

*Not To Be Published:*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

DOCTOR JOHN'S, INC., an Iowa  
Corporation,

Plaintiff,

vs.

CITY OF SIOUX CITY, IOWA,

Defendant.

No. C 03-4121-MWB

**ORDER REGARDING  
THE PLAINTIFF'S MOTION FOR  
FURTHER CLARIFICATION OF  
ISSUES FOR BENCH TRIAL**

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This matter comes before the court pursuant to the plaintiff's January 13, 2007, Motion For Further Clarification Of Order Regarding The Defendant's Motion To Clarify Issues For Bench Trial (docket no. 172). The plaintiff's motion follows the court's January 13, 2007, Order (docket no. 171), which was in response to the City's January 12, 2007, Motion to Clarify (docket no. 170) asking the court to clarify the scope of the evidence relevant to the January 26, 2007, bench trial to assist the parties in excluding witnesses and evidence that pertain only to issues that will be heard in the subsequent jury trial. The City's motion was prompted by the City's belief that the parties were marshaling evidence concerning "applicability" issues that might not be relevant to the bench trial in light of the court's December 20, 2006, Order (docket no. 153) (published at *Doctor John's, Inc. v. City of Sioux City, Iowa*, \_\_\_ F. Supp. 2d \_\_\_, 2006 WL

3742174 (N.D. Iowa Dec. 20, 2006)), on the scope of the right to jury trial in this case. In the motion presently before the court, Doctor John's asserts that the court's attempt to clarify the issues for the bench trial requires further clarification.

In the January 13, 2007, Order, the court attempted to clarify the issues to be tried to the bench and those to be tried to the jury, as follows:

The December 20, 2006, ruling should have made clear that the "constitutionality" question for the court to determine in the January 26, 2007, bench trial, in the context of the broad constitutional challenge by Doctor John's to the City's "adult entertainment businesses" ordinances, is the determination of the motivation of the City in enacting the ordinances in question, that is, whether the ordinances were "content neutral" or "content based" (*i.e.*, based on a personal or political animus unrelated to a governmental function). That determination includes determination of the credibility of the City's representatives on the motivation for the ordinances. This "content neutral" or "content based" determination will determine the level of scrutiny applicable to determine the constitutionality of remaining "non-media" provisions of the January 2004 ordinances and the remaining "media" provisions of the December 2004 ordinances on which the court has thus far declined to make a "constitutionality" determination. *"Applicability" issues, on the other hand, are fact issues related only to damages relief, not "constitutionality" or "equitable relief" issues, and thus, are proper for the jury to determine.* The "applicability" and "damages" issues will be determined in the jury trial set for March 5, 2007.

January 13, 2007, Order (docket no. 171) (emphasis added).

Quoting only the italicized sentence in the paragraph quoted above, Doctor John's now contends that further clarification of the issues to be tried to the court is required, because Doctor John's believes that evidence concerning its inventory and its ability to

change that inventory to comply with local ordinances relates to the court's power to issue equitable relief and does not relate directly to the question of damages. More specifically, Doctor John's asserts that it is unsure of the limits of the bench trial on the following kinds of evidence: The amounts of sales, floor space, and inventory devoted to various categories of merchandise; what standards the ordinance requires for such measurements (how ordinance limits on sales or inventory are applied); the philosophy and management of the business; the absence of the accouterments of "adult businesses" that are typically regulated by "sexually-oriented business (SOB)" ordinances; and whether its business, when ordinance limitations are properly applied, is inherently an "adult business" as defined by the Ordinances, and subject to the licensing and zoning provisions. Doctor John's contends that the "applicability" issues thus overlap with the "constitutionality" issues of its claim, so that it is now unclear whether all evidence pertaining to the inventory of the Doctor John's store and the store's ability to alter the inventory is relevant or irrelevant to the bench trial.

Just as the City's prior motion for clarification of the issues for bench trial was untimely, the motion for further clarification by Doctor John's is also untimely. Any motion asserting confusion about what issues are for the court or the jury arising from either the court's December 20, 2006, ruling on the scope of the right to jury trial, or the July 21, 2006, ruling on the parties' second round of summary judgment motions, is untimely, if construed as a Rule 60(b) motion for relief from an order, because a request for clarification of those rulings made weeks, if not months, after the pertinent rulings, was not filed "within a reasonable time." FED. R. CIV. P. 60(b) (requiring a motion for relief from an order must be filed "within a reasonable time . . . after the . . . order . . . was entered. . . ."). Similarly, pursuant to the August 17, 2006, Order Setting Bench Trial (docket no. 141), motions concerning evidentiary issues were to be filed "at least **14**

days before the [final pretrial conference (FPTC)],” which is currently set for January 17, 2007, to afford the opposing party the opportunity to respond before the FPTC. *See* Order (docket no. 141) at 5-6 (emphasis in the original). Thus, the motion for further clarification of the evidence pertinent to the bench trial, filed just four days before the FPTC, is untimely. The untimeliness of the motion by Doctor John’s cannot be excused on the ground that the motion seeks “further clarification” in response to an order only filed January 13, 2007, because, as the court observed in the January 13, 2007, order, the court does not believe that there really should be any confusion about what issues are for the court to determine in the bench trial and what issues are for a jury to determine in a separate jury trial, at least not after the court’s December 20, 2006, ruling on the scope of the right to jury trial. Nevertheless, because confusion still apparently reigns, in order to make the FPTC as beneficial as possible, and to make the bench trial go as smoothly and efficiently as possible, the court will now address the belated Motion For Further Clarification filed by Doctor John’s.

The court must, first, point out that Doctor John’s has ignored the portions of the paragraph of the court’s January 13, 2007, Order quoted above that clearly define the “constitutionality” issues remaining for trial to the court. The primary issue, once again, is the determination of the motivation of the City in enacting the ordinances in question, that is, whether the ordinances were “content neutral” or “content based” (*i.e.*, based on a personal or political animus unrelated to a governmental function). That determination includes determination of the credibility of the City’s representatives on the motivation for the ordinances. This “content neutral” or “content based” determination will determine the level of scrutiny applicable to determine the constitutionality of remaining “non-media” provisions of the January 2004 ordinances and the remaining “media” provisions of the

December 2004 ordinances on which the court has thus far declined to make a “constitutionality” determination.

Second, it should have been readily apparent to the parties that this identification of the remaining “constitutionality” issues to be tried to the bench was a reiteration of the court’s conclusions in its July 21, 2006, opinion and order (docket no. 136) on the parties’ second round of summary judgment motions. *See Doctor John’s, Inc. v. City of Sioux City, Iowa*, 438 F. Supp. 2d 1005 (N.D. Iowa 2006) (*Doctor John’s III*). Nevertheless, the court concludes that it might be helpful to the parties’ understanding of the issues properly before the court for bench trial to review further specific aspects of the July 21, 2006, ruling.

In the July 21, 2006, ruling, as to “media” provisions of the January 2004 Ordinances, the court rejected the City’s motion to reconsider a prior ruling that, even if those Ordinances were “content neutral,” they would fail the less demanding “intermediate scrutiny” thus applicable as to the “combination” definition of a “sex shop” involving a “combination” of “adult media” and “non-media” merchandise. *Id.* at 1029-32 (citing *Doctor John’s, Inc. v. City of Sioux City, Iowa*, 389 F. Supp. 2d 1096, 1125 (N.D. Iowa 2005) (*Doctor John’s II*)). Thus, the court has already ruled that the “combination” definition of a “sex shop” involving a “combination” of “adult media” and “non-media” merchandise is unconstitutional, and the court has already entered declaratory judgment to that effect and permanently enjoined enforcement of that provision. *Doctor John’s II*, 389 F. Supp. 2d at 1130.

As to the “non-media” provisions of the January 2004 Ordinances, the court concluded in its July 21, 2006, ruling that Doctor John’s had failed to nominate a “similarly situated” comparator for purposes of its “equal protection” challenge, so that that portion of its constitutional challenge failed as a matter of law. *See Doctor John’s III*,

438 F. Supp. 2d at 1033-34. On the other hand, for purposes of a “substantive due process” challenge, the court concluded that the “combination” provision of the January 2004 Ordinances involving only “non-media” merchandise failed even “rational basis” scrutiny to the extent that it could be met by a lopsided “combination” of “non-media” merchandise, consisting of a single item of “sodomasochistic leather goods” in combination with “lingerie” that exceeds ten percent of the stock in trade or public floor area. *Id.* at 1034-35. Thus, the “constitutionality” of that provision is no longer at issue. In contrast, the court concluded that the “sex toys” provision of the January 2004 Ordinances, which defined a “sex shop” as an entity with more than five percent of its stock in trade or gross public floor area devoted to “sexually oriented toys or novelties,” would be unconstitutional *only* if the January 2004 Ordinances were “content based,” that is, were enacted for the very purpose of excluding Doctor John’s from its chosen location, based on the “adult” content of its merchandise, rather than “content neutral,” that is, enacted to address public welfare concerns arising from adult entertainment businesses generally. *Id.* at 1035-36. The court found that genuine issues of material fact on that “content based” or “content neutral” issue prevented summary judgment in either party’s favor on the “constitutionality” of the “sex toys” provision. *Id.* Thus, that “constitutionality” question remains to be resolved in the bench trial.

The court then identified the unresolved “applicability” issues concerning the January 2004 Ordinances—including whether or not Doctor John’s would ever have run afoul of the limitations on “non-media” merchandise in those Ordinances, in light of repeated representations that it was willing to comply with existing ordinances in order to open at its chosen location—and the potential effect of the disposition of those “applicability” issues on any relief that Doctor John’s may obtain. *Id.* at 1036-38. Finally, the court identified unresolved “damages” issues concerning the January 2004

Ordinances—consisting of whether or not Doctor John’s can prove lost profits of its Sioux City store during the winter of 2003-2004 owing to the City’s enforcement of “unconstitutional” or “inapplicable” ordinances. *Id.* at 1038-39.

None of the evidence that Doctor John’s has identified in its January 13, 2007, Motion For Further Clarification as evidence of uncertain relevance to the bench trial is relevant to any outstanding “constitutionality” issues pertaining to the January 2004 Ordinances. Although some of that evidence may be relevant to “applicability” issues concerning the January 2004 Ordinances,<sup>1</sup> there is no “overlap” of “applicability” issues with “constitutional” and “equitable” relief issues pertaining to those Ordinances. This is so, because there is no additional “equitable” relief that the court could grant based on the City’s attempts to enforce “inapplicable” ordinances, where enforcement of those Ordinances was preliminarily enjoined until they were repealed. To put it another way, Doctor John’s has already obtained all the equitable relief that it could obtain as to the January 2004 Ordinances, with the exception of final declaratory judgment concerning “constitutionality” of certain provisions of those Ordinances as to which “constitutionality” has not yet been finally determined. Both the “constitutionality” issues and the limited remaining “equitable relief” issues pertaining to those Ordinances are for the court to determine and are in no way dependent upon “applicability” issues that are for the jury to determine. Moreover, there is no “overlap” between “constitutionality” and “applicability” issues, because, as the court made clear in its ruling on the second round of summary judgment motions, by “applicability” issues, the court does not mean “as

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<sup>1</sup>The court will not attempt to settle in this ruling precisely what evidence will be relevant or admissible at the subsequent jury trial on “applicability” and “damages” issues. The question properly before the court at this time is only what evidence is relevant or admissible at the bench trial on January 26, 2007.

applied” challenges to the constitutionality of the ordinances in question, but the purely factual issues of whether or not the ordinances, if otherwise “constitutional,” would apply to Doctor John’s, based on the actual inventory of its Sioux City store or its promises to limit its inventory. *Id.* at 1029 n.5. Thus, the *only* relief that Doctor John’s can obtain with respect to the January 2004 Ordinances, if any such relief is appropriate, is declaratory judgment from the court, to the effect that the January 2004 Ordinances were unconstitutional, and “damages” relief from the jury for the delay to the opening of the Doctor John’s store caused by the City’s attempts to enforce an “unconstitutional” or “inapplicable” statute.

In these circumstances, the roles of the court and the jury in determination of remaining issues pertaining to the January 2004 Ordinances are clearly defined and no uncertainty about the evidence to be heard by the court or the jury on issues pertaining to those Ordinances should remain. Thus, the court’s statement in its January 13, 2007, Order that “[a]pplicability” issues . . . are fact issues related only to damages relief, not ‘constitutionality’ or ‘equitable relief’ issues, and thus, are proper for the jury to determine,” was correct as to the January 2004 Ordinances and should not have engendered any confusion as to those Ordinances.

In its ruling on the parties’ second round of summary judgment motions, the court also clearly defined the remaining issues relating to the December 2004 Ordinances and the role of the court and the jury in determining those issues. As to “constitutionality” of the “adult bookstore or adult video store” provisions of those Ordinances, the court determined that there were, again, genuine issues of material fact as to whether or not the December 2004 Ordinances were “content neutral” or “content based.” *Id.* at 1045-48. The court determined that there were further genuine issues of material fact as to whether or not those Ordinances were “narrowly tailored” to serve the “compelling interest”

offered by the City and accepted by the court of exercising police powers to regulate adult entertainment businesses to combat “secondary effects” of such businesses. *Id.* at 1048. The court explained that, in the context of this case, the issue of whether the December 2004 Ordinances were “narrowly tailored” to serve a “compelling interest” involved the question of whether it is necessary to subject adult entertainment businesses providing “adult” media only for “off-premises” viewing to the same limitations as businesses providing such media for “on-premises” viewing to combat “secondary effects.” *Id.* at 1048. More specifically still, the court found that the only evidence in the summary judgment record that reasonably went to that question was Dr. McCleary’s report concerning the supposed “secondary effects” of the Doctor John’s store in Sioux City. *Id.* at 1048-49. The court also determined, as a matter of law, that the “adult bookstore or adult video store” provisions of the December 2004 Amendments are “applicable” to Doctor John’s, if those provisions are “constitutional,” because, at least from time to time, Doctor John’s exceeded one or more of the “triggers” for application of those provisions, although there were genuine issues of material fact keeping the “applicability” issue alive, based on representations by Doctor John’s personnel and the modifications of the inventory of other Doctor John’s stores to comply with local regulations, as to whether or not Doctor John’s would comply with such provisions after notice that they are constitutional and will be enforced. *Id.* at 1049-50. Finally, the court noted that the question of whether or not Doctor John’s was “grandfathered” from application of the “adult bookstore or adult video store” provisions had not been squarely presented.■<sup>2</sup>

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<sup>2</sup> Although there were also “non-media” provisions of the December 2004 Ordinances, consisting of “sexual device shop” provisions, the court concluded in its ruling on the parties’ second round of summary judgment motions that Doctor John’s was entitled to summary judgment in its favor on both its “equal protection” and “substantive (continued...)

The only evidence that Doctor John’s has identified in its Motion For Further Clarification that may be marginally relevant to the remaining “constitutionality” issues pertaining to the December 2004 Ordinances would be evidence demonstrating whether or not the Doctor John’s store in Sioux City has the accouterments of “adult businesses” that are typically regulated by “sexually-oriented business (SOB)” ordinances, as this evidence may be probative of whether or not the Doctor John’s store has the sort of “secondary effects” that the Ordinances are intended to limit or prevent. The other kinds of evidence identified by Doctor John’s in its Motion For Further Clarification, however, have nothing to do with this remaining “constitutionality” question, even if they might be relevant to “applicability” or “damages” issues. Moreover, there is no “overlap” between the remaining “constitutionality” and “applicability” issues as to the remaining provisions of the December 2004 Ordinances, because “applicability” here does not refer to any “as applied” constitutional challenge, *see id.* at 1029 n.5, and because the specific “applicability” question for the jury here—whether or not Doctor John’s would comply with the provisions in question after notice that they are constitutional and will be enforced, in light of representations by Doctor John’s personnel and the modifications of

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<sup>2</sup>(...continued)

due process” challenges to those provisions. *See id.* at 1050-53. Thus, there are no outstanding “constitutionality” issues for the court to determine nor any “applicability” issues for the jury to determine as to those provisions. Moreover, unless Doctor John’s can show the jury that those provisions have been enforced against it, the only relief that can be afforded to Doctor John’s on its claims that the “sexual device shop” provision is unconstitutional is the “equitable” relief of declaratory judgment of unconstitutionality and permanent injunction on enforcement, which the court has already entered. *See id.* at 1055. Similarly, the court determined that the “civil disability” provisions of the December 2004 Ordinances are both “constitutional” and “applicable” to Doctor John’s as a matter of law, *id.* at 1053-55, so that there are no outstanding issues for either the court or the jury to determine as to those provisions.

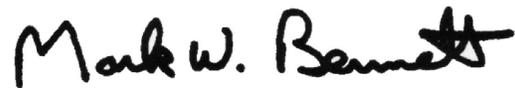
the inventory of other Doctor John's stores to comply with local regulations—sheds no light and has no impact on the “constitutionality” question for the court.

The specific “applicability” question here might have some overlap with “equitable” relief that the court might provide. Specifically, if the jury determines that a provision of the December 2004 Ordinances was “inapplicable” to Doctor John's, then, in addition to any legal relief provided by the jury for the City's attempts to enforce such an “inapplicable” provision, the court might enter “equitable” relief enjoining the City from enforcing the “inapplicable” provision. Nevertheless, such “equitable” relief from the court would only be secondary to the fact questions of “applicability” and legal relief, in the form of “damages” for enforcement of the “unconstitutional” or “inapplicable” ordinances, if any such enforcement has occurred, which are issues that properly belong to the jury. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (to determine the applicability of the Seventh Amendment, the court “ask[s] whether *the particular trial decision* must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791”) (emphasis added). Thus, the court's statement in its January 13, 2007, Order that “[a]pplicability” issues . . . are fact issues related only to damages relief, not ‘constitutionality’ or ‘equitable relief’ issues, and thus, are proper for the jury to determine,” was overbroad as to the December 2004 Ordinances only to the extent that it did not address the possibility of some “equitable” relief from the court that might be secondary to the fact questions of “applicability” and legal relief, in the form of “damages,” that properly belong to the jury. Even so, in the context of the entire explanation in the January 13, 2007, Order of the issues that are for the court to determine in the January 26, 2007, bench trial, the statement on which Doctor John's focuses should not have created any confusion about whether any “applicability” issues concerning the December 2004 Ordinances would be tried to the court or the jury.

THEREFORE, the plaintiff's January 13, 2007, Motion For Further Clarification Of Order Regarding The Defendant's Motion To Clarify Issues For Bench Trial (docket no. 172), is **granted** to the extent that some further clarification has been provided herein.

**IT IS SO ORDERED.**

**DATED** this 16th day of January, 2007.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a horizontal line underneath it.

MARK W. BENNETT  
U. S. DISTRICT COURT JUDGE  
NORTHERN DISTRICT OF IOWA