[J-141-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN THE MATTER OF: CONDEMNATION BY URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH OF CERTAIN LAND IN THE 22ND WARD OF THE CITY OF PITTSBURGH, ALLEGHENY COUNTY, PENNSYLVANIA, REDEVELOPMENT AREA 51 (FEDERAL NORTH) BEING PROPERTY OF NEW GARDEN REALTY CORPORATION, A PENNSYLVANIA CORPORATION; ITS ADMINISTRATORS, EXECUTORS, SUCCESSORS, ASSIGNS OR ANY OTHER PERSONS FOUND TO HAVE ANY INTEREST IN THE PROPERTY APPEAL OF: NEW GARDEN REALTY CORPORATION	:	No. 15 WAP 2004 Appeal from the Order of the Commonwealth Court entered May 19, 2003 at No. 1063 CD 2002, affirming the Order of the Court of Common Pleas of Allegheny County entered April 18, 2002 at No. GD 97-7170. ARGUED: September 22, 2004

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: DECEMBER 27, 2006**

I believe that the Pittsburgh Urban Redevelopment Authority's taking of the subject property, in order to alter the type of entertainment provided there, burdened protected expression, thus triggering strict scrutiny under Article I, Section 7 of the Pennsylvania Constitution. Thus, I would remand the matter to the trial court for a determination of whether the government's actions constitute the least restrictive means to accomplish its objectives. My reasoning follows.

The majority finds that the decision of the Urban Redevelopment Authority ("URA") to condemn the New Garden Theatre (the "Theatre") was unrelated to the content of the speech occurring on its premises, and therefore, that no constitutional scrutiny is necessary pursuant to Arcara v. Cloud Books, 478 U.S. 697, 106 S. Ct. 3172 (1986). The majority also determines that the protections embodied in Article I, Section 7 of the Pennsylvania Constitution, as interpreted by this Court in Pap's A.M. v. City of Erie, 571 Pa. 375, 812 A.2d 591 (2002) ("Pap's II"), are inapplicable to the present matter. I respectfully differ with the majority on both of these points.

First, as to federal law, it is noteworthy that, to support its position that First Amendment protections are irrelevant to the present controversy, the majority states that the URA adduced evidence that its proposed use -- namely, providing entertainment of a different variety from "adult" films -- would "reinvigorate the economy of the Federal North area in a fashion that would not occur if" the Theatre continues to offer its present fare, and that these new forms of entertainment would be "broader in scope and appeal" than the old films, thus increasing the economic vitality of the neighborhood. Majority Opinion, slip op. at 11. While these effects may be socially beneficial, they depend entirely upon changing the type of speech taking place at the Theatre. Under the Supreme Court's prevailing precedent, therefore, even if one accepts that the URA's actions and motivations were unrelated to the suppression of free expression -- i.e., that the taking pertains exclusively to the perceived secondary effects of the speech at issue -- the First Amendment requires judicial scrutiny, including an inquiry into whether the challenged governmental action allows for reasonable alternative avenues for the communication of the affected speech. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50, 106 S. Ct. 925, 930 (1986); see also City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 440, 122 S. Ct. 1728, 1738 (2002)

(observing that Renton requires that municipal ordinances restricting speech be subject to intermediate scrutiny if they are content neutral); City of Erie v. Pap's A.M., 529 U.S. 277, 299, 120 S. Ct. 1382, 1396 (2000) (recognizing that Erie's facially content-neutral restriction on public nudity, which had the effect of banning the expressive conduct of nude dancing, could be justified based upon the "secondary effects" of the speech so long as the ordinance satisfied the intermediate-scrutiny standard set forth in United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673 (1968)); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984) (observing that content-neutral restrictions on speech are only valid if they are justified without reference to the content of the regulated speech, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information); Turner Broadcasting Sys. v. FCC, 520 U.S. 180, 185, 117 S. Ct. 1174, 1184 (1997) (explaining that content-neutral speech restrictions are evaluated under intermediate scrutiny).[1]

Moreover, Arcara is inapposite to the present case, as Judge Friedman recognized in her responsive opinion on appeal. See URA, 823 A.2d at 1098-99 (Friedman, J., concurring and dissenting). The Arcara Court determined that the First Amendment does not protect parties from criminal and civil sanctions imposed as the

[1] As to reasonable alternative avenues of communication, neither the trial court nor the Commonwealth Court resolved whether Appellant could relocate the Theatre. The trial court likewise did not determine whether the type of speech at issue would be entirely eliminated in the City of Pittsburgh, while the Commonwealth Court stated that "reasonable alternatives of communication" would not be eliminated because the city has video booths for individual movie viewing as well as adult movie rental outlets. See In re Condemnation by Urban Redevelopment Auth. of Pittsburgh, 823 A.2d 1086, 1096 (Pa. Cmwlth. 2003) ("URA"). This statement, however, appears to reflect speculation on the part of the Commonwealth Court; moreover, it is not readily apparent that such modes of communication are qualitatively identical to the display or viewing of large-screen motion pictures.

result of unlawful activity occurring on a property simply because some protected speech also happens to occur there. See Arcara, 478 U.S. at 705 n.2, 106 S. Ct. at 3177 n.2 (observing that the closure of the book store based on health code violations "ha[d] nothing to do with any expressive conduct at all"). Indeed, a careful reading of that decision reveals that its holding was motivated by the Court's concern that the First Amendment not be used as a "cloak for obviously unlawful public conduct." Arcara, 478 U.S. at 705, 106 S. Ct. at 3176.[2]

In the present dispute, by contrast, the URA does not contend that the Theatre is engaged in any unlawful conduct or that the activities occurring on the premises otherwise make it a threat to public safety or subject it to civil liability. Additionally, whereas in Arcara the activities that formed the basis of the governmental action (prostitution, lewdness, etc.) were unrelated to any expressive conduct, here, the basis for the government's action relative to the Theatre is centered on controlling the speech itself. Thus, while the URA may legitimately desire to enhance the economic and social conditions extant in the neighborhood, it is the content of the speech that concerns the URA in light of its judgment that, unless such speech is altered in conformance with its

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[2] See, e.g., Arcara, 478 U.S. at 707, 106 S. Ct. at 3178 ("Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises."); see also id. at 705, 106 S. Ct. at 3176-77 ("If the city imposed closure penalties for demonstrated Fire Code violations or health hazards from inadequate sewage treatment, the First Amendment would not aid the owner of premises who had knowingly allowed such violations to persist."); id. at 706, 106 S. Ct. at 3177 ("One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim."); id. ("[A] thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders.").

overall plan, the economic goals in question will not come to fruition. In short, unlike the bookstore in Arcara, the Theatre is not attempting to use First-Amendment guarantees as a pretext to avoid sanctions for non-expressive conduct.

Apart from any First Amendment concerns, moreover, the majority determines that the protections embodied in Article I, Section 7 of the Pennsylvania Constitution, as interpreted by this Court in Pap's II, do not apply to the present matter. While the majority states, in this regard, that the situation under review is the "opposite" of that involved in Pap's II, Majority Opinion, slip op. at 17, in my view Pap's II is directly on point. In particular, I would find that the Commonwealth Court erred in failing to consider the "unmentioned purposes" of the taking as required by Pap's II, and would further conclude that the unmentioned purposes apparent on the existing record require a conclusion that the taking was content-based for purposes of our state Constitution.

As the majority explains, Pap's II involved the question of whether Article I, Section 7 was violated by Erie's public indecency ordinance, which was enacted to ban nude live entertainment by making it a summary offense to appear in public in a state of nudity. In resolving this question, the Pap's II court acknowledged the established principle that Section 7 "provides greater protection of expression than its federal counterpart." Id. at 392, 399, 812 A.2d at 601, 605; see Norton v. Glenn, 580 Pa. 212, 228, 860 A.2d 48, 57 (2004); Commonwealth, Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy, 556 Pa. 268, 275, 728 A.2d 340, 343-44 (1999). It also acknowledged -- as it had to do in light of the Supreme Court's decision remanding the matter to this Court -- that the city's stated content-neutral purpose of combating the socially undesirable activity that it believed was aggravated by the existence of nude dancing establishments subjected the ordinance only to intermediate scrutiny under the United States Constitution. Critically, however, the Pap's II court explained that the

primary difference between this Court's approach under Article I, Section 7, and judicial review pursuant to the First Amendment, is that, when a claim is raised under the state charter, the reviewing court must consider whether there is an "unmentioned purpose" of burdening protected expression that is "inextricably bound up with" the government's valid, content-neutral objective. See Pap's II, 571 Pa. at 405, 812 A.2d at 609.[3] If so, then the broader protections of Article I are implicated and the governmental action is subjected to strict scrutiny.[4]

The majority presently states that the Pap's II construct is inapplicable for the same reason that it believes Arcara applies, namely, that the URA's decision to condemn the Theatre was content neutral. See Majority Opinion, slip op., at 17. What this analysis overlooks is that, even if the taking could be considered content neutral for federal purposes, it may still be content based for purposes of the state Constitution. Indeed, this was the very point of Pap's II, in which this Court explained at length that solely relying upon the government's content-neutral "stated purpose" for its actions -- and ascertaining the level of scrutiny accordingly (as would be appropriate under the

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[3] It is undisputed that the taking here at issue burdens protected speech, as non-obscene motion pictures represent a constitutionally-protected form of expression, see Young v. American Mini Theatres, Inc., 427 U.S. 50, 59, 96 S. Ct. 2440, 2447 (1976); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02, 72 S. Ct. 777, 780 (1952); Commonwealth v. Guild Theatre, Inc., 432 Pa. 378, 381, 248 A.2d 45, 47 (1968), and the URA does not contend that the films shown at the Theatre are obscene. Cf. Pap's II, 571 Pa. at 394, 812 A.2d at 602 (noting that, although it may not "ascend to the level of high art form," nude dancing is constitutionally protected expression).

[4] Were this an issue of first impression, I would favor application of a modified O'Brien standard, see O'Brien, 391 U.S. at 377, 88 S. Ct. at 1679, as outlined in my responsive opinion in Pap's II. See Pap's II, 571 Pa. at 412, 812 A.2d at 613 (2002) (Saylor, J., dissenting) (citing City of Erie v. Pap's A.M., 529 U.S. 277, 310-13, 120 S. Ct. 1382 1402-04 (2000) (Souter, J., concurring)). As this is not an issue first impression, I am bound by the judgment of the Pap's II majority.

First Amendment) -- could not fully effectuate the protections contained in the state charter. See, e.g., Pap's II, 571 Pa. at 408, 812 A.2d at 611.

Here, the URA's "stated purpose" for condemning the Theater (namely, to carry through with its plan to revitalize the neighborhood) is undoubtedly content neutral and valid, but it is equally obvious that its action was also grounded upon an "unmentioned purpose" of altering the content of the speech that occurs on that property. This is particularly apparent because the URA did not intend to demolish or otherwise change the function of the Theatre, but planned only to replace the current "adult"-content motion pictures with alternate events and performances that would conform to the URA's overall plans for the neighborhood. See, e.g., In re Condemnation by Urban Redevelopment Auth. of Pittsburgh, No. GD 97-7170, slip op. at 7 (CCP Allegheny County, April 18, 2002) (reciting the plan to "reuse" the Theatre "as a performing arts, cultural and community activities venue with live performance, music, dance and theater . . .."); id. at 8 (observing that these same proposed new uses were included in the redevelopment master plan).

The majority avoids this critical point by focusing instead on the broader propositions that the URA's enabling legislation is a content-neutral law of general applicability, that urban revitalization efforts are not inherently speech burdening, and that the present effort has "wide sweep" in seeking the acquisition of all properties in the targeted area. Majority Opinion, slip op. at 13. This position is not entirely persuasive in the context of the present case, however, as the only property at issue is the Theatre, and the only governmental action at issue is the taking of it, since all other properties have been acquired amicably, see Majority Opinion, slip op. at 3; moreover, it is evident that if the URA were assured that the Theatre would be used for the cultural and educational events envisioned by the URA under present ownership, the URA would

have no need to take it, as the URA's goals could be achieved without doing so. Thus, the URA's decision to take the Theatre is inescapably bound up with its perceived need to alter the type of speech that would otherwise occur there if it did not take the property.[5] In this sense, I find a direct analogy between the present dispute and Pap's II, where the City of Erie's content-neutral end of reducing the negative secondary effects associated with nude live entertainment was valid and content neutral, but such purpose was "inextricably bound up with" the content-based objective of suppressing "the erotic message of the dance." Pap's II, 571 Pa. at 405, 812 A.2d at 609. Under Pap's II, then, I would uphold the taking only if it satisfies strict scrutiny, that is, if it constitutes the least intrusive means of furthering a compelling state interest.

Applying the standard presently, I would conclude that the URA has a compelling interest in redeveloping blighted urban areas, and thus, that the taking can be upheld if it is "narrowly tailored to meet that compelling interest," that is, that there are no "less intrusive, practicable methods available" of doing so. Pap's II, 571 Pa. at 410, 812 A.2d at 612 (internal quotation marks omitted). The trial court did not make any findings on this latter question, as it concluded that the taking was not content based in the first

[5] The record also supports this content-based underlying rationale. For example, the Conditions Report that formed the basis for the revitalization plan noted that the presence of an adult theater adds to the "negative image" of the area. See In re Condemnation by Urban Redevelopment Auth. of Pittsburgh, No. GD 97-7170, slip op. at 3 (CCP Allegheny County, April 18, 2002). Additionally, Angalo Taranto, the URA project manager for the Federal North Redevelopment Project, testified at trial that the URA's desire to acquire the Theatre related to the "image problem" caused by the Theatre's "undesirable uses." N.T. April 3, 2000 at 634. In the face of this evidence, the majority's suggestion that there is "no link" between the URA's content-neutral stated purpose for acquiring the Theatre and the speech which would be suppressed is unpersuasive. See Majority Opinion, slip op. at 17.

instance.[6] The Commonwealth Court, which issued its decision after Pap's II, noted the issue, but supplied a less-than-convincing analysis. In particular, the court suggested that the URA's expertise in such matters is beyond question, and that because the URA had stated that it could not fully effectuate its plan without taking the Theatre, there must have been no other means available to it that were less restrictive of free speech. See URA, 823 A.2d at 1097-98. Notably, the court's statement in this regard was brief and conclusory, and it failed to reference the record or any authority for support.[7]

In view of the above, and considering the size of the record and the sheer volume of testimony, I would refrain from making a judgment at the appellate level on whether the least-restrictive-means prong of strict scrutiny has been satisfied. Instead, I would remand the matter to the trial court so that it can make the necessary factual findings to resolve whether there are less intrusive, practical measures available to accomplish the URA's redevelopment goals, and instruct it to take into consideration whether any alternative avenues for the type of expression targeted for elimination from the Federal North neighborhood would remain within the city if the Theatre were taken by the URA.

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[6] The trial court issued its opinion before Pap's II was decided.

[7] Indeed, neither the Commonwealth Court nor the trial court indicated that the URA considered the feasibility of an alternative plan which would allow the Theatre to continue in its present usage, or otherwise showed that redevelopment could not be accomplished without acquisition of the property. Further, certain trial testimony indicates that the URA never considered such an alternative or sought the Theatre's participation in redevelopment activities. For instance, when a URA official was asked whether the URA had made "any effort at all to learn of anybody who would have redeveloped that block with the adult theater in place," he admitted that it had not. N.T. April 3, 2000, at 634. The same official stated that one reason the URA decided to condemn the Theatre was that it was not an economic generator in the neighborhood; he admitted, however, that the URA had not undertaken any efforts to assess the Theatre's economic contributions. See id. at 476.

Mr. Justice Castille joins this dissenting opinion.