IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GERMANTOWN PARKWAY, LLC and STEVE COOPER,	)	
Plaintiffs,	)	
vs.	)	**No. 11-2439 B/P**
CITY OF MEMPHIS, TENNESSEE and AUBREY HOWARD, in his official capacity as Memphis Permit Administrator,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Before the court by order of reference is the Motion for Dismissal filed by defendants City of Memphis and Aubrey Howard, in his official capacity as Memphis Permit Administrator (collectively, the "City"), on July 1, 2011. (D.E. 10.) Plaintiffs Germantown Parkway, LLC and Steve Cooper filed a response in opposition on July 13, 2011. For the reasons below, the court recommends that the City's Motion for Dismissal be denied.

I. PROPOSED FINDINGS OF FACT

Steve Cooper, who is the sole member of Germantown Parkway, LLC, desires to operate a bar in Memphis. He describes the establishment in his complaint as "a bar/restaurant presenting

constitutionally protected dance performances by clothed women similar to entertainment presented at the establishment known as Coyote Ugly." (Compl. ¶ 6.) On February 3, 2011, Cooper filed for a "compensated dance permit" with the City, as required by ordinance 6-20-4. On March 1, 2011, the Memphis City Council adopted a resolution that imposed a moratorium on the issuance of compensated dance permits, including any pending applications, until May 1, 2011. The resolution establishing this moratorium states as follows:

> WHEREAS, recently certain businesses have filed applications for the issuance of compensated dance permits; and
>
> WHEREAS, the citizens of Memphis have fundamental rights to the greatest protection of their welfare and safety, and the democratic process should allow them to maintain the highest quality of life possible; and
>
> WHEREAS, in the interests of the citizens of Memphis a Moratorium on all compensated dance permits is deemed to be in the best interest of the public welfare to allow completion of a study and changes to City ordinances.
>
> NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Memphis that the City hereby establishes a Moratorium on the issuance of compensated dance permits by the Memphis Alcohol Commission and Permits Office, until May 01, 2011, applicable to all pending applications and all permits applied for from and after the date of this resolution.
>
> BE IT FURTHER RESOLVED that the Council desires to study a possible modification of the compensated dance permit ordinance to ensure its consistency with the sexually oriented business ordinance and to evaluate possible penalties and remedies available to the City in the event of a violation of the compensated dance permit ordinance.

(Compl. Ex. 1-4.)

According to the complaint, the plaintiffs' application was the only compensated dance permit application pending with the City, and the purpose of the moratorium was to prevent plaintiffs from obtaining a permit and exercising their constitutional right to engage in protected expression. On March 7, 2011, Cooper filed an application for a writ of mandamus from the Shelby County Chancery Court seeking a writ directing the City to issue him a permit. The City responded by claiming that Cooper's application was incomplete, and subsequently returned his application and the corresponding fee on March 25, 2011. Based on the fact that Cooper's application had been rejected as incomplete, the Chancery Court denied the writ of mandamus without prejudice.

On May 2, 2011, one day after the moratorium allegedly expired, Cooper submitted another permit application, which both parties agree was complete. On May 3, 2011, the Memphis City Council passed another resolution that purportedly extended the March 1 moratorium on the issuance of compensated dance permits until July 6, 2011.[1] According to the City, the May 3 resolution had been approved by a committee of the City Council on April 19, 2011, and it was not voted on by the full City Council at that time due to an oversight. On May 9, 2011, Cooper received a letter

[1]At a July 6, 2011 meeting, the City Council voted to extend the moratorium a third time, to October 4, 2011.

stating that his permit application could not be considered until the expiration of the moratorium. Plaintiffs proceeded to file this lawsuit on June 3, 2011.

Plaintiffs claim that the City's actions "to thwart Plaintiffs' efforts to obtain a compensated dance permit and the resolutions imposing a moratorium on the issuance of compensated dance permits violate Plaintiffs' rights secured by the First and Fourteenth Amendments" of the United States Constitution. In the present Motion for Dismissal, the City argues that this court should abstain from deciding the federal constitutional issues pursuant to Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). Pullman abstention is appropriate in this case, the City contends, because of an unsettled state law question that should be resolved by a state court, which may obviate the need for this court to resolve the federal constitutional claims. Specifically, the City claims that the unsettled state law question involves the interpretation of a legal doctrine known as the "pending ordinance doctrine" or "pending legislation doctrine."

II. PROPOSED CONCLUSIONS OF LAW

"Abstention is a limited exception to the 'virtually unflagging' obligation of federal courts to exercise the jurisdiction given them." The Fifth Column, LLC v. Vill. of Valley View, No. 98-3963, 2000 WL 799785, at *4 (6th Cir. June 13, 2000) (quoting Colo. River Water Conservation Dist. v. United States, 424

U.S. 800, 813, 817 (1975)). "The Pullman-type abstention doctrine is used to avoid a decision on federal constitutional questions when the case hinges on unresolved questions of state law." Id. In order for a court to abstain under Pullman, there must be (1) an unclear state law and (2) a likelihood that a clarification of the state law would obviate the necessity of deciding the federal claim in question. Id. (citing Tyler v. Collins, 709 F.2d 1106, 1108 (6th Cir. 1983)); see also Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 233 (6th Cir. 2011) ("Abstention under [Pullman] is appropriate only where state law is unclear *and* a clarification of that law would preclude the need to adjudicate the federal question.") (emphasis in original); Anderson v. Charter Twp. of Ypsilanti, 266 F.3d 487, 491 (6th Cir. 2001) ("the classic reason to apply the Pullman abstention doctrine is where the remanded state-law question is an independent and unsettled issue best decided by the state courts, a circumstance not present in the case before us.") (internal citation omitted); 17A C. WRIGHT, A. MILLER, E. COOPER, & V. AMAR, FEDERAL PRACTICE AND PROCEDURE § 4242 (3d ed. 2007) ("Pullman-type abstention requires that there be 'an unsettled question of state law.' There would be no point in sending the parties to state court to find out what the state law is, and thus possibly avoid having to decide the federal constitutional question, if the state law is known.").

The court submits that abstention under Pullman is not

warranted in this case. The complaint only alleges violations of plaintiffs' rights under the United States Constitution. As for the City's contention that a state court should first decide whether the pending ordinance doctrine applies, that doctrine is neither unclear nor unsettled. Several courts have ruled on the scope and application of the doctrine, including the Tennessee Supreme Court. See, e.g., Smith Cnty. Regional Planning Comm'n v. Hiwassee Vill. Mobile Home Park, LLC, 304 S.W.3d 302, 319 n.19 (Tenn. 2010); Harding Acad. v. The Metro. Gov't of Nashville & Davidson Cnty., 222 S.W.3d 359, 364-67 (Tenn. 2007); Cherokee Country Club, Inc. v. City of Knoxville, 152 S.W.3d 466, 470-71 (Tenn. 2004); State ex rel. SCA Chem. Waste Servs., Inc. v. Konigsberg, 636 S.W.2d 430, 436-37 (Tenn. 1982).[2]

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[2]The Tennessee Supreme Court discussed the application of the doctrine in its Harding Acad. opinion:

> The "pending legislation doctrine," also known as the "pending ordinance doctrine," provides that a building permit need not be issued if pending at the time of application is an amendment to a zoning ordinance that would prohibit the use of land for which the permit is sought. The pending ordinance doctrine permits a municipality to amend its zoning ordinances "without the threat of landowners racing to beat the clock by filing an application and thus obtaining vested rights under existing regulations." Accordingly, the pending ordinance doctrine allows a municipality to refuse to issue a permit even if the permit application is made a considerable time before the enactment of the pending ordinance. The ordinance, however, must be legally pending on the date of the permit application.

Harding Acad., 222 S.W.3d at 364 (internal citations omitted).

Moreover, this court, in conducting its own research, could not find any case in which a federal court has abstained under Pullman based on the pending ordinance or pending legislation doctrine. In fact, several federal courts have analyzed the applicability of the doctrine. See, e.g., Covenant Media of S.C., LLC. v. City of North Charleston, 493 F.3d 421, 438 (4th Cir. 2007); Nat'l Adver. Co. v. City and Cnty. of Denver, 912 F.2d 405, 412-13 (10th Cir. 1990); Layman Lessons, Inc. v. City of Millersville, Tenn., 636 F. Supp. 2d 620, 643-44 (M.D. Tenn. 2008); Devereux Found., Inc. v. O'Donnell, No. Civ. A. 89-6134, 1990 WL 132406, at *4 (E.D. Pa. Sept. 6, 1990); Sargo, II, Inc. v. City of Phila., 488 F. Supp. 1045, 1047-49 (E.D. Pa. 1980).

III. RECOMMENDATION

For the reasons above, the court recommends that the City's Motion for Dismissal be denied.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

September 13, 2011
Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.