampa ordinance defining "adult entertainment establishments" limits its application to businesses does not mean the ordinance applies to all businesses. Furthermore, *Voyeur Dorm* did not hold that the Tampa residence was not a business, it merely held that the residence was not an adult business *establishment* (where there was no public offering of adult entertainment), which is a much narrower conclusion. We agree with Flava Works that an adult business is always a business. However, the opposite is not necessarily true. The vast majority of businesses are not adult

businesses but are nevertheless prohibited within residential zones. As such, we decline to apply such an expansive reading of *Voyeur Dorm* and find that it does not address a prohibition against the operation of all businesses within a residential zone.

Is Flava Works operating a business at the 27th Street residence

We are careful to distinguish the activities taking place at the 27th Street residence from a home occupation, which is incidental and subordinate to a dwelling's use for residential purposes. The Miami Zoning Ordinance allows for a variety of home occupations in residential zones. These exceptions to the general prohibition against operating a business in a residential zone are strictly defined by the zoning ordinance. In the R-4 zoning district, home occupations may not be conducted by more than three persons and are limited to certain enumerated occupations, such as: architect, broker, or lawyer. The activities taking place at the 27th Street residence do not fall within the zoning ordinance's limited exception for home occupations.

Flava Works argues that no business was being conducted at the 27th Street residence because no goods were bought or sold and nothing was manufactured on the premises. However, it can be reasonably asserted that raw video images, which were later sold over the internet, were created at the 27th Street residence. While these images are not tangible goods, they have a commercial value and enable Flava Works to earn a profit. This seems to comport with the common definition of a business, which is "[a] commercial enterprise carried on for profit." Black's Law Dictionary 211 (8th ed. 2004).

The activities taking place at the 27th Street residence are part and parcel to Flava Work's business operations. The fact that certain aspects of the business are performed at other locations does not alter this analysis. Business objectives are the sole reason individuals are paid to live and engage in sexual activities at the 27th Street residence. Flava Works would be unable to deliver content to its subscribers without these endeavors. The activities taking place at the 27th Street residence are a clear violation of the prohibition against operating a business in a residential zone.

For the foregoing reasons, we REVERSE AND RENDER PARTIAL JUDGMENT in favor of the City of Miami on the state law claim that Flava Works was operating a business at the residence, and REMAND for further proceedings on the constitutional claims.