

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2009 CA 1698**

**V. LOUIS GOPPELT, JR. AND KATHRYN E. GOPPELT**

**VERSUS**

**THE ASCENSION PARISH COUNCIL AND PAT BELL**

**Judgment Rendered:** MAY 13 2010

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On Appeal from the Twenty-Third Judicial District Court  
In and for the Parish of Ascension  
State of Louisiana  
Docket No. 90884

Honorable Alvin Turner, Jr., Judge Presiding

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Jean-Paul Robert  
Gonzales, Louisiana

Counsel for Plaintiffs/Appellants  
V. Louis Goppelt, Jr. and  
Kathryn E. Goppelt

O'Neil Parenton, Jr.  
Prairieville, Louisiana

Counsel for Defendants/Appellees  
Ascension Parish Council and  
Pat Bell

Mark G. Simmons  
Baton Rouge, Louisiana

Counsel for Defendants/Appellees  
S. Barton Enterprises and  
Steven Dupuy Enterprises

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**BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.**

*Downing, J. concurs and assigns  
reasons.*

**McCLENDON, J.**

Plaintiffs appeal a judgment dismissing their petition seeking declaratory judgment that a license issued for a sexually oriented business located in Ascension Parish was null and void for failing to comply with the requirements of a parish ordinance and to enjoin any sexually oriented business from operating at that location. For the following reasons, we reverse.

**FACTS AND PROCEDURAL HISTORY**

The Ascension Parish Council adopted a Sexually Oriented Business Ordinance, effective January 1, 2003, regulating all sexually oriented businesses in the Parish. The Adult Business Standards were set forth in Sections 17-291 through 295 of the Ascension Parish Development Code. Pursuant to Section 17-295, all sexually oriented businesses in existence prior to January 1, 2003, were to be treated as non-conforming uses and could continue operation.

On and before January 1, 2003, Theron Ladner Enterprises, Inc., doing business as Escapades (Escapades) operated an adult cabaret at 17378 Airline Highway in Ascension Parish. Although Escapades did not meet all of the new locational requirements, it was granted a non-conforming use license as it was in existence prior to January 1, 2003. In late May or early June 2008, Escapades closed.

S. Barton Enterprises, LLC, doing business as Silhouettes (Silhouettes) later applied for a license to operate a sexually oriented business to be located at the same site formerly occupied by Escapades — 17378 Airline Highway in Ascension Parish. On October 23, 2003, the Ascension Parish Council issued Silhouettes a license after it determined that the adult cabaret was a non-conforming use of the property.

On November 7, 2008, V. Louis Goppelt, Jr. and Kathryn E. Goppelt (plaintiffs), residents of Ascension Parish, filed suit against Pat Bell, Chairman of the Ascension Parish Council, seeking a declaration that the license was null and void and enjoining any sexually oriented business from locating at 17378 Airline Highway, insofar as that location is within 3000 feet of a daycare center, which is

prohibited by Section 17-294(a)(4) of the ordinance. Plaintiffs later amended their original petition to add Silhouettes as a defendant, and prayed for a permanent injunction to preclude Silhouettes from opening for business. Plaintiffs contended that Silhouettes was a new business that must comply with the Parish's locational requirements and that it could not take advantage of the non-conforming use clause in Section 17-295.<sup>1</sup>

Following a trial on February 10, 2009, the trial court issued a judgment of involuntary dismissal in favor of defendants and dismissed plaintiffs' petition for declaratory judgment and injunctive relief. Plaintiffs have filed the instant devolutive appeal to seek review of the trial court's ruling.<sup>2</sup>

### DISCUSSION

Zoning ordinances should be construed in favor of unrestricted use of property. In **Lozes v. Waterson**, 513 So.2d 1155 (La. 1987), the Louisiana Supreme Court stated:

In **Carrere v. Orleans Club**, 214 La. 303, 37 So.2d 715 (La. 1948), we indicated that a zoning ordinance, being in derogation of rights of private ownership and curtailing and limiting the use of property, must be strictly construed in favor of the property owner, and where exemptions appear in favor of a property owner, these exemptions should be liberally construed in favor of the property owner. See also **Wright v. DeFatta**, 244 La. 251, 152 So.2d 10 (La. 1963). Additionally, we have held that a zoning ordinance which is subject to more than one reasonable interpretation should be construed in favor of unrestricted use of property. **City of Kenner v. Normal Life of Louisiana**, 483 So.2d 903 (La. 1986).

**Lozes**, 513 So.2d at 1157.

The law also plainly requires courts to give great weight to the interpretation given an ordinance by the governing body that had enacted it. A

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<sup>1</sup> Neither defendant has challenged whether plaintiffs have a right to institute this action. Although a peremptory exception of no right of action may be noticed by the appellate court on its own motion pursuant to LSA-C.C.P. art. 927(B), we decline to do so in this case given that the parties have not raised it and the record does not contain sufficient evidence in this regard to allow us to determine if the exception may have merit. Moreover, we do not address whether plaintiffs are required to demonstrate a particularized or special interest separate and distinct from the interest of the public at large or whether plaintiffs are afforded a right of action upon a mere showing of an interest, however small and indeterminable. See **Alliance For Affordable Energy v. Council of City of New Orleans**, 96-0700, p.6 (La. 7/2/96), 677 So.2d 424, 428.

<sup>2</sup> The plaintiffs also filed a motion for new trial on April 3, 2009. However, the plaintiffs voluntarily dismissed the motion for new trial and a judgment to that effect was signed on August 31, 2009, thereby curing any defect with regard to the prematurity of the instant appeal.

reviewing court should not overturn such a determination unless it is clearly wrong. **Residents of Shenandoah Estates Subdivision v. Green**, 05-1331, p. 8 (La.App. 1 Cir. 6/9/06), 938 So.2d 1027, 1031, writ denied, 06-2098 (La. 1/8/06), 943 So.2d 1095.

Plaintiffs assert that the trial court failed to recognize that Silhouettes is a newly-established sexually oriented adult cabaret that must meet the Parish's locational requirements in order to obtain a license.<sup>3</sup> Although Section 17-295 of the Parish Development Code provided a grandfather clause for non-conforming uses, plaintiffs contend that the clause was limited to businesses that were in existence on January 1, 2003, and that the clause did not apply to the use of the property itself. Section 17-295 of the ordinance provides:

Sections 17-291 through 17-295 shall become effective on January 1, 2003. However, sexually oriented **businesses** which were in existence as of the effective date of this Division shall be considered nonconforming uses and **shall continue to operate pursuant to the nonconforming uses section of this Code.** [Emphasis added.]

Plaintiffs urge that when Escapades ceased doing business at 17378 Airline Highway in Ascension Parish, the chain of continued operation was broken.<sup>4</sup> Plaintiffs conclude that any new business located on the property thereafter had to comply with the sexually oriented business ordinance in order to operate an adult business.<sup>5</sup>

In opposition, appellees, the Ascension Parish Council and Pat Bell (collectively, "the Parish Council"), note that Section 17-295 provides that businesses that obtained a non-conforming use license "shall continue to operate pursuant to the nonconforming uses section of this Code." The non-conforming

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<sup>3</sup> Plaintiffs note that Silhouettes was not in existence or in operation on January 1, 2003. Moreover, Lance Brock, the Parish's zoning official, testified that there was also no evidence that S. Barton Enterprises was in existence in 2003.

<sup>4</sup> Plaintiffs also note that Section 17-292(l) of the Parish Development Code defines "Operate or Cause to Operate" as "to cause to function or to put or keep in a state of doing business."

<sup>5</sup> Plaintiffs also filed a motion to supplement the record with portions of the Ascension Parish Development Code, but we deny the motion. However, we take judicial notice of the ordinances sought to be introduced. See LSA-C.E. art. 202(B)(1)(c).

uses are addressed in Section 17-135 of the Parish Development Code.<sup>6</sup> The Parish Council emphasizes that Section 17-135 focuses on the use of the property and does not limit its provisions to a particular business licensee. As such, the Parish Council asserts that use of the property is the determining factor in whether a non-conforming use license should issue. The Parish Council concludes that a reasonable interpretation exists to apply Section 17-295 of the Parish Development Code to the use of the property, and as such, Silhouettes should be allowed to continue operation at 17378 Airline Highway in Ascension Parish.

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<sup>6</sup> Section 17-135 of the Parish Development Code provides:

This ordinance does not extend to buildings or land which fail to conform to the uses set forth in this Chapter on the date of enactment of this ordinance. The lawful use of any building or land existing as of the date of enactment of this ordinance may be continued, although such use does not conform with the provisions of this ordinance, provided that:

- (a) No nonconforming use shall be extended to displace a conforming use.
- (b) A building that contains a nonconforming use may not be reconstructed or structurally altered in excess of fifty percent (50%) of the assessed value of the building prior to construction, unless the building is changed to a conforming use approved by the Zoning Commission.
- (c) A nonconforming land use [may be] expanded by no more than 50% of the original nonconforming site.
- (d) Any nonconforming structure declared unsafe by an agent of the Parish may be restored to a safe condition.
- (e) Once changed to a conforming use, no building or land shall be permitted to revert to a nonconforming use.
- (f) Whenever a building or land used in whole or in part for a nonconforming use becomes and remains vacant for a continuous period of 180 days, or whenever the commercial operations carried on in such a building or on such land have been discontinued for a period of more than 180 days, the subsequent use of the property must conform to the provisions of this ordinance.
- (g) An abandoned nonconforming use may be re-established within 90 days after the 180th day of the abandonment upon a showing that the continuation of a conditional nonconforming use would not adversely affect the health, safety, or welfare of the public and is in substantial compliance with existing or permitted uses of adjacent properties.
- (h) This section shall apply to any nonconforming uses which may arise whenever the boundaries of a district are altered.

In **Ransome v. Ransome**, 01-2361 (La.App. 6/21/02), 822 So.2d 746, this court reviewed the statutory and jurisprudential rules for statutory interpretation:

When a law or ordinance is clear and free from all ambiguity, it must be given effect as written.

When interpreting a law (ordinance), the court should give it the meaning the lawmaker intended. It is presumed that every word, sentence or provision in the law was intended to serve some useful purpose, that some effect is to be given to each such provision, and that no unnecessary words or provisions were used. Conversely, it will not be presumed that the lawmaker inserted idle, meaningless or superfluous language in the law or that it intended for any part or provision of the law to be meaningless, redundant or useless. The lawmaker is presumed to have enacted each law with deliberation and with full knowledge of all existing laws on the same subject. The meaning and intent of a law is to be determined by a consideration of the law in its entirety and all other laws on the same subject matter, and a construction should be placed on the provision in question which is consistent with the express terms of the law and with the obvious intent of the lawmaker in enacting it. Where it is possible to do so, it is the duty of the courts in the interpretation of laws to adopt a construction of the provision in question which harmonizes and reconciles it with other provisions. A construction of a law which creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the law and will carry out the intention of the lawmaker.

When the expressions of a law are "dubious", the most effectual way of discovering the true meaning of the law is to consider the reason and spirit of it, or the cause which induced the lawmaker to enact it. When a law is susceptible to two or more interpretations, that which affords a reasonable and practical effect to the entire act is to be preferred over one which renders part thereof ridiculous or nugatory. If there is an irreconcilable conflict between the provisions of a law, only one provision can prevail.

**Ransome**, 01-2361 at pp. 5-6, 822 So.2d at 752.

Section 17-295 of the Parish Development Code limits application of the non-conforming use provision to those "sexually oriented businesses which were in existence as of the effective date of this Division" and allows those businesses to "continue to operate pursuant to the nonconforming uses section of this Code [Section 17-135]." The Parish Council posits that once Escapades obtained a nonconforming use license under Section 17-295, the general non-conforming use provision found in Section 17-135 controlled thereafter and allowed the

building or land to continue the nonconforming use provided it did not remain vacant for a continuous period of 180 days. See Section 17-135(F). However, this interpretation ignores the fact that the term "businesses" is the subject of the entirety of Section 17-295. As such, a plain reading of the non-conforming use section found in Section 17-295 indicates that it refers to the particular business licensee that was in existence when the ordinance became effective. Thereafter, Section 17-135 limits the particular business licensee from further expanding the non-conforming use.<sup>7</sup>

Such interpretation is further evidenced by Section 17-130 of the Parish Development Code, which provides that "development standards fall into four categories"—namely, "Use regulations," "Structure regulations," "Site regulations," and "Other regulations." Regulations regarding "adult business and alcohol-related business" are included within "Other regulations" as opposed to regulations regarding the use, site, or structure. Moreover, Section 17-292(u) of the Parish Development Code contemplates a scenario where an existing sexually oriented business could be sold, transferred, or gifted to another person or entity to allow the business to continue operation.<sup>8</sup> However, ownership or control of Escapades was not transferred to Silhouettes in the manner allowed by the ordinance. If the Parish intended the non-conforming uses section to apply to the building or the land as opposed to the particular business licensee, Section 17-292(u) would be unnecessary.

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<sup>7</sup> We also note that the "commentary" provided under Section 17-135 provides, in pertinent part:

However, the ordinance does discourage further investments in these nonconforming uses and uses of a similar nature. Such investments would make these uses more, rather than less, permanent.

<sup>8</sup> Section 17-292(u) of the Parish Development Code provides:

"Transfer of Ownership or Control" of a sexually oriented business shall mean any of the following:

- (1) sale, lease, or sublease of the business;
- (2) The transfer of securities which constitute a controlling interest in the business whether by sale, exchange or similar means; or
- (3) The establishment of a trust, gift, or similar device which transfers the ownership or control of the business, except for the transfer by bequest or other operation of law upon the death of the person possessing ownership or control.

Considering the foregoing, the only reasonable interpretation of the non-conforming use provision found in Section 17-295 is that it applies to the sexually oriented business entity in operation at the time the ordinance was passed and it does not apply to the building use or the land itself. As such, we find that the Parish's interpretation of its ordinance, as accepted by the trial court, was clearly wrong.

Accordingly, we reverse the trial court's ruling dismissing plaintiffs' petition for declaratory judgment and denying plaintiffs' writ for permanent injunction. We declare that S. Barton Enterprises, LLC d/b/a Silhouettes is a new sexually-oriented business adult cabaret operation that must comply with the locational requirements found in Section 17-294 of the Parish Development Code. As such, we enjoin S. Barton Enterprises, LLC, doing business as Silhouettes from continuing to operate an adult cabaret at 17378 Airline Highway in Prarieville, Louisiana, insofar as the cabaret is located within 3000 feet of a daycare. Moreover, we enjoin the Parish of Ascension from issuing a license to any other adult business to operate at this location. We split the total costs of this appeal between the plaintiffs and the Ascension Parish Council and set the amount of the Parish's costs at \$841.35, as required by LSA-R.S. 13:5112.

**MOTION TO SUPPLEMENT DENIED; REVERSED AND RENDERED.**



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**VERSUS**

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**DOWNING, J., concurs and assigns reasons**

 While I do not agree that the Ascension Parish Council's interpretation of its ordinances is clearly wrong, I defer to the majority's judgment and concur. The majority expends great effort to construct what it concludes is the only reasonable interpretation of the applicable Ascension Parish Ordinances.

I also believe that we should have noticed an exception of no right of action on our own motion. The Goppelts, the appellants/plaintiffs, make no showing of any particularized interest in bringing this lawsuit. The daycare center within 3000 feet of the subject property may have a particular, recognizable interest, but the Goppelts interest is not apparent from the record. This issue should be resolved before we decide this matter.

Even so, out of deference to the majority's efforts, I concur in the result.