

IN THE MUNICIPAL COURT OF APPEALS
OF THE CITY OF EL PASO, TEXAS

BARON VON KOLB, Appellant

vs.

NO. 85-MCA-1249

STATE OF TEXAS, Appellee

O P I N I O N

Appellant was convicted in Municipal Court of violating Section 25-63.5(1) of Chapter 25. The Complaint alleges that Appellant "did then and there unlawfully establish the operation of an 'adult bookstore' at 314 South Oregon when said establishment was within 1,000 feet of a church."

The Appellant and the State entered into a stipulation, filed of record, that the business establishment located at the above address is an "adult bookstore" as defined in the City Code of El Paso, and that it is within 1,000 feet of a church.

However, the Appellant contends in his brief and oral argument that he is being charged with a criminal offense under an inappropriate section of the City Code. His principal contention is that a reading of the regulations as prescribed by Section 25-63.5(1) clearly indicate that the particular section has prospective application only. His argument rests on the definition of the word "established"

as used in the ordinance and as used in the Complaint, as well as the import of the word "proposed site".

Although the parties argue about the respective definitions applicable to those terms, this Court believes that the prohibition prescribed in 25-63.5(1) of Chapter 25 of the Code of City of El Paso is directed at future activity and not past conduct. This is not to say that this Court believes that the existence of this adult bookstore in its present location is lawful since it would appear that its continued existence has been declared illegal pursuant to Section 25-11(6) of Chapter 25 of the Code of the City of El Paso which provides:

"Any adult bookstore . . . which lawfully existed on February 21, 1978, shall be entirely discontinued and shall thereafter cease operation within 5 years from the date any such use becomes nonconforming."

The above provision provides for an "amortization" of nonconforming uses, and this adult bookstore would fall within the terms of that provision. However, that is not to say that the present charge properly addresses the violation. Simply stated, Appellant has been charged under the wrong section for the zoning violation in question.

The City contends that this is the only applicable section which addresses the alleged unlawful conduct; however, it appears that prosecution of this offense could have been conducted pursuant to Section 25-11(6) of the Code of the

City of El Paso, and that the penalty provisions provided in Section 25-96 of Chapter 25 of the Code of the City of El Paso would be equally applicable to such allegations. Specifically, Section 25-96 provides "any person or corporation who shall violate any of the provisions of this chapter or fail to comply therewith or with any of the requirements thereof . . . shall be liable to a fine not to exceed \$1,000.00 Therefore, allegations brought under Section 25-11(6) would be sufficient to establish a violation. That is, under the section quoted, this business does not presently enjoy the status of a "nonconforming use" as defined under the zoning ordinances of the City.

The clear intent expressed under Section 25-63.5(1) is that the ordinance is directed at prohibiting the proliferation of this type of establishment, but is not directed at the regulation of existing business establishments. Its effect, then, is prophylactic in nature, and is directed at prohibiting the spread of this type of business establishment. The record in this case reflects that this particular business establishment has been in existence at the present location for over 12 years, and the present prosecution is directed more at the use of the property in the past than it is of its present use.

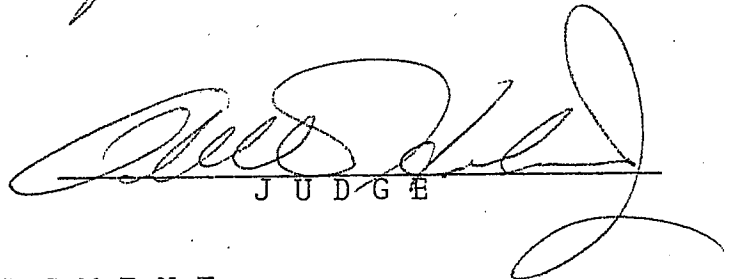
Therefore, since this Court construes Section 25-63.5(1) as an ordinance directed to the regulation of future activi-

ties, and not applicable to the present offense, Appellant's conviction must be reversed, making it unnecessary to address any of Appellant's other points of error at this point.

Certainly, the ruling of this Court would not preclude further prosecution for this violation as may be appropriate or the seeking of injunctive relief or the additional penalties provided for by law under Section 25-96(2).

Having found that the complaint in this case charges Appellant with the wrong offense, the Judgment of the Trial Court is hereby reversed.

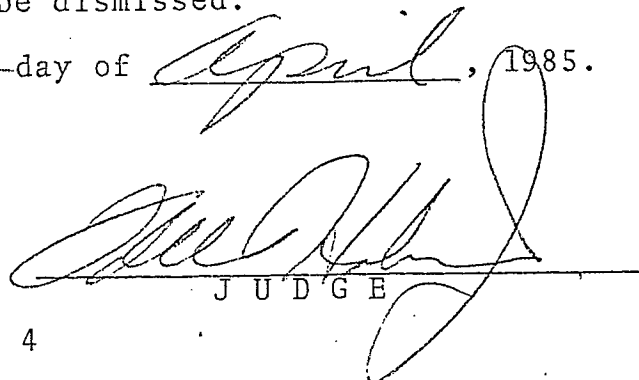
Signed this 12 day of April, 1985.


J U D G E

J U D G M E N T

This case came on to be heard, the same being considered, because it is the opinion of this Court that there was error in the Judgment, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things reversed and the complaint be dismissed.

Signed this 12 day of April, 1985.


J U D G E