



NEW YORK CITY LAW DEPARTMENT  
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Michael A. Cardozo, *Corporation Counsel*

Press Release

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## **CITY WINS LONGSTANDING CASE INVOLVING ADULT USE ZONING LAWS**

Contact: Kate O'Brien Ahlers, Communications Director, (212) 788-0400, [media@law.nyc.gov](mailto:media@law.nyc.gov)

New York, March 30, 2010 – New York City prevailed late yesterday in a years-long case against efforts by many adult establishments to get around the City's strict zoning laws regarding where they can operate.

### The "For the People Theaters" Case

The case decided yesterday, *For the People Theaters v. New York City*, is an important win that involves a legal challenge to the zoning laws governing adult video stores and theaters.

New York State Supreme Court Judge Louis York, after a trial that spanned about two weeks in January 2009, found that certain bookstores and video stores which purport to operate on a "60/40" basis (referring to the ratio of non-adult versus adult materials carried) but nonetheless exhibit a focus on adult materials, are adult establishments notwithstanding their 60/40 configuration.

### Why is the Decision Important?

This case is significant, because it affirms the City's ability to regulate all book and video stores that have an adult focus, even those that claim to be in compliance with the 60/40 rule (but which employ sham methods to do so).

How does the sham work? You might have a store where the adult videos were limited to 40 percent. However, the so-called 60 percent of non-adult space (including things like marital aids and adult lingerie, as well as non-adult videos that were used as "filler" such as westerns, kung fu movies and cartoons), were being displayed in manner that made them less accessible than the adult materials. Essentially, the 40 percent of adult material was the store's *real* focus.

Who enforces the 60/40 rule? These are provisions of the Zoning Resolution which is enforced by the Department of Buildings. (Note: Some aspects are also enforced by the Mayor's Office of Special Enforcement, but, ultimately, the building inspectors who are assigned to work with that office that do the inspections and issue the violations.)

According to DOB, there are about 125 assorted establishments following the 60/40 rule in the City -- although, of course, not all are perpetuating shams.

### A Brief Case Overview

This matter has an extensive history. In 1995, the City adopted a new law limiting locations where adult uses would be permitted. That law contained a provision which became commonly known as the "60/40 Rule." That rule was interpreted to prohibit an adult establishment in residential and other neighborhoods if more than 40 percent of its material or floor space was dedicated to adult materials.

As described above, many establishments tried to “work around” the law by creating technical compliance with the 60/40 rule while still maintaining an adult focus.

Consequently, in 2001 the City improved the definition of adult establishment to include 60/40 bookstores and theaters that adopted these sham efforts at compliance with the zoning requirements and which operate as predominantly adult establishments. After a battle spanning eight years, the court upheld the 2001 change late yesterday in its *For the People Theaters* decision.

"While the plaintiffs may have introduced evidence that the essential nature of these entities has changed [i.e. that they display some non-adult material], it is also true that the defendants have provided substantial evidence that their dominant, ongoing focus is on adult matters," the judge wrote.

#### City Reaction

"Protecting the quality of life in our neighborhoods has always been a top priority for our Administration, and that includes protecting residents and visitors from establishments that attempt to make illegal displays of adult material. This ruling reaffirms our ability to do just that," said John Feinblatt, the Mayor's Criminal Justice Coordinator. "It is obvious to community residents and the City alike that many of these so-called '60/40' establishments are shams created by adult businesses in an attempt to avoid complying with the law - and we will continue to hold them accountable."

"The judge correctly recognized the City's ability to regulate all establishments with an adult focus," added Robin Binder, Deputy Chief of the Law Department's Administrative Law Division and the lead attorney on the case. "The evidence showed that many 60/40 video stores are wolves in sheep's clothing: pretending to be non-adult when they are anything but."

Interestingly, while finding that 60/40 video stores that did not meet the new definition were "shams" and properly considered adult establishments, Judge York's decision found that the two movie theatres also considered during the trial (Kings Cinema and Fair Theater) were not shams but legitimate, non-adult establishments, even though they featured some occasional adult movies.

#### What is the "Ten's Cabaret" Case?

*Ten's Cabaret* is a separate, companion suit to the *For the People Theaters* matter, and it has also been longstanding. It relates to establishments that provide live entertainment (i.e. topless dancing and the like). It was considered together with the *For The People* case by the Court of Appeals, and both cases were sent back to the trial court at the same time with a direction to conduct a trial on the sham compliance question. Since *Ten's Cabaret* is a separate case, there was a separate trial before the same judge in 2009 on the sham compliance issue at establishments with live entertainment. A decision has not yet been issued in the *Tens* case.

#### Detailed Legal Backgrounder For Reporters

As the press have previously show a strong interest in adult entertainment matters, zoning issues, and their impact on New York City, we felt that a more-detailed legal summary might be useful.

The history is deep. The operators of several adult establishments -- including Ten's Cabaret as well as another called the Pussycat Lounge (again, cabarets that feature live entertainment by topless or nude female dancers) and For the People Theaters (again, adult theater and bookstore) – sued the City in the fall of 2002. As noted above, they had challenged the 2001 amendments to zoning provisions that had been enacted in 1995. The 1995 zoning provisions limited where adult establishments such as topless clubs, peep shows and triple-X video stores may be located. Those provisions had been adopted based on the City's findings that these types of establishments have a well-established harmful effect on their areas, including depressing real estate values, increasing criminal activities and adversely affecting tourism.

After prevailing in a challenge brought by the adult use industry to the 1995 law, the City began enforcement proceedings in 1999. Soon, the operators of adult establishments started to engage in sham practices in an effort to avoid complying with the law. The 2001 amendments to the Zoning Resolution were adopted to put a halt to those sham practices. However, as a result of further litigation,

enforcement of the 2001 amendments was stayed as to the adult book and video stores (pending the resolution of the case in which the decision was issued yesterday). The stay as to establishments featuring adult live entertainment remains in effect while the judge considers the *Tens* case.

The 1995 Adult Use law, contains the aforementioned provision, commonly called the "60/40 Rule." The "60/40 Rule" has been interpreted to prohibit the operation of a businesses in residential and other neighborhoods if more than 40 percent of its material or floor space was dedicated to adult content. The law allows the City to enforce zoning requirements by issuing violations or going to court to seek injunctions closing premises down when necessary. Following court rulings that the 1995 law was constitutional, several establishments began exploiting loopholes in the law to evade enforcement and remain open at prohibited locations. Many establishments created artificial situations to make themselves appear non-adult -- for example, stocking 60 percent of their space with non X-rated material but in such a way that few, if any, customer would buy, such as carrying hundreds of copies of the same children's video and stacking them on the floor so that they were difficult to access. Businesses would also sometimes call themselves "billiard rooms" or "cigar bars" when their clear intention was to provide adult entertainment.

In 2001, the City amended its adult use zoning laws to close these loopholes and allow the City to regulate businesses which were exploiting them. In October 2002, just before the amended law was about to take effect, several adult establishments again sued the City. This time they contended that the City had unfairly amended the 1995 law without doing a "new" study on impacts that "60/40" establishments have on their surrounding communities. (Legal case precedent requires that City zoning restrictions imposed on adult establishments be supported or justified by appropriate studies first. In this case, the City argued that its original studies were sufficient and that more studies were not needed to support the adoption off the amendments.) The amendments closed the loopholes by requiring that establishments conduct their business in such a way that their sale of non-adult material is not a subterfuge.

In April 2005, the Appellate Division, First Department -- citing a previous opinion by the State's highest court, the Court of Appeals (in a case called *Stringfellow's v. City of New York*) -- firmly rejected the plaintiffs' claims that their constitutional rights had been violated. The Court found that the City had acted appropriately in passing the amendments without conducting additional studies. That decision was unanimous (5-0).

Then in December 2005, the state's highest court, the Court of Appeals (by a vote of 4-3), said that new studies on the impacts of 60/40 establishments are not required. The Court did, however, find that the City had to produce evidence at a trial to support its contention that 60/40 establishments, are shams and thus subject to the adult use restrictions. The cases were returned to the lower court (New York State Supreme Court), where separate trials were conducted.

Again, the ruling on the *For the People Theaters* case, involving adult book and video stores as well as motion picture theaters, was issued late yesterday; a ruling on the *Tens Cabaret* case that involved establishments that feature live adult entertainment has not yet been issued. (The *Pussycat Lounge* litigation was folded into the *Ten's Cabaret* case.)

#### Legal Team

Deputy Chief Robin Binder and Senior Counsel Sheryl Neufeld, with the assistance of Assistant Corporation Counsel Rachel Moston, tried both the *For the People Theaters* and *Ten's Cabaret* cases on behalf of the City. All three attorneys are with the New York City Law Department's Administrative Law Division.

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