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## Business Name: Gold Rush
## Location: 29 NE 11th St.
## January 1, 2005 thru July 15, 2008

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| 13 | SPECIAL INFORMATION | LM1050806026477 | 08/06/2005 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1050806026476 | 08/06/2005 | 29 NE 11TH ST | R160 |
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| 13 | SPECIAL INFORMATION | LM1051221168375 | 12/21/2005 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1060129029928 | 01/29/2006 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1060226058996 | 02/26/2006 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1060318081165 | 03/18/2006 | 29 NE 11TH ST | R160 |
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| 13 | SPECIAL INFORMATION | LM1070714206017 | 07/14/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1070714206591 | 07/14/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1070722214550 | 07/22/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1070804228215 | 08/04/2007 | 29 NE 11TH ST | R160 |
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| 13 | SPECIAL INFORMATION | LM1070916274967 | 09/16/2007 | 29 NE 11TH ST | R160 |
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| 13 | SPECIAL INFORMATION | LM1070927285819 | 09/27/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1070929288427 | 09/29/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071006296259 | 10/06/2007 | 29 NE 11TH ST | R160 |
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| 13 | SPECIAL INFORMATION | LM1071007296925 | 10/07/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071007296959 | 10/07/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071008297693 | 10/08/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071028319298 | 10/28/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071028319430 | 10/28/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071104326696 | 11/04/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071104326837 | 11/04/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071105327542 | 11/05/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071124347869 | 11/24/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071204358578 | 12/04/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071210365442 | 12/10/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1071230386997 | 12/30/2007 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080106005130 | 01/06/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080109007980 | 01/09/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080113012178 | 01/13/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080114012893 | 01/14/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080119017995 | 01/19/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080128027045 | 01/28/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080129027999 | 01/29/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080131030413 | 01/31/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080216047735 | 02/16/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080302062870 | 03/02/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080316077432 | 03/16/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080323084857 | 03/23/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080330092465 | 03/30/2008 | 29 NE 11TH ST | R160 |

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
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| 13 | SPECIAL INFORMATION | LM1080331093201 | 03/31/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080410103640 | 04/10/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080417110975 | 04/17/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080425119922 | 04/25/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080426121111 | 04/26/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080522149146 | 05/22/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080526153694 | 05/26/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080602161153 | 06/02/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080607166404 | 06/07/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080607166588 | 06/07/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080614173957 | 06/14/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080616175856 | 06/16/2008 | 29 NE 11TH ST | R160 |
| 13 | SPECIAL INFORMATION | LM1080705196156 | 07/05/2008 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1050717005737 | 07/17/2005 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1051031116504 | 10/31/2005 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1051203150466 | 12/03/2005 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1051208154829 | 12/08/2005 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1051209155927 | 12/09/2005 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1051221168390 | 12/21/2005 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060120019836 | 01/20/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060131031299 | 01/31/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060216048417 | 02/16/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060216048880 | 02/16/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060317079764 | 03/17/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060407102568 | 04/07/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060425121931 | 04/25/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060427123756 | 04/27/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060511138584 | 05/11/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060719212144 | 07/19/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1060719212261 | 07/19/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1061016305545 | 10/16/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1061016305571 | 10/16/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1061126345836 | 11/26/2006 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070120020138 | 01/20/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070123022271 | 01/23/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070126025559 | 01/26/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070215046582 | 02/15/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070303063510 | 03/03/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070314076699 | 03/14/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070318080372 | 03/18/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070318080442 | 03/18/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070330094269 | 03/30/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070421116715 | 04/21/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070427123007 | 04/27/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070504130736 | 05/04/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070519146936 | 05/19/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070601160301 | 06/01/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070601160318 | 06/01/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070614174219 | 06/14/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070614174245 | 06/14/2007 | 29 NE 11TH ST | R160 |
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| 14 | DIRECT ARREST | LM1070626186557 | 06/26/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070711202617 | 07/11/2007 | 29 NE 11TH ST | R160 |
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| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
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| 14 | DIRECT ARREST | LM1070805229752 | 08/05/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070810234656 | 08/10/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070811235969 | 08/11/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070819244660 | 08/19/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070824250109 | 08/24/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1070825251204 | 08/25/2007 | 29 NE 11TH ST | R160 |
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| 14 | DIRECT ARREST | LM1071104326637 | 11/04/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1071108331712 | 11/08/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1071110332958 | 11/10/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1071110333115 | 11/10/2007 | 29 NE 11TH ST | R160 |
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| 14 | DIRECT ARREST | LM1071117341443 | 11/17/2007 | 29 NE 11TH ST | R160 |
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| 14 | DIRECT ARREST | LM1071208363239 | 12/08/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1071209364421 | 12/09/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1071215371008 | 12/15/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1071223379823 | 12/23/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1071229385708 | 12/29/2007 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1080105004148 | 01/05/2008 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1080105004155 | 01/05/2008 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1080111009959 | 01/11/2008 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1080112011150 | 01/12/2008 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1080125023922 | 01/25/2008 | 29 NE 11TH ST | R160 |
| 14 | DIRECT ARREST | LM1080126025969 | 01/26/2008 | 29 NE 11TH ST | R160 |
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| 14 | DIRECT ARREST | LM1080307068667 | 03/07/2008 | 29 NE 11TH ST | R160 |
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| 15 | BACKUP / ASSIST OTHE | LM1070416111270 | 04/16/2007 | 29 NE 11TH ST | R160 |
| 15 | BACKUP / ASSIST OTHE | LM1070526154255 | 05/26/2007 | 29 NE 11TH ST | R160 |
| 15 | BACKUP / ASSIST OTHE | LM1070727219612 | 07/27/2007 | 29 NE 11TH ST | R160 |
| 15 | BACKUP / ASSIST OTHE | LM1071005294877 | 10/05/2007 | 29 NE 11TH ST | R160 |
| 15 | BACKUP / ASSIST OTHE | LM1071006296138 | 10/06/2007 | 29 NE 11TH ST | R160 |
| 15 | BACKUP / ASSIST OTHE | LM1071108330757 | 11/08/2007 | 29 NE 11TH ST | R160 |
| 15 | BACKUP / ASSIST OTHE | LM1080126025967 | 01/26/2008 | 29 NE 11TH ST | R160 |
| 15 | BACKUP / ASSIST OTHE | LM1080712204474 | 07/12/2008 | 29 NE 11TH ST | R160 |
| 16 | DUI | LM1070304064907 | 03/04/2007 | 29 NE 11TH ST | R160 |
| 17 | ACCIDENT | LM1050817038311 | 08/17/2005 | 29 NE 11TH ST | R160 |
| 17 | ACCIDENT | LM1051007092009 | 10/07/2005 | 29 NE 11TH ST | R160 |
| 17 | ACCIDENT | LM1060505132161 | 05/05/2006 | 29 NE 11TH ST | R160 |
| 17 | ACCIDENT | LM1070513140567 | 05/13/2007 | 29 NE 11TH ST | R160 |
| 17 | ACCIDENT | LM1080105004743 | 01/05/2008 | 29 NE 11TH ST | R160 |
| 17 | ACCIDENT | LM1080222053525 | 02/22/2008 | 29 NE 11TH ST | R160 |
| 17M | ACCIDENT, MINOR | LM1061125344809 | 11/25/2006 | 29 NE 11TH ST | R160 |
| 17M | ACCIDENT, MINOR | LM1061230379526 | 12/30/2006 | 29 NE 11TH ST | R160 |
| 17M | ACCIDENT, MINOR | LM1070414109285 | 04/14/2007 | 29 NE 11TH ST | R160 |
| 17M | ACCIDENT, MINOR | LM1071225381881 | 12/25/2007 | 29 NE 11TH ST | R160 |
| 18 | HIT & RUN ACCIDENT | LM1060929287145 | 09/29/2006 | 29 NE 11TH ST | R160 |
| 18 | HIT & RUN ACCIDENT | LM1070113012417 | 01/13/2007 | 29 NE 11TH ST | R160 |
| 18 | HIT & RUN ACCIDENT | LM1070916275050 | 09/16/2007 | 29 NE 11TH ST | R160 |
| 18 | HIT & RUN ACCIDENT | LM1071005294566 | 10/05/2007 | 29 NE 11TH ST | R160 |
| 18 | HIT & RUN ACCIDENT | LM1080404097583 | 04/04/2008 | 29 NE 11TH ST | R160 |
| 18 | HIT & RUN ACCIDENT | LM1080410103572 | 04/10/2008 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1051128144541 | 11/28/2005 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1061119339671 | 11/19/2006 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070224055978 | 02/24/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070309070993 | 03/09/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070421116706 | 04/21/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070429125578 | 04/29/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070506132823 | 05/06/2007 | 29 NE 11TH ST | R160 |

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|---|---|---|---|---|---|
| 19 | TRAFFIC VIOLATION | LM1070603162163 | 06/03/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070610170036 | 06/10/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070621181292 | 06/21/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070621181296 | 06/21/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070707198363 | 07/07/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070715207071 | 07/15/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070728220796 | 07/28/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070805229359 | 08/05/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070811235966 | 08/11/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070816241355 | 08/16/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070816241358 | 08/16/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070817242393 | 08/17/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070817242498 | 08/17/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070818243498 | 08/18/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070818243580 | 08/18/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070818243665 | 08/18/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070825251166 | 08/25/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070831257542 | 08/31/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070901258852 | 09/01/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070901258934 | 09/01/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070902259897 | 09/02/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070902260024 | 09/02/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070906263848 | 09/06/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070906263872 | 09/06/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070907265049 | 09/07/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070913271619 | 09/13/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070920278867 | 09/20/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070920278877 | 09/20/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070923282088 | 09/23/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070929288221 | 09/29/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1070929288939 | 09/29/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071004293189 | 10/04/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071005295327 | 10/05/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071006295790 | 10/06/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071014304349 | 10/14/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071018308343 | 10/18/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071021311761 | 10/21/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071021311878 | 10/21/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071027318897 | 10/27/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071104326948 | 11/04/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071215371309 | 12/15/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1071229385747 | 12/29/2007 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1080105004242 | 01/05/2008 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1080112011031 | 01/12/2008 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1080121019948 | 01/21/2008 | 29 NE 11TH ST | R160 |
| 19 | TRAFFIC VIOLATION | LM1080307067613 | 03/07/2008 | 29 NE 11TH ST | R160 |
| 21 | STOLEN TAG | LM1060327090531 | 03/27/2006 | 29 NE 11TH ST | R160 |
| 21 | STOLEN TAG | LM1080423117487 | 04/23/2008 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1060504131262 | 05/04/2006 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1060918275802 | 09/18/2006 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1060930288193 | 09/30/2006 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1070210041597 | 02/10/2007 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1070428124214 | 04/28/2007 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1070705196459 | 07/05/2007 | 29 NE 11TH ST | R160 |

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|---|---|---|---|---|---|
| 22 | STOLEN VEHICLE | LM1070816241393 | 08/16/2007 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1070916275017 | 09/16/2007 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1071203358267 | 12/03/2007 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1071215371256 | 12/15/2007 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1071216372512 | 12/16/2007 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1080112011311 | 01/12/2008 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1080224056154 | 02/24/2008 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1080420114977 | 04/20/2008 | 29 NE 11TH ST | R160 |
| 22 | STOLEN VEHICLE | LM1080426120756 | 04/26/2008 | 29 NE 11TH ST | R160 |
| 24 | CITY RECOVERY OF STO | LM1080225057284 | 02/25/2008 | 29 NE 11TH ST | R160 |
| 26 | BURGLARY | LM1060722215591 | 07/22/2006 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1060218050560 | 02/18/2006 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1060429126002 | 04/29/2006 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1060910268085 | 09/10/2006 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1061221371210 | 12/21/2006 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1070118017740 | 01/18/2007 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1070219050649 | 02/19/2007 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1070408102960 | 04/08/2007 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1070714205884 | 07/14/2007 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1070825251374 | 08/25/2007 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1071024315493 | 10/24/2007 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1071116339738 | 11/16/2007 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1080203034203 | 02/03/2008 | 29 NE 11TH ST | R160 |
| 27 | LARCENY | LM1080525152823 | 05/25/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1050814035073 | 08/14/2005 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1060507134545 | 05/07/2006 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1060610170771 | 06/10/2006 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1070202033413 | 02/02/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1070218050307 | 02/18/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1070225057065 | 02/25/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1070329092245 | 03/29/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1070529157252 | 05/29/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1070819244929 | 08/19/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1071110332936 | 11/10/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1071122346277 | 11/22/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1071208363486 | 12/08/2007 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080117015928 | 01/17/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080310071678 | 03/10/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080321083236 | 03/21/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080420115168 | 04/20/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080427122214 | 04/27/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080511137559 | 05/11/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080521148511 | 05/21/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080523150768 | 05/23/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080605164932 | 06/05/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080614173967 | 06/14/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080614173968 | 06/14/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080614173988 | 06/14/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080621181776 | 06/21/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080628188471 | 06/28/2008 | 29 NE 11TH ST | R160 |
| 27M | LARCENY, MOTOR VEHIC | LM1080629189503 | 06/29/2008 | 29 NE 11TH ST | R160 |
| 28 | VANDALISM | LM1060523151194 | 05/23/2006 | 29 NE 11TH ST | R160 |
| 28 | VANDALISM | LM1061112332458 | 11/12/2006 | 29 NE 11TH ST | R160 |
| 28 | VANDALISM | LM1070624184616 | 06/24/2007 | 29 NE 11TH ST | R160 |

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|---|---|---|---|---|---|
| 28 | VANDALISM | LM1070701192344 | 07/01/2007 | 29 NE 11TH ST | R160 |
| 28 | VANDALISM | LM1071126349712 | 11/26/2007 | 29 NE 11TH ST | R160 |
| 28 | VANDALISM | LM1080126025201 | 01/26/2008 | 29 NE 11TH ST | R160 |
| 28 | VANDALISM | LM1080503128570 | 05/03/2008 | 29 NE 11TH ST | R160 |
| 28 | VANDALISM | LM1080619179490 | 06/19/2008 | 29 NE 11TH ST | R160 |
| 29 | ROBBERY | LM1051220167834 | 12/20/2005 | 29 NE 11TH ST | R160 |
| 29 | ROBBERY | LM1060624186109 | 06/24/2006 | 29 NE 11TH ST | R160 |
| 29 | ROBBERY | LM1061015303708 | 10/15/2006 | 29 NE 11TH ST | R160 |
| 29 | ROBBERY | LM1070714206015 | 07/14/2007 | 29 NE 11TH ST | R160 |
| 29 | ROBBERY | LM1070805229511 | 08/05/2007 | 29 NE 11TH ST | R160 |
| 29 | ROBBERY | LM1080403096306 | 04/03/2008 | 29 NE 11TH ST | R160 |
| 30N | SHOTS FIRED, NO REPO | LM1080504129671 | 05/04/2008 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1050727016217 | 07/27/2005 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1050731020253 | 07/31/2005 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1050820041602 | 08/20/2005 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1051126142651 | 11/26/2005 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1051209155995 | 12/09/2005 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1051224171123 | 12/24/2005 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060105004253 | 01/05/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060402097056 | 04/02/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060531160505 | 05/31/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060618179300 | 06/18/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060902259740 | 09/02/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060902259788 | 09/02/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060909266527 | 09/09/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060910268116 | 09/10/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1060911268806 | 09/11/2006 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1070217048924 | 02/17/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1070331095206 | 03/31/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1070331095210 | 03/31/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1070426121940 | 04/26/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1070526154086 | 05/26/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1070622183261 | 06/22/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1070729222048 | 07/29/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1070805229525 | 08/05/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1071111334271 | 11/11/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1071201355037 | 12/01/2007 | 29 NE 11TH ST | R160 |
| 32 | SIMPLE ASSAULT OR BA | LM1080308069018 | 03/08/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1050819040524 | 08/19/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1050925080529 | 09/25/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051007092481 | 10/07/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051013099232 | 10/13/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051104120848 | 11/04/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051109125785 | 11/09/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051113130077 | 11/13/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051121137923 | 11/21/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051121138630 | 11/21/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051207153841 | 12/07/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051208154823 | 12/08/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051217164234 | 12/17/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051219166950 | 12/19/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051222169129 | 12/22/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1051231177979 | 12/31/2005 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060102001360 | 01/02/2006 | 29 NE 11TH ST | R160 |

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| 34 | DISTURBANCE | LM1060111010181 | 01/11/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060130031131 | 01/30/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060202033476 | 02/02/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060205037029 | 02/05/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060303064083 | 03/03/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060304065478 | 03/04/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060313075488 | 03/13/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060320083029 | 03/20/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060331094945 | 03/31/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060331095747 | 03/31/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060414110102 | 04/14/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060429125976 | 04/29/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060524152438 | 05/24/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060529157833 | 05/29/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060603163228 | 06/03/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060618179802 | 06/18/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060623184953 | 06/23/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060701192574 | 07/01/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060711203792 | 07/11/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060712204423 | 07/12/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060807232297 | 08/07/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060823249998 | 08/23/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060826253248 | 08/26/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060903260624 | 09/03/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060923281188 | 09/23/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1060924282048 | 09/24/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061001289280 | 10/01/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061007295578 | 10/07/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061007295586 | 10/07/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061009298286 | 10/09/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061010298386 | 10/10/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061010298404 | 10/10/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061011299540 | 10/11/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061030319129 | 10/30/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061105326035 | 11/05/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061125344676 | 11/25/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061209358805 | 12/09/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061211360735 | 12/11/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1061216366333 | 12/16/2006 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070106005097 | 01/06/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070118017220 | 01/18/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070119018274 | 01/19/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070125024677 | 01/25/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070131030916 | 01/31/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070204036011 | 02/04/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070210041601 | 02/10/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070212043453 | 02/12/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070214046435 | 02/14/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070214046492 | 02/14/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070215046685 | 02/15/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070215046763 | 02/15/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070217048680 | 02/17/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070221052677 | 02/21/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070225057321 | 02/25/2007 | 29 NE 11TH ST | R160 |

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 34 | DISTURBANCE | LM1070226058003 | 02/26/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070302062431 | 03/02/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070322084376 | 03/22/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070327089935 | 03/27/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070330093347 | 03/30/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070412107798 | 04/12/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070414109221 | 04/14/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070423118550 | 04/23/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070423118575 | 04/23/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070429125544 | 04/29/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070502128578 | 05/02/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070505131727 | 05/05/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070507134120 | 05/07/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070511138755 | 05/11/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070514141324 | 05/14/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070529156933 | 05/29/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070601161035 | 06/01/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070602161208 | 06/02/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070612173071 | 06/12/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070614174267 | 06/14/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070620180357 | 06/20/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070622182426 | 06/22/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070625185578 | 06/25/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070627187651 | 06/27/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070701191782 | 07/01/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070701191962 | 07/01/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070705196128 | 07/05/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070706197108 | 07/06/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070707198299 | 07/07/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070711202569 | 07/11/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070714206564 | 07/14/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070715207019 | 07/15/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070721213393 | 07/21/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070731223693 | 07/31/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070812237152 | 08/12/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070828255123 | 08/28/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070903261267 | 09/03/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070905262746 | 09/05/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1070905262847 | 09/05/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071002290856 | 10/02/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071006296229 | 10/06/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071007296825 | 10/07/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071007296841 | 10/07/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071020310512 | 10/20/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071020310718 | 10/20/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071130353979 | 11/30/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071202356450 | 12/02/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071209364659 | 12/09/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071215371491 | 12/15/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1071218374690 | 12/18/2007 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080112011464 | 01/12/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080118017309 | 01/18/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080125024322 | 01/25/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080126025306 | 01/26/2008 | 29 NE 11TH ST | R160 |

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 34 | DISTURBANCE | LM1080131030492 | 01/31/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080203033873 | 02/03/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080209040196 | 02/09/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080209040478 | 02/09/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080210041284 | 02/10/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080210041322 | 02/10/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080212043079 | 02/12/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080216047501 | 02/16/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080221053412 | 02/21/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080309069936 | 03/09/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080323084862 | 03/23/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080401095138 | 04/01/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080406099783 | 04/06/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080427122065 | 04/27/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080524151612 | 05/24/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080601160032 | 06/01/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080605164955 | 06/05/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080607166553 | 06/07/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080607166560 | 06/07/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080610169463 | 06/10/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080622182086 | 06/22/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080628188420 | 06/28/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080629189553 | 06/29/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080701191587 | 07/01/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080705196148 | 07/05/2008 | 29 NE 11TH ST | R160 |
| 34 | DISTURBANCE | LM1080711202542 | 07/11/2008 | 29 NE 11TH ST | R160 |
| 35 | ALCOHOL RELATED INCI | LM1060312074416 | 03/12/2006 | 29 NE 11TH ST | R160 |
| 35 | ALCOHOL RELATED INCI | LM1070714206037 | 07/14/2007 | 29 NE 11TH ST | R160 |
| 35 | ALCOHOL RELATED INCI | LM1070923282270 | 09/23/2007 | 29 NE 11TH ST | R160 |
| 35 | ALCOHOL RELATED INCI | LM1071104326698 | 11/04/2007 | 29 NE 11TH ST | R160 |
| 35 | ALCOHOL RELATED INCI | LM1080127026220 | 01/27/2008 | 29 NE 11TH ST | R160 |
| 35 | ALCOHOL RELATED INCI | LM1080601160038 | 06/01/2008 | 29 NE 11TH ST | R160 |
| 40 | ARREST BASED ON WARR | LM1060415111198 | 04/15/2006 | 29 NE 11TH ST | R160 |
| 40 | ARREST BASED ON WARR | LM1070729222198 | 07/29/2007 | 29 NE 11TH ST | R160 |
| 40 | ARREST BASED ON WARR | LM1071110333122 | 11/10/2007 | 29 NE 11TH ST | R160 |
| 40 | ARREST BASED ON WARR | LM1080619178801 | 06/19/2008 | 29 NE 11TH ST | R160 |
| 41 | SICK OR INJURED PERS | LM1070326088823 | 03/26/2007 | 29 NE 11TH ST | R160 |
| 43 | SPECIAL DETAIL | LM1070527154933 | 05/27/2007 | 29 NE 11TH ST | R160 |
| 46 | OFF DUTY DETAIL | LM1051016101517 | 10/16/2005 | 29 NE 11TH ST | R160 |
| 46 | OFF DUTY DETAIL | LM1061126345835 | 11/26/2006 | 29 NE 11TH ST | R160 |
| 46 | OFF DUTY DETAIL | LM1080628188470 | 06/28/2008 | 29 NE 11TH ST | R160 |
| 50 | DIRECTED PATROL | LM1070630190899 | 06/30/2007 | 29 NE 11TH ST | R160 |
| 50 | DIRECTED PATROL | LM1080114012895 | 01/14/2008 | 29 NE 11TH ST | R160 |
| 54 | WORTHLESS DOCUMENT | LM1050906059528 | 09/06/2005 | 29 NE 11TH ST | R160 |
| 54 | WORTHLESS DOCUMENT | LM1060329093370 | 03/29/2006 | 29 NE 11TH ST | R160 |
| 54 | WORTHLESS DOCUMENT | LM1070127027148 | 01/27/2007 | 29 NE 11TH ST | R160 |
| 54 | WORTHLESS DOCUMENT | LM1071115338703 | 11/15/2007 | 29 NE 11TH ST | R160 |
| 54 | WORTHLESS DOCUMENT | LM1080327089401 | 03/27/2008 | 29 NE 11TH ST | R160 |
| 55 | DOMESTIC VIOLENCE | LM1061119339657 | 11/19/2006 | 29 NE 11TH ST | R160 |
| 55 | DOMESTIC VIOLENCE | LM1071013303356 | 10/13/2007 | 29 NE 11TH ST | R160 |
| 56 | CRISIS INTERVENTION | LM1060321084023 | 03/21/2006 | 29 NE 11TH ST | R160 |
| 56 | CRISIS INTERVENTION | LM1071124347792 | 11/24/2007 | 29 NE 11TH ST | R160 |
| 56 | CRISIS INTERVENTION | LM1080516142719 | 05/16/2008 | 29 NE 11TH ST | R160 |
| 57 | NARCOTICS RELATED IN | LM1061016305576 | 10/16/2006 | 29 NE 11TH ST | R160 |

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 57 | NARCOTICS RELATED IN | LM1070123022248 | 01/23/2007 | 29 NE 11TH ST | R160 |
| 57 | NARCOTICS RELATED IN | LM1070618178380 | 06/18/2007 | 29 NE 11TH ST | R160 |
| 57 | NARCOTICS RELATED IN | LM1070729222200 | 07/29/2007 | 29 NE 11TH ST | R160 |
| 57 | NARCOTICS RELATED IN | LM1070826252329 | 08/26/2007 | 29 NE 11TH ST | R160 |
| 57 | NARCOTICS RELATED IN | LM1071005294941 | 10/05/2007 | 29 NE 11TH ST | R160 |
| 57 | NARCOTICS RELATED IN | LM1071224381036 | 12/24/2007 | 29 NE 11TH ST | R160 |
| 57 | NARCOTICS RELATED IN | LM1080328089907 | 03/28/2008 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1070217048937 | 02/17/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1070225057098 | 02/25/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1070331095230 | 03/31/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1070526154109 | 05/26/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1070624184623 | 06/24/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1070706197119 | 07/06/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1070805229506 | 08/05/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1070827253876 | 08/27/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1071013303386 | 10/13/2007 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1080503128585 | 05/03/2008 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1080622182203 | 06/22/2008 | 29 NE 11TH ST | R160 |
| ID | ID REQUEST | LM1080628188495 | 06/28/2008 | 29 NE 11TH ST | R160 |
| REPO | REPOSSESSED VEHICLE | LM1061205355449 | 12/05/2006 | 29 NE 11TH ST | R160 |
| TEST | TEST TYPE FOR CONFIG | LM1060527155779 | 05/27/2006 | 29 NE 11TH ST | R160 |
| TEST | TEST TYPE FOR CONFIG | LM1070827253849 | 08/27/2007 | 29 NE 11TH ST | R160 |
| TOW | TOW REQUEST | LM1061203352919 | 12/03/2006 | 29 NE 11TH ST | R160 |
| TOW | TOW REQUEST | LM1070909267258 | 09/09/2007 | 29 NE 11TH ST | R160 |

7/15/2008

# CITY ATTORNEY'S OFFICE
## Calls for Service
## Business Name: Pleasure Emporium
## Location: 224 SW 6th St.
## January 1, 2005 thru July 15, 2008

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 13 | SPECIAL INFORMATION | LM1050912066469 | 09/12/2005 | 224 SW 6TH ST | R248 |
| 13 | SPECIAL INFORMATION | LM1060416112024 | 04/16/2006 | 224 SW 6TH ST | R248 |
| 13 | SPECIAL INFORMATION | LM1060520148905 | 05/20/2006 | 224 SW 6TH ST | R248 |
| 13 | SPECIAL INFORMATION | LM1060926283963 | 09/26/2006 | 224 SW 6TH ST | R248 |
| 13 | SPECIAL INFORMATION | LM1061001289722 | 10/01/2006 | 224 SW 6TH ST | R248 |
| 13 | SPECIAL INFORMATION | LM1070212043961 | 02/12/2007 | 224 SW 6TH ST | R248 |
| 13 | SPECIAL INFORMATION | LM1070427123459 | 04/27/2007 | 224 SW 6TH ST | R248 |
| 13 | SPECIAL INFORMATION | LM1071207362958 | 12/07/2007 | 224 SW 6TH ST | R248 |
| 13 | SPECIAL INFORMATION | LM1071216372988 | 12/16/2007 | 224 SW 6TH ST | R248 |
| 14 | DIRECT ARREST | LM1080321082635 | 03/21/2008 | 224 SW 6TH ST | R248 |
| 24 | CITY RECOVERY OF STO | LM1060118017629 | 01/18/2006 | 224 SW 6TH ST | R248 |
| 25 | FALSE ALARM | LM1080126025244 | 01/26/2008 | 224 SW 6TH ST | R248 |
| 27 | LARCENY | LM1050912066619 | 09/12/2005 | 224 SW 6TH ST | R248 |
| 27 | LARCENY | LM1060711204240 | 07/11/2006 | 224 SW 6TH ST | R248 |
| 27 | LARCENY | LM1080709200207 | 07/09/2008 | 224 SW 6TH ST | R248 |
| 27M | LARCENY, MOTOR VEHIC | LM1070426122351 | 04/26/2007 | 224 SW 6TH ST | R248 |
| 27R | LARCENY, RETAIL THEF | LM1050925080790 | 09/25/2005 | 224 SW 6TH ST | R248 |
| 27R | LARCENY, RETAIL THEF | LM1060805231027 | 08/05/2006 | 224 SW 6TH ST | R248 |
| 27R | LARCENY, RETAIL THEF | LM1061109329666 | 11/09/2006 | 224 SW 6TH ST | R248 |
| 27R | LARCENY, RETAIL THEF | LM1070115014883 | 01/15/2007 | 224 SW 6TH ST | R248 |
| 29 | ROBBERY | LM1050812032787 | 08/12/2005 | 224 SW 6TH ST | R248 |
| 29 | ROBBERY | LM1060926283965 | 09/26/2006 | 224 SW 6TH ST | R248 |
| 29 | ROBBERY | LM1061204354666 | 12/04/2006 | 224 SW 6TH ST | R248 |
| 32 | SIMPLE ASSAULT OR BA | LM1061023312778 | 10/23/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1050714002624 | 07/14/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1050721009534 | 07/21/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1050729018313 | 07/29/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1050815035964 | 08/15/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1050824045498 | 08/24/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1050918073320 | 09/18/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1050919074015 | 09/19/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1051218165579 | 12/18/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1051220167026 | 12/20/2005 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060101001021 | 01/01/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060116015956 | 01/16/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060207038760 | 02/07/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060216048024 | 02/16/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060225058572 | 02/25/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060226058667 | 02/25/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060317079835 | 03/17/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060322086262 | 03/22/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060331095729 | 03/31/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060610171204 | 06/10/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060612172858 | 06/12/2006 | 224 SW 6TH ST | R248 |

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 34 | DISTURBANCE | LM1060613174529 | 06/13/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060615176491 | 06/15/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060721214783 | 07/21/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060805230271 | 08/05/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060810236357 | 08/10/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060812237670 | 08/12/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060908265487 | 09/08/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060926284674 | 09/26/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060928286901 | 09/28/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1060929287236 | 09/29/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061002290718 | 10/02/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061002290866 | 10/02/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061004293215 | 10/04/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061006294806 | 10/06/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061008296943 | 10/08/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061015303772 | 10/15/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061015304106 | 10/15/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061123343186 | 11/23/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061123343809 | 11/23/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061202351942 | 12/02/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061204354620 | 12/04/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1061216366014 | 12/16/2006 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070106005233 | 01/06/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070312073845 | 03/12/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070314076488 | 03/14/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070410105683 | 04/10/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070418114246 | 04/18/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070427123461 | 04/27/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070519146723 | 05/19/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070525153417 | 05/25/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1070525153467 | 05/25/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1071206361739 | 12/06/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1071206361797 | 12/06/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1071211366337 | 12/11/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1071225381518 | 12/25/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1071225382315 | 12/25/2007 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1080107006822 | 01/07/2008 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1080118017510 | 01/18/2008 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1080203034438 | 02/03/2008 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1080217048458 | 02/17/2008 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1080218050220 | 02/18/2008 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1080309070126 | 03/09/2008 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1080310071309 | 03/10/2008 | 224 SW 6TH ST | R248 |
| 34 | DISTURBANCE | LM1080712203940 | 07/12/2008 | 224 SW 6TH ST | R248 |
| 35 | ALCOHOL RELATED INCI | LM1080218050316 | 02/18/2008 | 224 SW 6TH ST | R248 |
| 35 | ALCOHOL RELATED INCI | LM1080616176750 | 06/16/2008 | 224 SW 6TH ST | R248 |
| 38 | SUSPICIOUS PERSONS | LM1080218050295 | 02/18/2008 | 224 SW 6TH ST | R248 |
| 40 | ARREST BASED ON WARR | LM1080616176748 | 06/16/2008 | 224 SW 6TH ST | R248 |
| 57 | NARCOTICS RELATED IN | LM1060501127967 | 05/01/2006 | 224 SW 6TH ST | R248 |
| 57 | NARCOTICS RELATED IN | LM1061026315816 | 10/26/2006 | 224 SW 6TH ST | R248 |
| 57 | NARCOTICS RELATED IN | LM1080321082615 | 03/21/2008 | 224 SW 6TH ST | R248 |
| ID | ID REQUEST | LM1050812032796 | 08/12/2005 | 224 SW 6TH ST | R248 |
| ID | ID REQUEST | LM1060501127997 | 05/01/2006 | 224 SW 6TH ST | R248 |
| ID | ID REQUEST | LM1060711204280 | 07/11/2006 | 224 SW 6TH ST | R248 |

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| ID | ID REQUEST | LM1061023312798 | 10/23/2006 | 224 SW 6TH ST | R248 |
| ID | ID REQUEST | LM1061027316548 | 10/27/2006 | 224 SW 6TH ST | R248 |
| TOW | TOW REQUEST | LM1061219368726 | 12/19/2006 | 224 SW 6TH ST | R248 |

7/15/2008

# CITY ATTORNEY'S OFFICE
## Calls for Service
## Business Name: The Boulevard/Gayety Theaters/Black Gold
## Location: 7778 Biscayne Blvd.
## January 1, 2005 thru July 15, 2008

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|

NO CALLS FOR SERVICE DATA

7/15/2008

# CITY ATTORNEY'S OFFICE
## Calls for Service
## Business Name: The Boulevard/Gayety Theaters/Black Gold
## Location: 7770 Biscayne Blvd.
## January 1, 2005 thru July 15, 2008

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 13 | SPECIAL INFORMATION | LM1050930085764 | 09/30/2005 | 7770 BISCAYNE BLVD | R012 |
| 13 | SPECIAL INFORMATION | LM1060129029760 | 01/29/2006 | 7770 BISCAYNE BLVD | R012 |
| 13 | SPECIAL INFORMATION | LM1070216048215 | 02/16/2007 | 7770 BISCAYNE BLVD | R012 |
| 13 | SPECIAL INFORMATION | LM1070529157006 | 05/29/2007 | 7770 BISCAYNE BLVD | R012 |
| 13 | SPECIAL INFORMATION | LM1071227383588 | 12/27/2007 | 7770 BISCAYNE BLVD | R012 |
| 13 | SPECIAL INFORMATION | LM1080510136092 | 05/10/2008 | 7770 BISCAYNE BLVD | R012 |
| 16 | DUI | LM1070424119818 | 04/24/2007 | 7770 BISCAYNE BLVD | R012 |
| 17 | ACCIDENT | LM1050725013466 | 07/25/2005 | 7770 BISCAYNE BLVD | R012 |
| 17M | ACCIDENT, MINOR | LM1060825251683 | 08/25/2006 | 7770 BISCAYNE BLVD | R012 |
| 22 | STOLEN VEHICLE | LM1060418114956 | 04/18/2006 | 7770 BISCAYNE BLVD | R012 |
| 22 | STOLEN VEHICLE | LM1071001290048 | 10/01/2007 | 7770 BISCAYNE BLVD | R012 |
| 23 | OUT OF TOWN RECOVERY | LM1051001086955 | 10/01/2005 | 7770 BISCAYNE BLVD | R012 |
| 27 | LARCENY | LM1051119136839 | 11/19/2005 | 7770 BISCAYNE BLVD | R012 |
| 27M | LARCENY, MOTOR VEHIC | LM1071103325411 | 11/03/2007 | 7770 BISCAYNE BLVD | R012 |
| 29 | ROBBERY | LM1070826252419 | 08/26/2007 | 7770 BISCAYNE BLVD | R012 |
| 29 | ROBBERY | LM1080609168386 | 06/09/2008 | 7770 BISCAYNE BLVD | R012 |
| 33 | SEX OFFENSE | LM1051028113538 | 10/28/2005 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1050726014454 | 07/26/2005 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1050917072856 | 09/17/2005 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1051009094834 | 10/09/2005 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1051119136760 | 11/19/2005 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1060116016064 | 01/16/2006 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1060312074956 | 03/12/2006 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1060517144740 | 05/17/2006 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1080110009005 | 01/10/2008 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1080127026892 | 01/27/2008 | 7770 BISCAYNE BLVD | R012 |
| 34 | DISTURBANCE | LM1080223054743 | 02/23/2008 | 7770 BISCAYNE BLVD | R012 |
| 51 | NUISANCE | LM1070825251134 | 08/25/2007 | 7770 BISCAYNE BLVD | R012 |
| 54 | WORTHLESS DOCUMENT | LM1071019309507 | 10/19/2007 | 7770 BISCAYNE BLVD | R012 |
| ID | ID REQUEST | LM1050725013496 | 07/25/2005 | 7770 BISCAYNE BLVD | R012 |
| ID | ID REQUEST | LM1070826252448 | 08/26/2007 | 7770 BISCAYNE BLVD | R012 |
| ID | ID REQUEST | LM1070826252514 | 08/26/2007 | 7770 BISCAYNE BLVD | R012 |

7/15/2008

# CITY ATTORNEY'S OFFICE
## Calls for Service
## Business Name: Alley Cat
## Location: 3875 Shipping Ave.
## January 1, 2005 thru July 15, 2008

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 13 | SPECIAL INFORMATION | LM1050718006358 | 07/18/2005 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1051013098336 | 10/13/2005 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1060516144605 | 05/16/2006 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1060612172658 | 06/12/2006 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1060720213002 | 07/20/2006 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1060806231413 | 08/06/2006 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1070322084439 | 03/22/2007 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1070409104034 | 04/09/2007 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1070424119595 | 04/24/2007 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1070929287931 | 09/29/2007 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1071029320006 | 10/29/2007 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1080107006698 | 01/07/2008 | 3875 SHIPPING AV | R307 |
| 13 | SPECIAL INFORMATION | LM1080202032691 | 02/02/2008 | 3875 SHIPPING AV | R307 |
| 14I | INFORMATION REPORT | LM1070110009671 | 01/10/2007 | 3875 SHIPPING AV | R307 |
| 15 | BACKUP / ASSIST OTHE | LM1060706197988 | 07/06/2006 | 3875 SHIPPING AV | R307 |
| 15 | BACKUP / ASSIST OTHE | LM1060809234430 | 08/09/2006 | 3875 SHIPPING AV | R307 |
| 16 | DUI | LM1060705197953 | 07/05/2006 | 3875 SHIPPING AV | R307 |
| 17 | ACCIDENT | LM1050720008726 | 07/20/2005 | 3875 SHIPPING AV | R307 |
| 17 | ACCIDENT | LM1060406102365 | 04/06/2006 | 3875 SHIPPING AV | R307 |
| 17 | ACCIDENT | LM1060510138050 | 05/10/2006 | 3875 SHIPPING AV | R307 |
| 17 | ACCIDENT | LM1080124023885 | 01/24/2008 | 3875 SHIPPING AV | R307 |
| 17M | ACCIDENT, MINOR | LM1060510138067 | 05/10/2006 | 3875 SHIPPING AV | R307 |
| 18 | HIT & RUN ACCIDENT | LM1061108328275 | 11/08/2006 | 3875 SHIPPING AV | R307 |
| 18 | HIT & RUN ACCIDENT | LM1070716207740 | 07/16/2007 | 3875 SHIPPING AV | R307 |
| 19 | TRAFFIC VIOLATION | LM1061005294060 | 10/05/2006 | 3875 SHIPPING AV | R307 |
| 19 | TRAFFIC VIOLATION | LM1061116337303 | 11/16/2006 | 3875 SHIPPING AV | R307 |
| 19 | TRAFFIC VIOLATION | LM1070629190511 | 06/29/2007 | 3875 SHIPPING AV | R307 |
| 19 | TRAFFIC VIOLATION | LM1070724217103 | 07/24/2007 | 3875 SHIPPING AV | R307 |
| 22 | STOLEN VEHICLE | LM1070805229324 | 08/05/2007 | 3875 SHIPPING AV | R307 |
| 22 | STOLEN VEHICLE | LM1080517144159 | 05/17/2008 | 3875 SHIPPING AV | R307 |
| 25 | FALSE ALARM | LM1060616177445 | 06/16/2006 | 3875 SHIPPING AV | R307 |
| 25 | FALSE ALARM | LM1060718210952 | 07/18/2006 | 3875 SHIPPING AV | R307 |
| 25 | FALSE ALARM | LM1060826252647 | 08/26/2006 | 3875 SHIPPING AV | R307 |
| 25 | FALSE ALARM | LM1061028317427 | 10/28/2006 | 3875 SHIPPING AV | R307 |
| 25 | FALSE ALARM | LM1070412107151 | 04/12/2007 | 3875 SHIPPING AV | R307 |
| 25 | FALSE ALARM | LM1070520148324 | 05/20/2007 | 3875 SHIPPING AV | R307 |
| 25 | FALSE ALARM | LM1080524151585 | 05/24/2008 | 3875 SHIPPING AV | R307 |
| 26 | BURGLARY | LM1070220051389 | 02/20/2007 | 3875 SHIPPING AV | R307 |
| 27 | LARCENY | LM1050805025317 | 08/05/2005 | 3875 SHIPPING AV | R307 |
| 27 | LARCENY | LM1060605166139 | 06/05/2006 | 3875 SHIPPING AV | R307 |
| 27 | LARCENY | LM1061201350765 | 12/01/2006 | 3875 SHIPPING AV | R307 |
| 27 | LARCENY | LM1080627187155 | 06/27/2008 | 3875 SHIPPING AV | R307 |
| 27M | LARCENY, MOTOR VEHIC | LM1050916071002 | 09/16/2005 | 3875 SHIPPING AV | R307 |
| 27M | LARCENY, MOTOR VEHIC | LM1080413107044 | 04/13/2008 | 3875 SHIPPING AV | R307 |

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 28 | VANDALISM | LM1050717006249 | 07/17/2005 | 3875 SHIPPING AV | R307 |
| 28 | VANDALISM | LM1070813237974 | 08/13/2007 | 3875 SHIPPING AV | R307 |
| 32 | SIMPLE ASSAULT OR BA | LM1050722010544 | 07/22/2005 | 3875 SHIPPING AV | R307 |
| 32 | SIMPLE ASSAULT OR BA | LM1060501128416 | 05/01/2006 | 3875 SHIPPING AV | R307 |
| 32 | SIMPLE ASSAULT OR BA | LM1061118338528 | 11/18/2006 | 3875 SHIPPING AV | R307 |
| 32 | SIMPLE ASSAULT OR BA | LM1070419114518 | 04/19/2007 | 3875 SHIPPING AV | R307 |
| 32 | SIMPLE ASSAULT OR BA | LM1070426121938 | 04/26/2007 | 3875 SHIPPING AV | R307 |
| 32 | SIMPLE ASSAULT OR BA | LM1071107330666 | 11/07/2007 | 3875 SHIPPING AV | R307 |
| 32A | AGGRAVATED ASSAULT O | LM1060328091517 | 03/28/2006 | 3875 SHIPPING AV | R307 |
| 32A | AGGRAVATED ASSAULT O | LM1070731223615 | 07/31/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1050924079038 | 09/24/2005 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1051002087210 | 10/02/2005 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1051110127668 | 11/10/2005 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1060110009129 | 01/10/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1060203034557 | 02/03/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1060329092702 | 03/29/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1060510138419 | 05/10/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1060610170503 | 06/10/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1060809234429 | 08/09/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1060818244218 | 08/18/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1061004292905 | 10/04/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1061010298351 | 10/10/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1061102322341 | 11/02/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1061118338459 | 11/18/2006 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070220051386 | 02/20/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070220052526 | 02/20/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070305065705 | 03/05/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070306066993 | 03/06/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070418113370 | 04/18/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070616176265 | 06/16/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070618178728 | 06/18/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070726218551 | 07/26/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070804228156 | 08/04/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070815240321 | 08/15/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1070923282022 | 09/23/2007 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1080225057521 | 02/25/2008 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1080417111018 | 04/17/2008 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1080514140396 | 05/14/2008 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1080519145922 | 05/19/2008 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1080619178769 | 06/19/2008 | 3875 SHIPPING AV | R307 |
| 34 | DISTURBANCE | LM1080705196133 | 07/05/2008 | 3875 SHIPPING AV | R307 |
| 38 | SUSPICIOUS PERSONS | LM1050724013167 | 07/24/2005 | 3875 SHIPPING AV | R307 |
| 38 | SUSPICIOUS PERSONS | LM1080211042275 | 02/11/2008 | 3875 SHIPPING AV | R307 |
| 40 | ARREST BASED ON WARR | LM1060905262514 | 09/05/2006 | 3875 SHIPPING AV | R307 |
| 50 | DIRECTED PATROL | LM1060828254598 | 08/28/2006 | 3875 SHIPPING AV | R307 |
| 50 | DIRECTED PATROL | LM1060828254599 | 08/28/2006 | 3875 SHIPPING AV | R307 |
| 50 | DIRECTED PATROL | LM1060831257531 | 08/31/2006 | 3875 SHIPPING AV | R307 |
| 50 | DIRECTED PATROL | LM1060831257532 | 08/31/2006 | 3875 SHIPPING AV | R307 |
| ID | ID REQUEST | LM1050722010547 | 07/22/2005 | 3875 SHIPPING AV | R307 |
| ID | ID REQUEST | LM1051013098884 | 10/13/2005 | 3875 SHIPPING AV | R307 |
| ID | ID REQUEST | LM1060328091522 | 03/28/2006 | 3875 SHIPPING AV | R307 |
| ID | ID REQUEST | LM1061118338576 | 11/18/2006 | 3875 SHIPPING AV | R307 |
| ID | ID REQUEST | LM1070426121952 | 04/26/2007 | 3875 SHIPPING AV | R307 |
| REPO | REPOSSESSED VEHICLE | LM1080222053475 | 02/22/2008 | 3875 SHIPPING AV | R307 |

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| TOW | TOW REQUEST | LM1060117017055 | 01/17/2006 | 3875 SHIPPING AV | R307 |
| TOW | TOW REQUEST | LM1060815240824 | 08/15/2006 | 3875 SHIPPING AV | R307 |
| TOW | TOW REQUEST | LM1060815240826 | 08/15/2006 | 3875 SHIPPING AV | R307 |
| TOW | TOW REQUEST | LM1070311072513 | 03/11/2007 | 3875 SHIPPING AV | R307 |
| TOW | TOW REQUEST | LM1070420115468 | 04/20/2007 | 3875 SHIPPING AV | R307 |
| TOW | TOW REQUEST | LM1070904262685 | 09/04/2007 | 3875 SHIPPING AV | R307 |

7/15/2008

# CITY ATTORNEY'S OFFICE
## Calls for Service
## Business Name: The Boulevard/Gayety Theaters/Black Gold
## Location: 550 NE 78th St.
## January 1, 2005 thru July 15, 2008

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 55 | DOMESTIC VIOLENCE | LM1051021106499 | 10/21/2005 | 550 NE 78TH ST | R012 |

7/15/2008

# CITY ATTORNEY'S OFFICE
## Calls for Service
## Business Name: BOTTOM'S UP LOUNGE
## Location: 410 SW 8th St & 426 SW 8th St
## January 1, 2005 thru July 15, 2008

| FINAL SIGNAL | INCIDENT DESCRIPTION | EVENT NUMBER | DATE & TIME | LOCATION | REPORTING AREA |
|---|---|---|---|---|---|
| 13 | SPECIAL INFORMATION | LM1051214161769 | 12/14/2005 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1070308069052 | 03/08/2007 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1070417113053 | 04/17/2007 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1070523150736 | 05/23/2007 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1070531159828 | 05/31/2007 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1071001290696 | 10/01/2007 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1080218050178 | 02/18/2008 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1080330093074 | 03/30/2008 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1080503128356 | 05/03/2008 | 5655 SW 8TH ST | R225 |
| 13 | SPECIAL INFORMATION | LM1080514140912 | 05/14/2008 | 5655 SW 8TH ST | R225 |
| 14I | INFORMATION REPORT | LM1051123139880 | 11/23/2005 | 5655 SW 8TH ST | R225 |
| 15 | BACKUP / ASSIST OTHE | LM1060926284760 | 09/26/2006 | 5655 SW 8TH ST | R225 |
| 17M | ACCIDENT, MINOR | LM1070501127383 | 05/01/2007 | 5655 SW 8TH ST | R225 |
| 25 | FALSE ALARM | LM1060420116590 | 04/20/2006 | 5655 SW 8TH ST | R225 |
| 26 | BURGLARY | LM1060410105905 | 04/10/2006 | 5655 SW 8TH ST | R225 |
| 28 | VANDALISM | LM1070815240805 | 08/15/2007 | 5655 SW 8TH ST | R225 |
| 32 | SIMPLE ASSAULT OR BA | LM1051101118296 | 11/01/2005 | 5655 SW 8TH ST | R225 |
| 32 | SIMPLE ASSAULT OR BA | LM1060727221342 | 07/27/2006 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1050714002119 | 07/14/2005 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1050815036022 | 08/15/2005 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1060703195145 | 07/03/2006 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1061108328346 | 11/08/2006 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1070607167672 | 06/07/2007 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1070808233354 | 08/08/2007 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1070924283742 | 09/24/2007 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1071130353861 | 11/30/2007 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1071226383408 | 12/26/2007 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1080308068785 | 03/08/2008 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1080501126988 | 05/01/2008 | 5655 SW 8TH ST | R225 |
| 34 | DISTURBANCE | LM1080526154074 | 05/26/2008 | 5655 SW 8TH ST | R225 |
| 35 | ALCOHOL RELATED INCI | LM1071227383478 | 12/27/2007 | 5655 SW 8TH ST | R225 |
| 54 | WORTHLESS DOCUMENT | LM1060426122544 | 04/26/2006 | 5655 SW 8TH ST | R225 |

7/15/2008

# TAKE ONE LOUNGE
# 333 NE 79TH ST
# Reporting Period: July 12, 2005 thru July 15, 2008

| Final Signal | Incident Description | Date/Time | Address | Reporting District | Event Number |
|---|---|---|---|---|---|
| **13** | | | | | |
| 13 | SPECIAL INFORMATION | 8/29/2005 3:51 am | 333 NE 79TH ST | R004 | LM1050829051272 |
| 13 | SPECIAL INFORMATION | 9/29/2005 5:03 am | 333 NE 79TH ST | R004 | LM1050929084105 |
| 13 | SPECIAL INFORMATION | 11/12/2005 5:07 am | 333 NE 79TH ST | R004 | LM1051112128849 |
| 13 | SPECIAL INFORMATION | 3/25/2006 4:36 am | 333 NE 79TH ST | R004 | LM1060325088659 |
| 13 | SPECIAL INFORMATION | 11/11/2006 4:09 am | 333 NE 79TH ST | R004 | LM1061111331457 |
| 13 | SPECIAL INFORMATION | 12/2/2006 4:18 am | 333 NE 79TH ST | R004 | LM1061202351834 |
| 13 | SPECIAL INFORMATION | 3/25/2007 2:23 am | 333 NE 79TH ST | R004 | LM1070325087766 |
| 13 | SPECIAL INFORMATION | 4/9/2007 7:45 pm | 333 NE 79TH ST | R004 | LM1070409104292 |
| 13 | SPECIAL INFORMATION | 5/3/2007 5:18 pm | 333 NE 79TH ST | R004 | LM1070503130223 |
| 13 | SPECIAL INFORMATION | 6/15/2007 11:01 pm | 333 NE 79TH ST | R004 | LM1070615176065 |
| 13 | SPECIAL INFORMATION | 12/23/2007 5:17 am | 333 NE 79TH ST | R004 | LM1071223379801 |
| 13 | SPECIAL INFORMATION | 1/20/2008 7:31 pm | 333 NE 79TH ST | R004 | LM1080120019581 |
| 13 | SPECIAL INFORMATION | 2/9/2008 11:01 pm | 333 NE 79TH ST | R004 | LM1080209040954 |
| 13 | SPECIAL INFORMATION | 3/1/2008 6:36 pm | 333 NE 79TH ST | R004 | LM1080301062366 |
| 13 | SPECIAL INFORMATION | 5/7/2008 11:39 pm | 333 NE 79TH ST | R004 | LM1080507133605 |
| 13 | SPECIAL INFORMATION | 5/25/2008 2:59 am | 333 NE 79TH ST | R004 | LM1080525152507 |
| 13 | SPECIAL INFORMATION | 6/17/2008 4:48 am | 333 NE 79TH ST | R004 | LM1080617176986 |
| 13 | SPECIAL INFORMATION | 6/19/2008 2:24 am | 333 NE 79TH ST | R004 | LM1080619178742 |
| 13 | SPECIAL INFORMATION | 7/13/2008 6:06 am | 333 NE 79TH ST | R004 | LM1080713204836 |
| **19** | | | | | |
| **14** | | | | | |
| 14 | DIRECT ARREST | 2/22/2006 2:49 am | 333 NE 79TH ST | R004 | LM1060222054533 |
| 14 | DIRECT ARREST | 11/26/2006 2:57 am | 333 NE 79TH ST | R004 | LM1061126345714 |
| 14 | DIRECT ARREST | 2/5/2007 4:03 am | 333 NE 79TH ST | R004 | LM1070205036226 |
| 14 | DIRECT ARREST | 3/9/2007 9:16 pm | 333 NE 79TH ST | R004 | LM1070309070961 |
| 14 | DIRECT ARREST | 4/24/2007 11:46 pm | 333 NE 79TH ST | R004 | LM1070424120745 |
| 14 | DIRECT ARREST | 5/1/2007 12:44 am | 333 NE 79TH ST | R004 | LM1070501127302 |
| 14 | DIRECT ARREST | 6/23/2007 2:12 am | 333 NE 79TH ST | R004 | LM1070623183477 |
| **7** | | | | | |

| Final Signal | Incident Description | Date/Time | Address | Reporting District | Event Number |
|---|---|---|---|---|---|
| **14I** | | | | | |
| 14I | INFORMATION REPORT | 1/8/2006 1:39 am | 333 NE 79TH ST | R004 | LM1060108007266 |
| **1** | | | | | |
| **15** | | | | | |
| 15 | BACKUP / ASSIST OTHE | 9/17/2006 4:21 am | 333 NE 79TH ST | R004 | LM1060917274902 |
| 15 | BACKUP / ASSIST OTHE | 5/11/2007 12:27 pm | 333 NE 79TH ST | R004 | LM1070511138379 |
| 15 | BACKUP / ASSIST OTHE | 2/15/2008 9:34 am | 333 NE 79TH ST | R004 | LM1080215046443 |
| **3** | | | | | |
| **16A** | | | | | |
| 16A | DUI ACCIDENT | 8/14/2005 3:33 am | 333 NE 79TH ST | R004 | LM1050814035086 |
| **1** | | | | | |
| **17** | | | | | |
| 17 | ACCIDENT | 2/22/2007 4:13 am | 333 NE 79TH ST | R004 | LM1070222053773 |
| **1** | | | | | |
| **17CVI** | | | | | |
| 17CV | CITY VEH ACCIDENT, I | 8/7/2005 3:31 am | 333 NE 79TH ST | R004 | LM1050807027431 |
| **1** | | | | | |
| **17M** | | | | | |
| 17M | ACCIDENT, MINOR | 9/25/2005 3:09 am | 333 NE 79TH ST | R004 | LM1050925080094 |
| 17M | ACCIDENT, MINOR | 1/2/2006 10:05 pm | 333 NE 79TH ST | R004 | LM1060102001965 |
| **2** | | | | | |
| **18** | | | | | |
| 18 | HIT & RUN ACCIDENT | 6/1/2008 4:52 am | 333 NE 79TH ST | R004 | LM1080601160089 |
| **1** | | | | | |
| **19** | | | | | |
| 19 | TRAFFIC VIOLATION | 9/6/2005 11:56 pm | 333 NE 79TH ST | R004 | LM1050906060650 |
| 19 | TRAFFIC VIOLATION | 11/23/2005 1:41 am | 333 NE 79TH ST | R004 | LM1051123139857 |
| 19 | TRAFFIC VIOLATION | 4/3/2006 2:57 am | 333 NE 79TH ST | R004 | LM1060403097954 |
| 19 | TRAFFIC VIOLATION | 3/15/2007 11:42 am | 333 NE 79TH ST | R004 | LM1070315077072 |
| 19 | TRAFFIC VIOLATION | 4/9/2007 1:46 am | 333 NE 79TH ST | R004 | LM1070409103529 |
| 19 | TRAFFIC VIOLATION | 11/7/2007 4:04 am | 333 NE 79TH ST | R004 | LM1071107329703 |
| 19 | TRAFFIC VIOLATION | 11/13/2007 1:17 am | 333 NE 79TH ST | R004 | LM1071113335938 |
| 19 | TRAFFIC VIOLATION | 2/13/2008 1:59 am | 333 NE 79TH ST | R004 | LM1080213044183 |
| 19 | TRAFFIC VIOLATION | 4/20/2008 4:51 am | 333 NE 79TH ST | R004 | LM1080420114546 |
| 19 | TRAFFIC VIOLATION | 5/10/2008 3:39 am | 333 NE 79TH ST | R004 | LM1080510136084 |
| 19 | TRAFFIC VIOLATION | 5/10/2008 4:10 am | 333 NE 79TH ST | R004 | LM1080510136108 |
| 19 | TRAFFIC VIOLATION | 6/17/2008 3:37 am | 333 NE 79TH ST | R004 | LM1080617176966 |
| **12** | | | | | |
| **22** | | | | | |
| 22 | STOLEN VEHICLE | 8/15/2005 7:05 pm | 333 NE 79TH ST | R004 | LM1050815036730 |

| Final Signal | Incident Description | Date/Time | Address | Reporting District | Event Number |
|---|---|---|---|---|---|
| 22 | STOLEN VEHICLE | 9/18/2005 4:00 am | 333 NE 79TH ST | R004 | LM1050918073177 |
| 22 | STOLEN VEHICLE | 12/27/2007 6:07 pm | 333 NE 79TH ST | R004 | LM1071227384137 |
| 22 | STOLEN VEHICLE | 2/9/2008 10:33 pm | 333 NE 79TH ST | R004 | LM1080209040932 |
| **4** | | | | | |
| **23** | | | | | |
| 23 | OUT OF TOWN RECOVERY | 8/11/2005 4:54 am | 333 NE 79TH ST | R004 | LM1050811031680 |
| **1** | | | | | |
| **27** | | | | | |
| 27 | LARCENY | 8/29/2005 4:50 am | 333 NE 79TH ST | R004 | LM1050829051293 |
| 27 | LARCENY | 12/18/2005 12:28 pm | 333 NE 79TH ST | R004 | LM1051218165432 |
| 27 | LARCENY | 1/9/2006 1:59 pm | 333 NE 79TH ST | R004 | LM1060109008559 |
| 27 | LARCENY | 2/15/2006 5:49 pm | 333 NE 79TH ST | R004 | LM1060215047593 |
| 27 | LARCENY | 12/17/2006 4:11 am | 333 NE 79TH ST | R004 | LM1061217366988 |
| 27 | LARCENY | 1/14/2007 2:34 am | 333 NE 79TH ST | R004 | LM1070114013399 |
| 27 | LARCENY | 9/22/2007 5:00 am | 333 NE 79TH ST | R004 | LM1070922281100 |
| 27 | LARCENY | 2/23/2008 4:10 am | 333 NE 79TH ST | R004 | LM1080223054708 |
| 27 | LARCENY | 3/17/2008 3:47 pm | 333 NE 79TH ST | R004 | LM1080317078993 |
| 27 | LARCENY | 5/18/2008 5:36 am | 333 NE 79TH ST | R004 | LM1080518145089 |
| **10** | | | | | |
| **27M** | | | | | |
| 27M | LARCENY, MOTOR VEHIC | 8/10/2005 7:49 pm | 333 NE 79TH ST | R004 | LM1050810031389 |
| 27M | LARCENY, MOTOR VEHIC | 7/18/2006 2:23 pm | 333 NE 79TH ST | R004 | LM1060718211335 |
| 27M | LARCENY, MOTOR VEHIC | 5/26/2007 8:42 pm | 333 NE 79TH ST | R004 | LM1070526154617 |
| 27M | LARCENY, MOTOR VEHIC | 2/23/2008 3:06 pm | 333 NE 79TH ST | R004 | LM1080223055186 |
| 27M | LARCENY, MOTOR VEHIC | 4/11/2008 11:38 pm | 333 NE 79TH ST | R004 | LM1080411105706 |
| 27M | LARCENY, MOTOR VEHIC | 5/17/2008 6:02 am | 333 NE 79TH ST | R004 | LM1080517143906 |
| **6** | | | | | |
| **28** | | | | | |
| 28 | VANDALISM | 5/19/2007 4:43 am | 333 NE 79TH ST | R004 | LM1070519146776 |
| 28 | VANDALISM | 8/18/2007 4:19 am | 333 NE 79TH ST | R004 | LM1070818243634 |
| 28 | VANDALISM | 5/17/2008 4:09 am | 333 NE 79TH ST | R004 | LM1080517143848 |
| **3** | | | | | |
| **29** | | | | | |
| 29 | ROBBERY | 8/19/2005 12:19 am | 333 NE 79TH ST | R004 | LM1050819040393 |
| 29 | ROBBERY | 9/14/2007 2:53 am | 333 NE 79TH ST | R004 | LM1070914272627 |
| 29 | ROBBERY | 12/11/2007 7:13 am | 333 NE 79TH ST | R004 | LM1071211366484 |
| **3** | | | | | |
| **30** | | | | | |
| 30 | SHOTS FIRED IN THE A | 7/17/2007 2:42 am | 333 NE 79TH ST | R004 | LM1070717208818 |

| Final Signal | Incident Description | Date/Time | Address | Reporting District | Event Number |
|---|---|---|---|---|---|
| **1** | | | | | |
| **31** | | | | | |
| 31 | HOMICIDE | 8/14/2005 2:50 am | 333 NE 79TH ST | R004 | LM1050814035057 |
| **1** | | | | | |
| **32** | | | | | |
| 32 | SIMPLE ASSAULT OR BA | 10/1/2005 3:56 am | 333 NE 79TH ST | R004 | LM1051001086119 |
| 32 | SIMPLE ASSAULT OR BA | 10/4/2005 3:53 am | 333 NE 79TH ST | R004 | LM1051004088988 |
| 32 | SIMPLE ASSAULT OR BA | 12/18/2005 4:57 am | 333 NE 79TH ST | R004 | LM1051218165212 |
| 32 | SIMPLE ASSAULT OR BA | 1/9/2006 1:49 am | 333 NE 79TH ST | R004 | LM1060109008139 |
| 32 | SIMPLE ASSAULT OR BA | 2/11/2006 5:18 am | 333 NE 79TH ST | R004 | LM1060211042859 |
| 32 | SIMPLE ASSAULT OR BA | 2/23/2006 5:23 am | 333 NE 79TH ST | R004 | LM1060223055663 |
| 32 | SIMPLE ASSAULT OR BA | 4/20/2006 11:17 pm | 333 NE 79TH ST | R004 | LM1060420117028 |
| 32 | SIMPLE ASSAULT OR BA | 7/7/2006 2:18 pm | 333 NE 79TH ST | R004 | LM1060707199504 |
| 32 | SIMPLE ASSAULT OR BA | 9/21/2006 8:41 pm | 333 NE 79TH ST | R004 | LM1060921279518 |
| 32 | SIMPLE ASSAULT OR BA | 1/25/2007 5:58 pm | 333 NE 79TH ST | R004 | LM1070125025285 |
| 32 | SIMPLE ASSAULT OR BA | 2/12/2007 1:06 am | 333 NE 79TH ST | R004 | LM1070212043409 |
| 32 | SIMPLE ASSAULT OR BA | 5/8/2007 2:46 pm | 333 NE 79TH ST | R004 | LM1070508135330 |
| 32 | SIMPLE ASSAULT OR BA | 5/27/2007 3:36 am | 333 NE 79TH ST | R004 | LM1070527154969 |
| 32 | SIMPLE ASSAULT OR BA | 8/26/2007 4:47 am | 333 NE 79TH ST | R004 | LM1070826252357 |
| 32 | SIMPLE ASSAULT OR BA | 9/10/2007 4:47 am | 333 NE 79TH ST | R004 | LM1070910268109 |
| 32 | SIMPLE ASSAULT OR BA | 9/30/2007 10:45 pm | 333 NE 79TH ST | R004 | LM1070930289825 |
| 32 | SIMPLE ASSAULT OR BA | 10/14/2007 3:50 am | 333 NE 79TH ST | R004 | LM1071014304263 |
| 32 | SIMPLE ASSAULT OR BA | 1/26/2008 4:25 am | 333 NE 79TH ST | R004 | LM1080126025154 |
| 32 | SIMPLE ASSAULT OR BA | 2/23/2008 2:29 am | 333 NE 79TH ST | R004 | LM1080223054656 |
| 32 | SIMPLE ASSAULT OR BA | 3/9/2008 8:36 am | 333 NE 79TH ST | R004 | LM1080309069975 |
| 32 | SIMPLE ASSAULT OR BA | 6/10/2008 12:16 pm | 333 NE 79TH ST | R004 | LM1080610169759 |
| 32 | SIMPLE ASSAULT OR BA | 6/17/2008 1:10 pm | 333 NE 79TH ST | R004 | LM1080617177276 |
| 32 | SIMPLE ASSAULT OR BA | 6/28/2008 10:36 pm | 333 NE 79TH ST | R004 | LM1080628189230 |
| **23** | | | | | |
| **32A** | | | | | |
| 32A | AGGRAVATED ASSAULT O | 12/10/2006 4:57 am | 333 NE 79TH ST | R004 | LM1061210359906 |
| 32A | AGGRAVATED ASSAULT O | 12/2/2007 4:41 am | 333 NE 79TH ST | R004 | LM1071202356392 |
| 32A | AGGRAVATED ASSAULT O | 3/1/2008 5:42 am | 333 NE 79TH ST | R004 | LM1080301061819 |
| 32A | AGGRAVATED ASSAULT O | 6/30/2008 4:40 am | 333 NE 79TH ST | R004 | LM1080630190524 |
| **4** | | | | | |
| **34** | | | | | |
| 34 | DISTURBANCE | 8/7/2005 3:21 am | 333 NE 79TH ST | R004 | LM1050807027425 |
| 34 | DISTURBANCE | 9/4/2005 2:45 am | 333 NE 79TH ST | R004 | LM1050904057798 |

| Final Signal | Incident Description | Date/Time | Address | Reporting District | Event Number |
|---|---|---|---|---|---|
| 34 | DISTURBANCE | 9/4/2005 5:11 am | 333 NE 79TH ST | R004 | LM1050904057882 |
| 34 | DISTURBANCE | 9/5/2005 3:49 am | 333 NE 79TH ST | R004 | LM1050905058793 |
| 34 | DISTURBANCE | 10/16/2005 4:37 am | 333 NE 79TH ST | R004 | LM1051016101461 |
| 34 | DISTURBANCE | 1/2/2006 2:31 am | 333 NE 79TH ST | R004 | LM1060102001266 |
| 34 | DISTURBANCE | 1/29/2006 12:23 am | 333 NE 79TH ST | R004 | LM1060129029203 |
| 34 | DISTURBANCE | 1/29/2006 2:13 am | 333 NE 79TH ST | R004 | LM1060129029324 |
| 34 | DISTURBANCE | 3/7/2006 9:54 am | 333 NE 79TH ST | R004 | LM1060307068661 |
| 34 | DISTURBANCE | 6/16/2006 10:31 pm | 333 NE 79TH ST | R004 | LM1060616177994 |
| 34 | DISTURBANCE | 6/24/2006 3:37 am | 333 NE 79TH ST | R004 | LM1060624185280 |
| 34 | DISTURBANCE | 7/1/2006 2:37 am | 333 NE 79TH ST | R004 | LM1060701192465 |
| 34 | DISTURBANCE | 9/5/2006 9:29 pm | 333 NE 79TH ST | R004 | LM1060905263207 |
| 34 | DISTURBANCE | 11/11/2006 3:20 am | 333 NE 79TH ST | R004 | LM1061111331424 |
| 34 | DISTURBANCE | 1/31/2007 11:02 pm | 333 NE 79TH ST | R004 | LM1070131031876 |
| 34 | DISTURBANCE | 2/3/2007 2:50 am | 333 NE 79TH ST | R004 | LM1070203034202 |
| 34 | DISTURBANCE | 2/22/2007 2:00 am | 333 NE 79TH ST | R004 | LM1070222053745 |
| 34 | DISTURBANCE | 3/23/2007 2:16 am | 333 NE 79TH ST | R004 | LM1070323085461 |
| 34 | DISTURBANCE | 3/28/2007 2:26 am | 333 NE 79TH ST | R004 | LM1070328091147 |
| 34 | DISTURBANCE | 4/1/2007 3:08 am | 333 NE 79TH ST | R004 | LM1070401095505 |
| 34 | DISTURBANCE | 4/3/2007 9:57 pm | 333 NE 79TH ST | R004 | LM1070403098473 |
| 34 | DISTURBANCE | 4/18/2007 7:24 pm | 333 NE 79TH ST | R004 | LM1070418114158 |
| 34 | DISTURBANCE | 5/5/2007 2:45 am | 333 NE 79TH ST | R004 | LM1070505131747 |
| 34 | DISTURBANCE | 5/9/2007 3:39 pm | 333 NE 79TH ST | R004 | LM1070509136483 |
| 34 | DISTURBANCE | 5/26/2007 4:18 am | 333 NE 79TH ST | R004 | LM1070526153923 |
| 34 | DISTURBANCE | 5/28/2007 12:51 am | 333 NE 79TH ST | R004 | LM1070528155912 |
| 34 | DISTURBANCE | 6/16/2007 1:47 am | 333 NE 79TH ST | R004 | LM1070616176215 |
| 34 | DISTURBANCE | 7/2/2007 1:35 am | 333 NE 79TH ST | R004 | LM1070702192704 |
| 34 | DISTURBANCE | 7/14/2007 1:48 am | 333 NE 79TH ST | R004 | LM1070714205821 |
| 34 | DISTURBANCE | 7/14/2007 5:14 am | 333 NE 79TH ST | R004 | LM1070714205920 |
| 34 | DISTURBANCE | 8/18/2007 3:14 am | 333 NE 79TH ST | R004 | LM1070818243592 |
| 34 | DISTURBANCE | 9/2/2007 4:36 am | 333 NE 79TH ST | R004 | LM1070902259932 |
| 34 | DISTURBANCE | 9/3/2007 4:59 am | 333 NE 79TH ST | R004 | LM1070903260914 |
| 34 | DISTURBANCE | 9/8/2007 4:38 am | 333 NE 79TH ST | R004 | LM1070908266200 |
| 34 | DISTURBANCE | 9/8/2007 5:29 am | 333 NE 79TH ST | R004 | LM1070908266218 |
| 34 | DISTURBANCE | 9/8/2007 10:34 pm | 333 NE 79TH ST | R004 | LM1070908266916 |
| 34 | DISTURBANCE | 9/13/2007 5:40 am | 333 NE 79TH ST | R004 | LM1070913271627 |
| 34 | DISTURBANCE | 9/17/2007 11:01 pm | 333 NE 79TH ST | R004 | LM1070917276668 |
| 34 | DISTURBANCE | 10/21/2007 5:44 am | 333 NE 79TH ST | R004 | LM1071021311825 |

| Final Signal | Incident Description | Date/Time | Address | Reporting District | Event Number |
|---|---|---|---|---|---|
| 34 | DISTURBANCE | 11/4/2007 4:41 am | 333 NE 79TH ST | R004 | LM1071104326642 |
| 34 | DISTURBANCE | 11/9/2007 4:43 am | 333 NE 79TH ST | R004 | LM1071109331853 |
| 34 | DISTURBANCE | 12/7/2007 5:03 am | 333 NE 79TH ST | R004 | LM1071207362049 |
| 34 | DISTURBANCE | 12/29/2007 3:01 am | 333 NE 79TH ST | R004 | LM1071229385643 |
| 34 | DISTURBANCE | 1/5/2008 1:53 am | 333 NE 79TH ST | R004 | LM1080105004053 |
| 34 | DISTURBANCE | 2/6/2008 3:12 am | 333 NE 79TH ST | R004 | LM1080206036903 |
| 34 | DISTURBANCE | 2/10/2008 3:49 am | 333 NE 79TH ST | R004 | LM1080210041229 |
| 34 | DISTURBANCE | 2/20/2008 6:01 am | 333 NE 79TH ST | R004 | LM1080220051571 |
| 34 | DISTURBANCE | 3/17/2008 2:54 am | 333 NE 79TH ST | R004 | LM1080317078449 |
| 34 | DISTURBANCE | 4/1/2008 3:45 am | 333 NE 79TH ST | R004 | LM1080401094241 |
| 34 | DISTURBANCE | 4/20/2008 4:37 am | 333 NE 79TH ST | R004 | LM1080420114540 |
| 34 | DISTURBANCE | 4/24/2008 10:53 am | 333 NE 79TH ST | R004 | LM1080424118783 |
| 34 | DISTURBANCE | 5/10/2008 5:39 am | 333 NE 79TH ST | R004 | LM1080510136154 |
| 34 | DISTURBANCE | 6/25/2008 11:35 pm | 333 NE 79TH ST | R004 | LM1080625185829 |
| 34 | DISTURBANCE | 7/4/2008 11:45 pm | 333 NE 79TH ST | R004 | LM1080704195905 |
| **54** | | | | | |
| **37** | | | | | |
| 37 | SUSPICIOUS CAR | 4/8/2008 5:17 am | 333 NE 79TH ST | R004 | LM1080408101699 |
| **1** | | | | | |
| **38** | | | | | |
| 38 | SUSPICIOUS PERSONS | 5/10/2008 3:06 am | 333 NE 79TH ST | R004 | LM1080510136060 |
| 38 | SUSPICIOUS PERSONS | 7/5/2008 5:41 am | 333 NE 79TH ST | R004 | LM1080705196184 |
| **2** | | | | | |
| **39** | | | | | |
| 39 | ARREST REF PREVIOUS | 1/12/2006 7:06 am | 333 NE 79TH ST | R004 | LM1060112011503 |
| **1** | | | | | |
| **40** | | | | | |
| 40 | ARREST BASED ON WARR | 2/4/2007 6:58 pm | 333 NE 79TH ST | R004 | LM1070204035897 |
| 40 | ARREST BASED ON WARR | 6/19/2008 2:43 am | 333 NE 79TH ST | R004 | LM1080619178747 |
| **2** | | | | | |
| **43** | | | | | |
| 43 | SPECIAL DETAIL | 8/13/2005 4:01 am | 333 NE 79TH ST | R004 | LM1050813033928 |
| **1** | | | | | |
| **51** | | | | | |
| 51 | NUISANCE | 9/5/2005 3:18 am | 333 NE 79TH ST | R004 | LM1050905058777 |
| **1** | | | | | |
| **55** | | | | | |
| 55 | DOMESTIC VIOLENCE | 3/10/2007 12:05 pm | 333 NE 79TH ST | R004 | LM1070310071571 |
| **1** | | | | | |
| **ID** | | | | | |

| Final Signal | Incident Description | Date/Time | Address | Reporting District | Event Number |
|---|---|---|---|---|---|
| ID | ID REQUEST | 8/7/2005 3:48 am | 333 NE 79TH ST | R004 | LM1050807027442 |
| ID | ID REQUEST | 8/14/2005 3:21 am | 333 NE 79TH ST | R004 | LM1050814035075 |
| ID | ID REQUEST | 8/14/2005 3:36 am | 333 NE 79TH ST | R004 | LM1050814035089 |
| ID | ID REQUEST | 10/16/2005 5:21 am | 333 NE 79TH ST | R004 | LM1051016101479 |
| ID | ID REQUEST | 12/18/2005 5:33 am | 333 NE 79TH ST | R004 | LM1051218165229 |
| ID | ID REQUEST | 1/9/2006 2:12 am | 333 NE 79TH ST | R004 | LM1060109008150 |
| ID | ID REQUEST | 2/11/2006 5:30 am | 333 NE 79TH ST | R004 | LM1060211042864 |
| ID | ID REQUEST | 12/10/2006 5:14 am | 333 NE 79TH ST | R004 | LM1061210359919 |
| ID | ID REQUEST | 2/12/2007 1:07 am | 333 NE 79TH ST | R004 | LM1070212043410 |
| ID | ID REQUEST | 4/3/2007 8:51 pm | 333 NE 79TH ST | R004 | LM1070403098396 |
| ID | ID REQUEST | 12/2/2007 4:49 am | 333 NE 79TH ST | R004 | LM1071202356401 |
| ID | ID REQUEST | 12/11/2007 8:04 am | 333 NE 79TH ST | R004 | LM1071211366515 |
| ID | ID REQUEST | 1/26/2008 4:47 am | 333 NE 79TH ST | R004 | LM1080126025167 |
| ID | ID REQUEST | 2/23/2008 3:15 am | 333 NE 79TH ST | R004 | LM1080223054678 |
| ID | ID REQUEST | 3/1/2008 5:53 am | 333 NE 79TH ST | R004 | LM1080301061823 |
| ID | ID REQUEST | 3/1/2008 8:16 pm | 333 NE 79TH ST | R004 | LM1080301062448 |
| ID | ID REQUEST | 6/30/2008 4:50 am | 333 NE 79TH ST | R004 | LM1080630190528 |

**17**

**184**


NW 85TH ST
NE 84TH ST
NE 84TH ST
UNNAMED
NE 83RD LN
NE 83RD TER
NW 84TH ST
NE 83RD ST
NE 83RD ST
BISCAYNE BLVD
NW 83RD ST
NE 82ND TER
NE 82ND TER
NW MIAMI CT
N MIAMI AVE
NE 2ND CT
NE 3RD AVE
NE 3RD CT
NE 4TH AVE
R004
R003
NE 1ST PL
NE 82ND TER
NE 82ND ST
NW 82ND ST
NE 4TH PL
R005
NE 3RD PL
NE 81ST ST
NE 7TH AVE
UNNAMED
NE 80TH TER
NE 5TH CT
NW 80TH TER
NE 80TH TER
NE 80TH ST
NE 80TH ST
NE 1ST AVE
NE 79TH TER
NE 79TH TER
NE 3RD AVE
NE 5TH AVE
NE 79TH ST
NW 79TH ST
NE 2ND AVE
NE 78TH ST
R014
NW MIAMI CT
NE 1ST CT
NE 78TH ST
NW 78TH ST
NW MIAMI PL
NE 77TH ST
NE 77TH ST
NE 77TH ST
R010
R011
NE 3RD CT
NW 77TH ST
NE 77TH ST
NE 76TH ST
NE 76TH ST
NE 1ST CT
NE 2ND CT
NE 3RD PL
NW 76TH ST
NE 3RD AVE
NE 75TH ST
NE 75TH ST
NE 75TH ST
R012
NE 4TH CT
NW 75TH ST
NE 75TH ST
NE 6TH CT
NE 74TH ST
NE 74TH ST
NW MIAMI PL
NW MIAMI CT
NE MIAMI CT
NE 1ST PL
NE 3RD CT
NE 5TH AVE
NE 73RD ST
NE 73RD ST
NE 73RD ST
NE 73RD ST
R017
R018

# Negative Secondary Effects of Sexually Oriented Businesses

## Hillsborough County Board of Commissioners Meeting
## August 16, 2006

# Record: Sources of Secondary Effects Information

1. Land Use Studies
2. Crime Reports
3. Judicial Opinions
4. Anecdotal Data
5. Media Reports

# Record: Types of Secondary Effects

1. Personal, property crime/public safety risks (focus here is on outside of business)

2. Prostitution (S. Bend, Monroe, Louisville)

3. Potential spread of disease, unsanitary conditions (XTC Adult Bookstore)

# Record: Types of Secondary Effects

4. Lewd conduct, public indecency, paid sexual activity (Cleopatra, Paper Moon, 2003 *BJS* case)

5. Illicit drug use and trafficking (Warner Robins, GA, Monroe, OH)

6. Undesirable, aggressive behaviors associated with alcohol consumption – lower inhibitions (*BJS* case, Garden Grove, CA, Greensboro, NC 2003)

# Record: Types of Secondary Effects

6. Alcohol:

   Testimony of Dr. William George, *Koziara v. Seminole County*, No. 5D03-1743

   *California v. LaRue*, 409 U.S. 109, 111 (1972)

   *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003)

   *Artistic Entertainment v. Warner Robins, GA*, 223 F.3d 1306 (11th Cir. 2000)

# Record: Types of Secondary Effects

6. Alcohol:

*Artistic Entertainment v. Warner Robins:*

- Plaintiffs argued “old,” “foreign,” non-specific
- ***The Sammy's court concluded that "the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as [the officials'] own wisdom and common sense" were sufficient. Id. Given the wealth of documentary evidence and testimony presented to it, we conclude that the Warner Robins City Council had an adequate basis for concluding that proscribing the sale and consumption of alcohol would reduce the crime and other social costs associated with adult businesses. See Renton, 475 U.S. at 51-52, 106 S. Ct. at 931.***

# Record: Types of Secondary Effects

7. Adverse impacts on surrounding properties

   Dallas, TX, September 2004 Survey of Appraisers by Duncan Associates

- Over 80% of respondent appraisers indicated an adverse impact on nearby residences and community shopping places
- *World Wide Video v. Spokane*, 368 F.3 1186

# Record: Types of Secondary Effects

8. Sexual assault and exploitation

   Holsopple Study on Workplace Sexual Violence

   High percentage of groping, assaults, unwanted touching

   Negative conduct can be exacerbated by alcohol

# Analysis of Secondary Effects Evidence: Richard McCleary, Ph.D.

1. Expert in statistics, research methods, and criminology
2. Prof. of Environmental Health Sciences, Planning, and Criminology (Univ. of CA, Irvine)
3. Four books, 75 articles, 25 cases over 25 years; FBI, CDC, Bureau of Justice Statistics
4. Editorial Boards:
   - Justice Quarterly
   - Journal of Quantitative & Mathematic Criminology
   - Journal of Research of Crime & Delinquency
   - Journal of Criminal Law and Criminology
   - Law and Policy Quarterly

# Legal Standard: Relationship between *Rationale* and *Record*

- Legislative record must "fairly support" legislative rationale (i.e., must be "reasonably believed to be relevant")

- Businesses must show "clear and convincing evidence," cast "direct doubt" on rationale

- If industry "succeeds" in casting "direct doubt," legislative body must supplement with evidence supporting *"a theory* that justifies its ordinance"

# Rationale: "Sexually oriented businesses, as a *category* of commercial uses...."

- Dealing with adult businesses as a class; thus, general nature of data is appropriate
- Not a public nuisance action
- Regulating the class, therefore evidence concerning that class of establishments is "reasonably believed to be relevant" to the problems the County intends to prevent

# Rationale: "...are associated with a *wide variety* of adverse secondary effects..."

- Legislative definition of secondary effects is broad:
  - Includes illicit activity *inside* as well as outside
  - Includes *anecdotal* as well as scientific

- Businesses' definition is extremely narrow:
  - Demanded "objective and quantifiable empirical evidence that suggests within a reasonable degree of *scientific certainty* that sexually oriented businesses in Hillsborough County" have caused a "*significant and sustained increase* in the crime volumes"

# Rationale: *"Each* of the foregoing negative secondary effects *..."*

- One substantial government interest is sufficient to satisfy the constitutional test
  - *World Wide Video v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004)
  - Not required to prove every secondary effect from every business within the class of establishments; regulating the class as a whole

# Rationale: *"...*County has a substantial government interest in *preventing and/or abating* in the *future*."

- Legislation is inherently prospective
- Ordinance for County's long-term approach
- Alleged lack of secondary effects from past businesses is not controlling under this ordinance's legislative rationale

# Rationale: *"...*County has a substantial government interest in *preventing and/or abating* in the *future*."

- "Latent" secondary effects
  - South Bend, IN 2004 (promoting prostitution at 20-year old business)
  - Monroe, OH 2002 (narcotics trafficking, promoting prostitution at 7-year old business)
  - Louisville, KY 2004 (prostitution, public masturbation, unsanitary conditions)
- Investigations that uncover otherwise unreported illegal activity on premises take very large investments of money, manpower, and time

# Rationale: "...government interest ... exists *independent of any comparative analysis between adult and non-adult*"

- The substantial government interest in regulating sexually oriented businesses does not depend on whether there is *more* crime than other places
  - Fulton County, GA "study" involving only police calls-for-service (CFS), not actual crimes
  - Unreliable data, unreliable methodology

VERBATIM TRANSCRIPT
BOARD OF COUNTY COMMISSIONERS
REGULAR MEETING - AUGUST 16, 2006

D-7, CONDUCT SECOND PUBLIC HEARING TO CONSIDER ADOPTION OF AMENDMENTS TO THE HILLSBOROUGH COUNTY LAND DEVELOPMENT CODE RELATING TO ADULT USES;
D-8, CONDUCT A PUBLIC HEARING TO CONSIDER ADOPTION OF AN ORDINANCE REGARDING LICENSING REQUIREMENTS AND REGULATIONS FOR SEXUALLY ORIENTED BUSINESSES;
D-9, CONDUCT A PUBLIC HEARING TO CONSIDER ADOPTION OF AN ORDINANCE REGARDING CONDUCT REGULATIONS IN ESTABLISHMENTS DEALING IN ALCOHOLIC BEVERAGES

CHAIRMAN JIM NORMAN: All righty, we're at a point that, uh, we need to, uh, have a little clarity where we're going--how we're going to conduct these last three public hearings. First of all, uh, I do want to read this into the record and, uh, that the Board welcomes comments from citizens, about, about the issue today. Your opinions are valued in terms of providing input to the Board members; however, it is requested that at the same time you address the Board that comments are not directed personally against a Commissioner or staff or anyone else in the public, but rather directed at the issues. This provides a mutual respect between Board members and the public. Let me further say, uh, and please hear what I'm about to say today, this is the first and last



EXH. J-02

warning that all speakers will be given respect. All speakers will be given respect, and disruptions from the audience during a speaker's time will not be tolerated. You get, one, one warning, and it's right now. Security will be asked to rem-remove anyone who is heckling from either side about comments from the speaker. We want to hear what the speaker has to say, and we want everybody in the room to respect everybody else's opinion. So that's your, one, one and final warning. Anyone yelling or screaming from the audience or booing or hissing when a speaker's given--has given their time, they will be removed. Secondly, let me say, we have three public hearings before us, and each one will be taken separately; however, before we start those three, uh, public hearings, there will be given--uh, Mr. Luke Lirot will be given one hour of time. Uh, preceding the public comment to, uh, uh, represent his, his, uh, particular perspective, and the County has, a, an attorney that, uh, will also put on the record certain perspectives, uh, that they

have gathered. At that time we'll open it for, uh, the public hearings, and we will-- because there are three public hearings, and the, and the crowd that we have today, you will have two minutes to speak when, the, the time period is open for the public hearing, and uh, then we will close on that particular case. Uh, also let me say that, uh, there is a, an additional information been given to the Board today for consideration. So, what we will do, uh, is we will not be taking final votes on these issues today. We will be closing public comment and continuing for two weeks while we are able and our attorneys are able to review the additional information that has been given to the Board as late as last night. So, uh, that is action being taken this, by this Board on, on counsel. Okay. And with that, uh, I will turn it over to the County Attorney that she may want to, uh, add further.

COUNTY ATTORNEY RENEE F. LEE: Thank you Mister Chair. Uh, just some background information on what you're going to hear today. This is the second public hearing

today on three ordinances regulating sexually oriented businesses. The first public hearing took place, um, on these ordinances on August second of this month. The ordinances that you have before you today have incorporated your comments, um, and they've been fine-tuned to comply with and be compatible with the County's procedures. Um, the purpose of the hearings today is to create a legislative record for your implementation of the ordinances. Um, you have been provided a disc from our consulting attorney, Scott Bergthold, uh, which contains studies, reports, and investigations for your review. You've also been provided information from Attorney Luke Lirot in res--in response to these published studies. Uh, we, uh, we received some additional information from, uh, Mister Lirot last night, and you've stated that we won't be adopting these ordinances today but at a future meeting in September. Uh, and with the Board's permission, I will schedule those for the first meeting in September. Uh, with that Mister Chair, I would ask that you would allow

Mister Lirot to address the Board. Uh, we have committed to give him one hour for his presentation, uh, and he's committed to, uh, try to make that less than one hour. Uh, but thank you.

CHAIRMAN NORMAN: Please come down sir. Welcome.

ATTORNEY LUKE LIROT: Mister Chairman, honorable members of the Commission, my name is Luke Lirot, twenty-two forty Belleair Road, Clearwater, Florida. And I want to first express my deep appreciation for you granting me more than the usual three minutes to address these very critical issues that I think are not just important to my clients, but are important to all the citizens of Hillsborough County. I've been told that the preferable way of addressing this today is to put all of our comments on the record relative to the first public hearing for Item D seven, which is actually the second public hearing for the zoning amendments to the Land Development Code, and also to incorporate those by reference into the discussion in Item D eight, which is the licensing regulation and other restrictions, and then Item D nine, the

conduct and establishment of dealing in alcohol. So, we'll just do this once . . .

CHAIRMAN NORMAN: Yes sir.

ATTORNEY LIROT: . . . and for the record, just incorporate that into the other public hearings. One of the things I just wanted to get into quickly was that there's been probably as much debate about the issue of adult entertainment, pseudo adult entertainment, bikini bars, and the like, certainly here in the Bay area as in any place else in the country. I myself have not gone to bed one night since 1987 where I wasn't involved in some form of litigation involving adult uses here in the Bay area. And what I have seen develop over the many years that I've participated in this type of litigation is that the courts have now taken, a, a new look. For many years the courts would basically--I don't want to use the term disrespectfully, but they would rubberstamp whatever a governmental body felt was in the best interest of the public health, safety, and welfare without any real analysis of the evidence upon which that governmental body was

relying. In the last few years, however, the Supreme Court and certainly in the Eleventh Circuit, as I'm sure your attorneys have told you, there's been somewhat of a shift. And what the courts have done, simply stated, is they'd rather dust off the scales of justice and allowed affected businesses to present evidence that they feel supports their side of the issue. Historically, the courts have always looked to not the type of entertainment. Obviously, that would be content-based if the sexual nature is looked at as the basis to adopt this type of legislation, I urge you to consider that as an improper basis. Not improper from a moral standpoint but improper from a legal standpoint, because looking at the actual type of entertainment is content-based and therefore unconstitutional. What the courts have asked you to do is to look at what's called the secondary effects of these businesses. And those have been isolated into an analysis of whether or not the operation of adult businesses, and obviously in what's

being considered today, you're expanding that definition to include bikini bars and the like. You're to look at whether or not those businesses act-actually caused those secondary effects. And what's good about that concept is that we are able, both sides of the issue, to look at the information and the evidence that's been compiled by local governmental agencies. If you want to test whether or not an adult entertainment business is causing adverse secondary effects, you can look to calls for police service, and we've done that. If you want to evaluate the hypothesis of whether or not an adult business actually has an adverse impact on property values, you can look to governmentally maintained data to do so. And what we hope to do today and in the materials that I've submitted, most of those deal with testing that hypothesis--do adult entertainment businesses actually cause an increase in crime. My theory that I personally have developed is that because there is a significant component of the population that seems to feel that these

businesses represent a quote criminal element, and in most of the whereas clauses of the ordinances there's certainly a lot of accusatory language that would suggest that people associated with the adult industry are more inclined to engage in criminal activity than in people, than people in other industries, I, I would resist that, and I would urge you to take a look, not just at the local data that we've presented, but also at some of the other statistical analyses. One of the things that I certainly--if you're going to take a break to take a look at what we've done, take a look at Tab thirty-three. Tab thirty-three actually is a one-page item that shows a poster from, a, a fifth grade science class that basically shows how to conduct an experiment. Your experiment will be to look at whether or not there's evidence to support the hypothesis that adult businesses cause secondary effects. And the reason I stress that term is that most of what I think you have before you is not evidence of a secondary effect but more of a primary

effect--allegations of what occurs within the business. Secondary effects really center on what the impact of the operation of a business is on the outlying areas. And I would certainly submit that if any data given to you shows a history of arrests in certain establishments, that the other requirement that whatever you adopt be narrowly tailored to address whatever problem, these, these pieces of legislation are designed to remedy. If there is an arrest being made, that activity is already being criminalized, and, those, those provisions that are already on the books so to speak can be enforced to the fullest extent of the law. Lest I use up my whole hour with my introductory statements, I'd like to introduce some of the expert witnesses. Today I'd like you to listen to the testimony of Doctor Randy Fisher, and they will each introduce themselves, and, and give their area of qualification on the record. But I have Doctor Randy Fisher, uh, Doctor Terry Danner. I've got Richard Schauseil, and I've got Doctor Judith Hanna. They have

participated in some general research dealing with the restrictions contained in this proposed legislation and also conducting, again, a testing of the hypothesis, do adult entertainment businesses cause secondary effects. And without any further delay, I'd like to have Doctor Fisher introduce himself and address the council. And I thank you very much for your time.

CHAIRMAN NORMAN: Thank you sir. Welcome sir.

DR. RANDY FISHER: Mister Chairman, uh, members of the Commission, I'm, uh, Doctor Randy Fisher. I reside at one zero zero seven Corkwood Drive. That's in Ovita, Florida, which is just north of the University of Central Florida where I'm employed in the psychology department and have been for over thirty years now. Uh, I did my undergraduate work in psychology at the University of Florida and received my Ph.D. with a specialization in social psychology, uh, from Vanderbilt University, uh, in Nashville. Uh, Mister Lirot invited me here today to speak to you about my experience with the theory of adverse secondary effects. For

over twenty years, uh, I've been involved uh, in efforts to evaluate the foreign and local studies uh, that Mister Lirot told you about. I have also, uh, performed, uh, empirical studies both of crime and property values, uh, in association with adult businesses, uh, and indeed I was involved as an expert, uh, in one of the cases that I believe Mister Lirot, uh, referred to, uh, Peek-A-Boo Lounge versus Manatee County. I was also involved in a recent case just decided last year, Daytona Grand versus the city of Daytona Beach, in which Judge Antoon, uh, overruled both the, uh, adult code, uh, and a public nudity ordinance that the city of Daytona Beach had passed, uh, the first in nineteen eighty-one and, and the other in, uh, two thousand two, I believe. Uh, basically, I, I believe I've developed an expertise in evaluating evidence and producing, uh, empirical studies that test hypotheses from this theory of adverse effects. What I have found in reviewing the studies that are--the so-called foreign studies that were done at, other, other

jurisdictions and are often used by municipalities as evidence for their own ordinances, is that the vast majority of these are simply junk science. Uh, they are done usually by police departments, um, departments of planning, persons who weren't trained in behavioral sciences and who lack the skills and the knowledge necessary to do adequate studies that would test causal hypotheses, which is what the theory of adverse secondary effects really is. It's a theory that says these adult businesses cause crime, lower property values, et cetera. Um, and I'm not alone in this opinion. This opinion has been reached by the only peer-reviewed scientific article to deal with the quality of these studies. Uh, this, uh, an article published in two thousand one, by Paul, Linz, and Schafer. Uh, they pointed out that in order to adequately test these causal hypotheses, one needs to meet several requirements. One at least needs a valid source of data, either on crime or property values, for example. One needs to examine that valid source of data

over a sufficiently long period of time, um, to get reliable estimates. Um, one also, and this is probably the most important, uh, issue, one needs to deal with alternative interpretations. There's a classic story about a researcher who discovered that there was a positive correlation between the sales of ice cream and tuberculosis. That is the rate of tuberculosis across communities. Now, one could conclude that somehow eating ice cream causes tuberculosis; however, this researcher delved a little deeper, looked at the alternative interpretations, and discovered that the common theme was that all of these communities were hot, where people ate more ice cream to cool off, and because of the way tuberculosis is communicated, heat, uh, increased rates of tuberculosis in these communities. There may well be associations between adult businesses and higher rates of crime or lower property values, but one certainly needs to deal with these alternative interpretations. Is that because of the adult businesses, or is there, uh, some other, uh,

variable operating, such as heat in the previous example. Um, the vast majority of these studies failed to do so. They failed to deal with these alternative interpretations. They at best demonstrated a correlation, uh, between adult businesses and various adverse effects. Many of these studies also failed to make valid comparisons. In deed, many of these studies failed to make any comparisons at all. They've simply said there is this much crime at adult businesses or these are the property values in the areas surrounding adult businesses, and gave us no comparative data whatsoever. There is one--there are a couple of exceptions. Uh, I say virtually all of these studies are junk science. Some of them were done by Doctor McCleary, who I see you are going to hear from shortly, and these are relatively sophisticated studies in most ways. However, there's a conceptual flaw in all of Doctor McCleary's studies and in his theory, uh, that he uses to predict that, uh, sexually oriented businesses will have, will cause crime, um, and that is that he fails to

make the appropriate comparisons. Uh, for example, in his Garden Grove study, he compared crime around adult businesses with crime around other adult businesses, uh, and basically found that adult businesses that have more customers, that were expanding for example, uh, tended to have more crime than adult businesses that had fewer customers. Well, I, I would suggest that's true of shopping malls and liquor stores and Publix and Winn Dixie as well. Uh, in addition to judging the quality of the foreign studies to be uniformly poor, uh, recently, academics like myself and, and like, uh, Doctor Danner, who you're going to hear from shortly, have performed original empirical studies. And as behavioral scientists, we know how to perform these studies well, and I, I like to think that we have done so, um, in ways that are far superior, uh, to the methodologies employed by, um, or in most of the foreign studies. And consistently, what we have found is that we've failed to get evidence that supports the hypothesis of adverse secondary effects. And

what makes this interesting, or, and, and truly significant, is as Mister Lirot told you, um, the Supreme Court has recently raised the evidentiary bar for adverse effects studies substantially. Uh, in a case called Alameda Books, and I'm not, I'm not an attorney, so I don't want to quote the law to you, but in a case called Alameda Books versus the city of Los Angeles, the court made clear that municipalities can no longer rely on what they called shoddy data or shoddy reasoning. Um, and that's why I think we've got cases such as, um, the decision in the Peek-A-Boo case and the decision in the Daytona Grand case. Um, basically, attorneys for, uh, adult businesses were able to cast considerable doubt on the evidence that municipalities had brought forth in favor of the theory of adverse effects, and they were able to produce their own data, uh, that was far superior and tended to not support the theory of adverse effects. Uh, that was the conclusion I reached after reviewing all of the foreign studies that the County had put forth in

Manatee and reviewing the studies that had been commissioned by, uh, Mister Lirot on behalf of his client there. Uh, I was involved in performing two empirical studies of crime in the Daytona Beach case, uh, and, well, let me just finish by telling you what Judge Antoon wrote in his decision. He basically said I'm left with no choice but to rule against the city and to overturn, uh, both of these ordinances, and he went on to say gone are the days when a municipality may enact an ordinance ostensibly regulating secondary effects based on evidence that consists of little more than self-serving assertions by municipality officials. I think the message for you is very clear. Uh, you need to assure yourselves that you have more than self-serving assertions, um, and assumptions based on prejudices about adult businesses before you pass this ordinance if you expect it to pass constitutional muster. Thank you.

CHAIRMAN NORMAN: Thank you.

COMMISSIONER RONDA STORMS: Mister Chair, may I ask a question?

CHAIRMAN NORMAN: Not, not at this time, no.

COMMISSIONER STORMS: Okay. May we have citations, the actual citations to the studies that he provided? Thank you.

UNIDENTIFIED SPEAKER: We have that.

ATTORNEY LIROT: Next I'd like Doctor Terry Danner to address the Commission. Thank you.

DR. TERRY DANNER: Good afternoon Commissioners.

CHAIRMAN NORMAN: Good afternoon.

DR. DANNER: My name is Doctor Terry Danner. I'm chair of the department of criminal justice at Saint Leo University. That's located in Pasco County in, uh, Saint Leo, Florida. Uh, I represent the department whose mission is two fold. Uh, we provide, uh, education, uh, graduate and undergraduate level education for law enforcement professionals. That's our main mission. We're today, uh, we're providing graduate level classes for the Hillsborough County Sheriff's Office. Uh, we do command officer schools in a variety of counties. We are currently servicing Marion County, Florida. We are very law enforcement oriented. We also try to develop research and

evidence to help in the making of criminal justice policy decisions. Uh, that's why Mister Lirot has asked me to research the issue of the crime-related adult secondary effects of adult cabarets and adult businesses. Uh, I am of course, as Doctor Fisher said, a university professor, but I promise I will be very to the point and very brief. We have submitted to you the hard copy of a number of studies and research, and I would just briefly summarize what we have found over the years and recently. Um, one of the--my specialization is focusing on the effect that any economic activities have on crime trends. I've done a lot of work on the Ybor City historic district and, as we're all aware, economic changes in that area had a lot of impact on the, on the crime patterns there. Um, I have kept close track of crime data in Tampa, and I thought that was the most interesting one to look at first. With the cooperation of the city of Tampa Police Department, I have tracked the crime, uh, trends for a variety of offenses, uh, even

including, uh, rape, nonforceable sex offenses, prostitution, assaults, uh, the--you will see the graphs in the material that I presented to you. Uh, you're all aware that in the last ten years or so, there has been a significant increase in adult businesses in the city of Tampa, and I thought it was educational to deter--look and see what has been going on with the crime trends at that same time. What you will see on a brief perusal of those graphs is that with the exception of drug offenses, which have been going up and down in Tampa for the last ten or so years, all of those major offenses have, have taken significantly, and we are all glad of that, have been significantly declining in Tampa over the time period where the volume of sexually oriented businesses has, in fact, been increasing. It's illi--it's illustrative that you would expect that if the, there were significant impacts of an increase in these businesses that you would see some effect on the crime rates. To focus a little more, uh, on, or I guess to expand to other cities, the

second piece of research, which I've submitted to the Commission, looks at thirty-two other cities; well, I should say it includes Tampa as well, that were, are roughly the size of the city of Tampa, and try to determine whether there is any correlation or not between the per capita density of adult cabarets and the index crime rates for those cities. That is, one would assume, if it's true that adult cabarets and adult businesses have crime-related secondary effects that you would find that the cities that had a higher concentration of them would have a lower, would have a higher crime rate. In fact, we have found no correlation whatsoever. The crime rates in those cities vary pretty much randomly, and, uh, we were unable to find any relationship whatsoever between the density. Finally, uh, we have submitted to you all a com--a uh, binder that has twenty-five studies that have been conducted in Tampa and in other areas in Florida and in the South where they have specifically looked at adult cabarets, and have tried to determine whether or not

they produce crime-related second effects that can be measured. They have used a variety of methodologies and a variety of datas. Uh, almost, or I should say all of the data was provided by local law enforcement. They have studied areas before they had adult entertainment there and compared them with the crime rates after. They have looked at areas that are comparable in a variety of ways in terms of demographics and economics and tried to compare them to those areas that have adult cabarets that are similar economically and demographically. And finally, they have compared nonadult, although that's perhaps not a good descriptive word--your more normal variety night club, alcohol-serving night club, with adult cabarets to try to determine whether the addition of the adult, uh, entertainment makes a big difference in terms of their calls for police service and the secondary crime effects there. Probably the most interesting of the studies was the Fulton County Police Department there, that I believe it was their county commission, and I think

mister, uh, one of those speakers referred to it said we want to look and determine whether there is sufficient evidence for further regulation. And I believe it was their sheriff's department did a study and came back and said sorry guys, we can't help you, because the, the, uh, night clubs and the bars are creating much more problems than the adult cabarets, and that wa--decision--that research was used in one of the court decisions. So, you have twenty-five of them there, and the--there's a good deal of, of, well it's quite voluminous reading, but of the twenty-five studies that I presented to you, none of them have ever been able to find significant effects using a variety of methodologies in terms of secondary crime related effects. Um, if as Mister Lirot said, if you hear evidence that crime occurs in adult businesses, I would say crime occurs as he said, in shopping malls and around shopping malls, in high schools and around high schools, uh, sports stadiums, um, almost the analogy that at least from our findings, the analogy that there is something

about adult entertainment that is uniquely criminogenic, you could conclude that from looking at the crime surrounding sports stadiums. Uh, when we first started doing data analysis in Tampa, um, we were using what's called scattergrams, and those, that's the old-fashioned, or it's the high-tech way of where they used to put pins in areas in the map for crimes. And we saw patterns of crime in Tampa as a whole, but we haven't laid the street map over the top of it yet. And there was this one area that was a huge cluster of crimes. It was assaults and robberies and, and just, uh, drug offenses, and when we laid the map over it, we discovered it was Tampa stadium. And we, of course, every criminologist understands that whenever you have places of public assembly, when you have lots of people gathering, you increase the probability of crime. But to conclude from that that football is somehow uniquely criminogenic is really analogist to assuming that there is something about adult entertainment that is uniquely criminogenic.

What we've discovered is, it's primly, primarily the result of drawing people together, drawing potential victims and potential offenders into one place, and that almost all places of public, uh, assembly have that kind of problem. So, uh, at, all that research is basically saying that when done carefully and considered rationally, there is very, very little evidence that adult cabarets, uh, cause crime-related significant, uh, crime-related effects. Thank you.

CHAIRMAN NORMAN: Thank you.

ATTORNEY LIROT: The next speaker will be Richard Schauseil, and he's gonna discuss his research on the impact of adult businesses and property values.

CHAIRMAN NORMAN: Yes sir.

MR. RICHARD SCHAUSEIL: I'm Richard Schauseil, twenty-seven fifteen Grand Reserve Circle, Clearwater, Florida. Thank you for the opportunity today. My experience is, uh, my academic training, um, as graduate of the U S F and chemistry degree, uh, my methodology is founded in the hard sciences, not the soft sciences. I have

twenty-two years of a license and real estate experience in Florida. Uh, I've been studying the adult industry in the surrounding areas since nineteen eighty-eight, and I have been testifying in federal and State courts since nineteen eighty-eight as well. The Eleventh Circuit Court of Appeals used my study as a basis of their opinion, in one of their opinions. The hypothesis that you've heard so much is simply put that adult businesses cause lower property values, loss of commerce, urban decay, and blight. And that is the hypothesis tested. As I've tested that in study after study, I proved it false. And the science is when it's proved false, must by modified or discarded. In the study, the Manatee study in two thousand, which was the one in the Eleventh Circuit Court of Appeals stu--uh, opinion, and found no negative secondary effects. They were particularly interested in the, uh, permit history that I did, and the reason being is, some of the other studies conduct surveys of property owners in a commercial district, and I'll read this out of

my digest, which has been tendered to you already, uh, surveys of property owners in a commercial district and asked their opinion of nearby adult businesses. This method is very subjective by the personal beliefs of the property owners and by the attitude of the surveyors and the form and substance of the questions. A superior gauge of a property owner's confidence is the planning and commencement of improvements and renovations, repairs, and maintenance of the real property. The permit history can measure and record the activity of the property owners investing and improving their properties. This action is reliable and will ensure the true opinion of the property owners' confidence in the commercial district. That's why the permit history is so important and rather than trusting the survey of the opinion of the property owner. I studied the same area in Manatee County again in two thousand and four. Most of the old businesses that I saw in two thousand were still in existence. There were some new ones. Again, no negative secondary

effects were found. I did a study in Pinellas County, which is our neighbor co--neighboring county. Found no negative secondary effects in their relation--related to the adult industry as far as real property values were concerned. Since that study in the area of Bliss Cabaret, which was formerly called Christine's Cabaret, there has been significant, uh, development. Across the street, there was a sleep-in motel constructed. Across the street again, there was a Cracker Barrel constructed. Down the street, in construct--under construction now is a Hampton Inn, which Hampton Inn already has a site nearby there, but they feel the business is so good they would find another site, build it closer to--not close--not necessarily closer to Bliss Cabaret, just coincidentally, closer to Cabar--Bliss Cabaret because of the availability of the land, and they are constructing that. And also, you have down the street, Denny's has been vacated and is due to be demised to allow for an eighteen-thousand-square-foot structure. I

was gonna put these on the teleprompter and I'm going to tender these pictures into the record, and I will do so after I'm done speaking, if that's okay. The study in Tampa was in nineteen ninety-eight and we found once again no sec--no nega--no negative secondary negative effects, negative secondary effects in relation to Mons Venus. Uh, matter of fact, that area led the County, led the County in economic growth development, as, as well as other indicators appreciating values, property values, et cetera, but other economic indicators. Since that study, across the street from Two-thousand-one Odyssey on the same side of Dale Mabry and across the street from Mons Venus, a Sonic restaurant was built. The Pack 'N Save nearby was demolished and a new plaza was built, modern plaza that had Kash 'N Karry, now Sweet Bay, with, with other tenants. Uh, down the street where Jim Walters was, they, that building was demolished and Rooms to Go closed their store in that parking lot and built down the street a larger facility, because business is so good

you need a bigger facility to handle the new, the, the, the increased business. Where they left, was, was occupied now by a major large liq-liquor store. Also, a large retail center was also built where Target is and a parking garage to facilitate the customers. Also, and I'll tender those pictures into the record as well after I'm done speaking. In the Castleberry Seminole County study in two thousand and two, once again, no negative secondary effects were found. Those are part of your, uh, you have those studies. You also have an outline of those studies, as well as a digest of those studies. An Oakland Park study in two thousand and three, once again no negative secondary effects was found, and you have a copy of that study as well as the digest. I'd like to end by talking about Copernicus if I can. Copernicus was an astronomer in the thirteen hundreds. Until Copernicus, every astronomer, learned astronomer, had as a fact that the earth was the center of the universe and a movable mass. The stars, the sun, everything revolved around

it. Copernicus did his studies and he found we're just orbiting the sun and that the sun is a star in a galaxy and there's many stars around it. And after that time, we now know the way astronomy works. It was considered fact before, and after he did his studies, we found out that wasn't fact, and we had to believe what was really occurring. Thank you very much.

CHAIRMAN NORMAN: Thank you.

ATTORNEY LIROT: The last presenter will be Doctor Judith Hanna, and she's going to address the impact that the restrictions contained in the second ordinance considered, the impact that they have on the communicative value of the speech involved in the operation of these businesses.

CHAIRMAN NORMAN: Thank you sir. Yes ma'am.

DR. JUDITH HANNA: My name is Judith Lynne Hanna. I earned a Ph.D.

CHAIRMAN NORMAN: Ma'am, if you--hold on one second. Uh, sir, would you lower the podium for her? Lower the, lower the podium for her.

DR. HANNA: Thank you. My name is Judith Lynne Hanna. I earned a Ph.D. in anthropology from Columbia

University, and I specialized in nonverbal communication, and that includes dance and that's a form of expression. I'm currently a senior research scholar in the department of dance at the University of Maryland. I've published six books and about three hundred scholarly and popular articles, and I've served since nineteen ninety-five as an expert court witness nationwide in nearly a hundred cases related to adult entertainment exotic dance. And to do this of course, I had to conduct studies in, for each of those cases. As a scholar, my mandate is to look at all sides of an issue, and as a cultural anthropologist, I would look at dance in its context. In other words, anthropologists look at things holistically, not just taking things apart. So during the past eleven years, I visited more than a hundred and twenty-seven clubs, observed no fewer than fifteen-hundred performances, interviewed about eight hundred dancers, managers, owners, bartenders, disc jockeys, house moms and house dads, patrons, and community members; and I have read the

extensive literature related to exotic dance and to nonverbal communication. I have yet to find evidence that dance clubs require special supervision because they create problems disproportionate to other businesses. Moreover, as Mister Lirot told you, governments already have laws on the books that deal with crime such as prostitution and drugs. What I've discovered is the disinformation campaign waged by the Christian Right that attacks exotic dance as part of its grand design to impose a theocracy based on its interpretation of the Bible. The subterfuge of repeated allegations that the clubs caused the adverse secondary effects of crime, property depreciation, and disease, coupled with the media search for the sensational, acquires the cache of truth and captures some public support for the Christian Right's efforts to promote government regulation of exotic dance clubs for quote, the public good, meaning to drive them out of business or prevent them from opening. Your consulting attorney who helped with your new

legislation is part of the Christian Right effort to draft and defend adult business regulations. He continues to perpetuate the myth of adverse secondary effects by citing the shoddy studies that have been referred to. Knoxville City Council member Joe Bailey said it seems to me like he's just a franchisee and goes around from city to city and sells these laws and municipalities pass them, and then we hire him to represent the city at two-hundred dollars an hour. Turning to your, uh, dancer patron distance, you have a whereas statement that proclaims it is not the intent nor the effect of this ordinance to suppress any speech activities protected by the U. S. Constitution or the Florida Constitution. In fact, section three dash forty-three precisely does that. Dance communicates through the senses and that includes the tactile sense, the sense of touch, and I've included some exhibits that detail what--how dance communicates and how touch and no touch communicates. Touch conveys many different feelings and ideas from comfort, pleasantness,

friendliness, fellowship, warmth, love, humor, playfulness to sensuality, sexual desire, and intimacy. Exotic dance is all about fantasy, and its dancer/patron touch has quite a long history. In city of Anaheim versus Janini, a California state judge in ruling on lap dancing referred to dime-a-dance. That is taxi dancing as an established tradition in America dating to the nineteen twenties and continuing today. For a fee, men could dance with a woman in a taxi dance, what they called a hall or a palace, and they were so named because like taxis, their services were hired by customers for short periods of time and measured by a time clock. Even earlier in American history than the taxi-dancing era, body contact was noted in a seventeen ninety-nine account of the waltz at its loosest. A man grasped the long dress of his partner, so that it would not be, dragged, dragged and trodden upon, and lifted it high, covering both bodies closely as they whirled on the dance floor. His supporting hand lay firmly on her breast, at each moment pressing

lustfully. Today, lap dance moves are very similar to the dance moves you find in high school dances and in regular social dance, uh, uh, facilities, cabarets. Uh, it's called da butt or freaking or booty dancing or doggy dancing or front-back piggy dancing or just dirty dancing. Partners twine thighs, pelvises touch and rotate, and upper torsos tilt away from each other, or females dance with their backs to their partners, sometimes bending over with hands on the floor and they press and grind their buttocks against the male's crotch. Note that the performers in Broadway and touring production of "Oh! Calcutta" have appeared nude in heterosexual physical contact. And similarly, in ballet at Brooklyn Academy of Music, the dance called mutations had nudity and heterosexual contact, and in the materials that I submitted, uh, photographs are included of those, uh, performances. You have a section twenty-two two forty-four, requiring dancers to obtain a license. This legislation discriminates against exotic dancers by requiring only

exotic dancers, not ballet or other dancers, to obtain a license. If the information required for licenses is made public, it subjects dancers to stalking. Requiring a license to engage in dance is a prior restraint on expression that is protected by the first amendment, and it is also a tax on expression. The bill's stigmatizing and degrading treatment of dancers, implying that most are immoral, dirty, criminal, contagious, or inferior, appears in some respects similar to white treatment of blacks during slavery and segregation. In conclusion, I urge the withdrawal of the proposed legislation, section three forty-three and section twenty-one two forty-four, re-requiring dancers to have a license and to be apart from patrons, because these do not serve a governmental interest but present an undemocratic concept of morals and restrict expression. It is my professional opinion that touch between dancer and patron is part of the theatrical fantasy in an expressive, uh, component of exotic dance. To eliminate in adult entertainment

clubs, the kind of body contact that is part of our history and occurs in schools, social dance halls, and musical and ballet theaters today appears both discriminatory and Victorian. I have provided, uh, some exhibits, uh, a peer-reviewed journal in, uh, a peer-reviewed article in the *Journal of Planning Literature for Policy Makers*, uh, a summary of a mini study that I did in North Carolina, uh, an elaboration of my comments about the Christian Right and its battle with the strip clubs, uh, critique of two of the studies that were cited as part of your evidence for your legis, uh, legislative predicate, a, a list of peer-reviewed research on exotic dance that challenges many of the assertions made about it, a description of "Oh! Calcutta," the, I mentioned the nude, uh, the photos of the, the nudes, uh, a chart, uh, a diagram of the lap dancing heritage and an article about that, a photo of booty dancing, and then how dance communicates like a verbal language, how adult exotic dance is both dance, artistic expression, communication, and

a specific form of dance, the meaning of touch between dancer and patron, the absence of such touch, and then some legislative talking points in an article that appeared in a Q and A of the *Washington Post*. Mister Lirot asked me to summarize some comments that were made by Doctor Rebekah Thomas who has . . .

CHAIRMAN NORMAN: Ma'am, I'm gonna stop you right now. I want to say something. And I let you go before, but let me reiterate what I said in my opening comments. I said that when you address this Board that comments are not directed personally against a Commissioner, staff member, or other speakers; and that's not what this is all about. And earlier you, you commented very sternly about counsel that was hired by the County. I want you to stay on point and don't make this a personal and open this, this forum up to personal attacks by either side. That's not what this is about. I want to make sure you really understand that.

DR. HANNA: I do.

CHAIRMAN NORMAN: Okay.

DR. HANNA: Doctor Rebekah Thomas has a Ph.D. in physiology. And, the study of physiology is the study of systems, whether it's the cardio system or the reproductive system or the immune system. In it she studies how things get in and out of cells. She's given court testimony in Pinellas County and in Kentucky and she's presented reports that were submitted to court. She testified that there are no risk behaviors in adult clubs that would cause the transmission of disease, and I would like to read from her court testimony. On page 77, and you have copies of this in the materials that were submitted to you, disease transmission has to involve specific parts of the body in specific manners. For example, most sexually transmitted disease and a lot of other diseases have to be introduced into the body in the right place, at the right time, and specifically we are talking about mucosal membranes. Those are membranes that line the nasal passage, mouth, throat, respiratory passage, entire d-digestive tract, reproductive tract--those parts of the body.

She says the risk behaviors identified by Center for Dis-Disease Control in terms of transmission of sexually transmitted diseases include sexual intercourse, whether that be vaginal, anal, or oral. It involves injected drug use. It involves taking blood, semen, or vaginal secretions into the body. It involves direct contact with genital to genital, genital to anal, genital to mouth contact with skin surrounding any of those areas. She had contacted the Center for Di-Disease Control for their evaluations and their studies, and they directed her--they found no studies, that the clubs caused disease, and they directed her to the American Social Health Association, and they said quote a person cannot be infected with S T D through a lap dance. There have been no cases of S T D transmission through lap dancing even with a completely nude dancer and a fully clothed person. So again, any questions you have, uh, about her testimony, I, I direct you to look at the materials that were submitted, and I'd be happy to answer any questions that you have.

CHAIRMAN NORMAN: Thank you.

DR. HANNA: Thank you for your attention.

CHAIRMAN NORMAN: Thank you. Yes sir.

ATTORNEY LIROT: The last thing I'd like to ask is that you just receive and file all of the materials that we provided to the Commission. And since we just have a couple of minutes left, I'm going to have my colleague, Mister Walters, wrap up our presentation for the day, and again, I'm grateful for your time and patience.

CHAIRMAN NORMAN: You understand also the material you submitted that what we're going to do is close public comment today, continue it for two weeks before we take any action.

ATTORNEY LIROT: And I do appreciate that very much. Thank you.

CHAIRMAN NORMAN: Okay. Thank you. Yes sir.

ATTORNEY LAWRENCE WALTERS: Thank you. Lawrence Walters. Without repeating what's been said here today, the point I'd like to make is don't rush to judgment with this ordinance. Uh, when you make a mistake in this realm, you end up with a First Amendment violation, which can end up

costing, the, the taxpayers dearly in terms of attorneys fees and damages in court. Uh, your legal representative was quoted in the paper as stating that she has access to a half million dollars in funds to be able to defend any lawsuits brought in connection with this ordinance. We dare say that there are some taxpayers who wouldn't want their funds used in that manner. Uh, I, I encourage you to look at what's been submitted here very carefully and to consider these matters when you--before you decide on whether to adopt this ordinance. I'm encouraged that you have stated on the record that you're going to take a couple of weeks to look at these issues and carefully decide what has been presented and make a determination based on the evidence. I would again reiterate my suggestion that I made at the last public hearing, that the County meet with representatives of the industry and take some industry input in that this is an industry you're trying to regulate, and it's certainly reasonable to do that. We've come to compromise agreements with

countless other cities and counties in many other places throughout the United States. And the downside, with the County moving forward right away, is that you may end up with a legal battle that could take several years and cost six or seven figures in attorneys fees. However, the only downside to the County of first trying to resolve these matters with us and with the industry, uh, for a couple of weeks or possibly a couple of months is a short delay in adoption of the ordinance. The upside is that we may reach a compromise between the industry and the County that we can all live with and a-avoid a waste of both time and judicial resources. As Mister Lirot mentioned, the days of the courts rubberstamping these ordinances are over. The U. S. Supreme Court stated in a, uh, a case Alameda Books versus city of Los Angeles, a case our firm handled, that the governments may not rely on shoddy evidence or reasoning any longer. Based on what I've seen of the expert reports and what's been said here today, that's all that the County has left, is

shoddy evidence and reasoning. And I trust that once you go back and look at what's been submitted and read through the many volumes of material and analyze the record, that you will conclude that some re-evaluation of the ordinance under consideration is necessary. We hope to be part of that re-evaluation process. Thank you very much for your time.

CHAIRMAN NORMAN: Thank you sir. All right.

ATTORNEY LEE: Uh, with that, Mister Chair, a thank you to Mister Lirot, and I would ask, uh, Scott Bergthold, who is our consulting attorney, to, um, please come forward.

CHAIRMAN NORMAN: Okay. Thank you.

COMMISSIONER STORMS: Mister Chair, when will we be able to ask follow-up questions to the presenters?

CHAIRMAN NORMAN: What we--what we'll do is, we're going to have the presenters, and then on each item what we're going to do is take public comment, and then Board discussion before we continue it to the next.

COMMISSIONER STORMS: Okay. Thank you.

CHAIRMAN NORMAN: Welcome sir.

ATTORNEY SCOTT BERGTHOLD: Good afternoon Board of Commissioners. I thank you for the opportunity to address you one more time. We have been in this room, um, over the last several months. I think the first time was in February for a detailed workshop at that juncture, and then again in June. So, I don't think that the process of the re-evaluation of the County's code regarding adult entertainment and sexually oriented businesses is anything, uh, close to a rush to judgment. I think it's been a measured process that's taken place over several months, uh, that has given due consideration to a number of comments and criticisms and critiques that have been made along the way. We've done our best to incorporate those into the ordinances that you have before you today, and just as the other speakers did, I would like to incorporate my comments and the materials received, uh, by the Clerk into the public hearing on the other two ordinances as well. Uh, I want to just basically do some of the things and cover some of the things unfortunately that we've covered

before. I also will be brief. I also will try to stay under the hour limit, uh, splitting the time between myself and Doctor Richard McCleary, uh, the County's expert on this, uh, . . .

CHAIRMAN NORMAN: No, no, no.

ATTORNEY BERGTHOLD: . . . issue of secondary effects.

CHAIRMAN NORMAN: You will stay under the hour.

ATTORNEY BERGTHOLD: I will not try. I will do it Commissioner Norman. Thank you Chairman for that, uh, gentle reminder. Uh, but because of some of the things that have been said previously in the other two workshops or, have, unfortunately not been a part of this public hearing. We do want to make sure that they're in the record for the purposes of this public hearing. As, uh, Miss Lee mentioned, you have received voluminous information regarding the secondary effects issue, both on the County's side, uh, as well as from the industry representatives, and I want to discuss, uh, just in general, what that information covers, uh, and then address some specific points about the rationale for the ordinance and how

it corresponds to the comments that were made by plaintiff's representatives or the potential plaintiff's representatives. Uh, the first thing is that there is a wide variety of negative secondary effects. Studies are not the only thing that the courts have recognized as a valid basis. The standard for adoption of ordinances regulating sexually oriented businesses is that the County can rely on quote any information reasonably believed to be relevant, end quote, to the problem that the County seeks to address. And that includes five major categories of evidence. The land use studies, and, and you've heard a lot about those, both in our prior workshops as well as from the plaintiffs today. Also, crime reports that just document, uh, prostitution and other types of illicit, uh, sexual activity, drugs, whatever types of crimes, those aren't always done in the form of formal studies, uh, and comparative analysis you might call it, and we'll talk about that in a minute. But those are also in the record. Number three,

judicial opinions. As I've explained before, the U. S. Supreme Court is specifically countenance local legislative bodies relying on secondary effects findings that are contained in other judicial opinions that have been reported. Uh, this body cannot be held, uh, to not know everything else that the whole world knows, and that is that which is well published and documented in the reported cases. And so, we've cited several opinions, judicial decisions, in, in the text of the ordinance itself upon which, uh, this ordinance is based. Uh, number four is investigations as well as anecdotal evidence. The courts have routinely held that in the legislative context as opposed to the judicial context, but especially in the legislative context, that public testimony from citizens who have experienced the adverse impacts of sexually oriented businesses, uh, private investigations that don't go out to every place in the whole County, but look at the conditions and the conduct that is occurring inside sexually oriented businesses. That's

relevant, as well as media reports. Uh, demonstrations of that would be, uh, well-publicized problems regarding prostitution or crime or illicit activities at strip clubs, adult book stores, and the like. When we look at that body of evidence, and it's, it's a robust body of evidence that spans thirty-some years, uh, and there have been different levels of methodologies. There've been very rigorous studies, but also anecdotal data that the courts have said that's very relevant to the problem. Uh, there are five different types of major affects. These aren't an exclusive list, but they're the majority ones. The first one is, uh, property crime and public safety risks that associate, uh, with, uh, with personal and property crimes. Now I want to address something that Mister Lirot said previously and that was, uh, secondary affects is just outside. And, and I think what he's talking about there is these ambient crime and the public safety risks that go along with that. We would emphatically reject that proposition as inconsistent both with the

law as well as the stated rationale of the Hillsborough County ordinances. Uh, there is evidence in the record, um, and that's number two that, for example, illicit sexual activity. Unsanitary conditions exist in Hillsborough County adult businesses, uh, presently. Uh, people went into several adult businesses, uh, and, and found filthy conditions, um, evidence of sexual activity that was not cleaned up. I'm not going to get into the graphic details here, uh, but we've previously gone over that evidence as well as the types of conduct that's going on in adult entertainment that offers quote/unquote dancing opportunities, and in fact, Doctor Hanna went into great detail about--and I think in many ways she accurately described what goes on in lap dances. I would disagree with the analogy to high school dances and social dance situations, but I think the description of what occurs with the grinding of the buttocks of the, uh, partially or almost nude dancer on the lap of a patron, and, and the physical contact with the breast

and other sexual parts is absolutely, uh, of an accurate description of adult entertainment today. And uh, what we found, in, in Hillsborough County, it was the same thing, when, when adult entertainment establishments were visited. And so that stuff going on inside the business is very much relevant to the regulations that are adopted. In fact, the regulations directly control that conduct as well as the configuration of the premises to prevent the illicit sexual behavior, which is much of the thrust here. Number three is prostitution, and the point that I wanted to make on that is that often times, uh, and the evidence in the Daytona Beach case, is, is indicative of this and I'll talk about that case shortly, but often times the prostitution or illicit sexual activity, uh, that takes place, in these, in these cities or in these adult entertainment establishments is latent for many years, because police will tell you it's a very difficult crime to prosecute. People are very sophisticated. Uh, there's evidence in cases out of Jacksonville,

Florida, and other cities in the middle district where people go through pretty intricate procedures to conceal what's going on in back rooms and intercom systems, peep holes, things like that to control against prostitution prosecutions. Uh, often times, and this was the evidence in Daytona Beach, uh, the girls know exactly what to say to get the officer to do X and such and it's been such a problem in Florida that in the last year and a half, the State legislature has amended the statute about who has to be the required victim or witness to a prostitution crime to address those issues, because of the inability to prosecute because of the sophisticated ways that prosecutions are avoided. And three cases in which I've been involved, South Bend, Indiana; Monroe, Ohio; and Louisville, Kentucky--I rep--I represented all those cities--although you wouldn't necessarily see it in calls for police service, and we've had that whole discussion in our workshops previously, and I'll talk about that briefly here, and Doctor McCleary

will address it in detail, is that very expensive, manpower intensive investigations that have occurred over many, many months and cost tens of thousands of dollars, have revealed prostitution rings being run out of clubs, that the plaintiffs in these three lawsuits in these three cities all said, oh, you don't have any problems with that. Yet, it led to prostitution arrests and prosecutions and convictions. Uh, the next slide talks about, uh, some of the lewd conduct, public indecency, and, uh, paid sexual contact that's taking place inside the clubs. You've received the information that shows that what's in the studies at large is very relevant to what's going on in Hillsborough County. It certainly meets the threshold standard for being reasonably believed to be relevant, and, uh, the documentation is for your review. Uh, number five. We've also included evidence that talks about drug use and trafficking in sexually oriented businesses. It's not because, uh, necessarily that, uh, you know, the patrons

are always doing the drug trafficking, but it is recognized in criminological theory that Doctor McCleary will talk about, that certain people are attracted to places, uh, like adult entertainment establishments and they engage in vice crimes, and therefore, the people who want to facilitate that, drug dealers and things like that, will sometimes congregate at those locations. One of my clients is Gary, Indiana, and we had examples with drug deals going on in the peep-show booths. We also had evidence of hookers hanging around, not because they were dancers who worked at the strip club, but hookers thought the best place to pick up a john would be a place where guys were going for sexual entertainment. And that seems like a pretty logical, uh, you know, link there. And then number six would be the undesirable aggressive behaviors that are associated with alcohol consumption. We've talked about, uh, we--there's cases in this, uh, in the record both from the U. S. Supreme Court all the way down to State trial courts as well as some studies that, uh, discuss that

effect. We've also included testimony from certain cases, uh, one out of Seminole County, in which the Seminole County ordinance was upheld against the legal challenge and, uh, the testimony of Doctor William George that talked about the exacerbating affect of alcohol, uh, for secondary effects in the nude entertainment context. Uh, in addition, there's some cases cited there, including one from the Eleventh Circuit Court of Appeals that talks about what the Courts call the combustible combination of these effects. Uh, one case is cited there, and I won't go into detail on that. The seventh type of adverse secondary effect are negative impacts on surrounding properties. Now this warrants a little bit of att-attention, because Mister Schauseil, uh, spoke about this issue and said that he'd done some studies and in-in-indicted certain types of analyses, and, and said that his was better. There is evidence in the record that's been provided for you from a real--a certified real estate ap-appraiser, not just someone who's licensed in real estate

and can get a license in three weeks of training, but someone who actually has the M A I designation for a certified appraiser and engages in market analysis, and he--uh, regarding the Manatee County, uh, data that was put together by Mister Schauseil, uh, this, uh, expert went through step by step by step and critiqued the analysis. You don't use tax assessments to determine whether property values are going up. All land in general is going up in value in most places, especially large metropolitan places like Hillsborough County around the country. The question is what is the market value. You don't use tax assessments to list your price. Uh, you know, on the, on the M A S, or on the market system. Number two, mass appraisals do not do individual or annualized inspections of properties. And that's why people who do market analyses don't rely on mass appraisal or tax assessment data, uh, to do market analyses. Uh, number three, permit history, uh, which was touted as a very important thing. Uh, first of all, permit history could

show that you are pulling a permit to do an addition or could say that you have a roof leak. I mean, there are lots of reasons, in fact in the Manatee County context, several of the permits that were pulled were because of disrepair, because things had fallen into disrepair and, roofs, roofs were leaking or what have you that needed to be repaired. So permit history is not, a, a proper form of analysis. Uh, basically, ap-appraisers do not use that data. We do have a study in the record from Dallas, Texas, uh, that was done in September of two thousand four and it is social science research survey data. Uh, now Mister Schauseil may disagree with this appro- approach, but the study was done by one of the biggest land use consultants companies in the country. And the two primary people who did the study were former presidents of the American Planning Association. They're very credentialed and very well respected in their field, and their study showed overwhelmingly, something like ninety-five to ninety-seven percent of survey respondents in very

objective nonleading question forms of data, and this was all appraisers, said that negative impacts on market decisions would flow from the presence of a sexually oriented business in the nearby vicinity. Now, independent of all of that, the ordinance rationale as it relates to properties and nearby properties is not limited to property values, because obviously, property values go up from time, people can come and say well the adult business didn't cause this to be a downgraded area. The adult business moved to a downgraded area that already had low rent prices. I mean there's lots of arguments that can be made about that. But what we also rely on is data that's in the record, uh, including data from the World Wide Video case out of Spokane Washington where people just testified about people coming out and getting into confrontations, uh, near their residential and commercial properties and problems that were impacted upon their dentist business or their real estate, uh, uh, office, because people were having problems with the patrons of adult

businesses nearby. So that is also a broader rationale than what has been identified here. And then lastly we have some evidence about physical assaults against, uh, entertainers in the adult entertainment industry and, uh, the high percentage of physical, uh, assaults that take place often unreported, but this study was done by a woman who was an adult entertainer for thirteen years and, uh, came out of that and then came back and did a study as part of her master's thesis and was able to have an inroad to do analyses of dancers in Minneapolis that other people wouldn't necessarily have that open door to do that type of analysis. Uh, in addition, the last part of what I'm going to say is going to address the rationale. And, and really what this comes down to, if we could do the Guido Sarduche two-minute law school and that is how do you define a secondary effect. The plaintiffs don't disagree that there's crime at these places. They don't agr--they don't disagree that illicit sexual activity can happen, and, and, and other witnesses that

have already testified certainly don't disagree about the graphic nature of some of the lap dancing, and, and activities that take place that would be regulated by this ordinance. What they disagree with is the definition of secondary effects. They would say that without doing a comparative analysis between adult and nonadult businesses, you can prove no secondary effects, and so it doesn't matter if we have evidence and testimony from all the adult book stores with peepshow booths in Hillsborough County that illicit sexual behavior is there and that semen is on the walls and it's an unsanitary condition and people engage in this illicit behavior, because you haven't compared it with anything. And until you compare it with anything, you have no justification for regulation. That, at, at its core, is the argument. That is the theory. Fortunately, the U. S. Supreme Court has made it clear that the city's rational, the, the county's rational, the local government's rationale is the one that's controlling. And the only requirement of that

rationale to be constitutional is that they would decrease secondary effects. Uh, and, and, and that's really, on the, the substantial government interests that's what's required. Opening up the booths and making a direct line of sight requirement for the configuration of those booths between a manager's station, where someone has to be stationed while anybody is on the premises, into that booth, obviously is going to take away the anonymity and, the, the, close, cramped quarters that make it very difficult to police that illicit sexual behavior. That's a direct effect. Uh, the illicit sexual contact that's taking place between dancers and patrons and adult entertainment establishments, which every federal appellant court in the country has looked at, for example, the six-foot rule, has upheld that rule because it has a direct relationship to the secondary effects that are sought to be prevented. You don't need to do a study to see if the same type of illicit sexual behavior is happening at the seven-eleven down

the street. Uh, so that, that, that, that's what we really what we get down to. As long as the ordinance is fairly supported by the legislative record, which we exceed that threshold, uh, substantially, the businesses must come back and cast direct doubt on that evidence. They're not casting any doubt on the evidence that's in the city's or in the County's legislative record. What they're doing is redefining what secondary effects are, and, and saying that things have to be uniquely criminogenic and you have to prove that adult businesses have more crime and more harms than nonadult businesses. Well on a nonscientific level, that's not the legislative burden and also it is not required for the simple fact that it is what lawyers call a non sequitur. It is--it does not follow. If you have people engaging in illicit sexual behavior in the peepshow booths in Manatee County or in Hillsborough County and then you have another establishment down the road that maybe has more calls for police service, because obviously the people engaging

in the activity are not calling nine one one, and the dancers that are receiving, uh, tips for lap dances are not calling nine one one. That is not the type of data that shows up in calls for ser-service or nine-one-one data bases. Obviously, you don't have to prove that you have more calls for service to an establishment to prove that there is a legitimate government interest justifying the regulation. And, uh, I think I've addressed the rest of the material. You have a copy of the handout. What I want to do now is basically move away from the basic rationale for the ordinance and that's stated right in the text of the ordinance itself. And say that when you do get to a scientific analysis, even though a scientific rationale, which is not the rationale of the ordinances and is not constitutionally required. When, when science is properly applied to these studies, they do show a robust secondary effect, including a number of the studies that have been commissioned by the industry. And for that, I will open it up to Doctor Richard McCleary.

I'll briefly introduce Doctor McCleary. He is, uh, essentially one of the leading, uh, criminologists in the field. He sits on four of the five editorial boards of the leading criminology journals in the country. As to the fifth, he was formerly on that editorial board for about fifteen years. He is going to address the secondary-effects evidence from a more scientific perspective.

CHAIRMAN NORMAN: Thank you. Yes sir.

DR. RICHARD MCCLEARY: Lets see. Well thank you very much. Uh, my name is, uh, Dick McCleary as I said, and, uh, I'm a professor at the University of California Irvine. I have appointments in criminology, environmental health sciences, and planning. Uh, I have a Bachelor of Science from the University of Wisconsin and M.A. and Ph.D from, uh, Northwestern. Go! Badgers. Go! Wildcats. Uh, I, uh, I'm a member of the American Statistical Association and the American Society for Criminology. I joined first in nineteen seventy-seven, so I've been, uh, in both associations for thirty years. Uh, like many of the experts you've

seen today, I'm the author of five books, seventy, uh, or more articles on statistics and criminology. Uh, I've been on the editorial boards of, uh, at least ten national, uh, journals, and I've had appointments in statistics at the University of California Irvine, uh, Minnesota, New Mexico, University of Michigan, Arizona State University, and an appointment at the F B I, uh, National Academy. I've had appointments in criminology at the University of California Irvine, uh, Michigan, State University of New York, Arizona State, and the University of Illinois. I've served on panels and task forces of the National Research Council and National Academy of Sciences, uh, the F B I, the U. S. Secret Service, uh, U. S. Census Bureau, and, uh, many others. I've been a consultant to the U. S. Bureau of, uh, Justice Statistics, the Centers for Disease Control, uh, National Center for Health Statistics, uh, many of the national institutes, and, uh, two of the national laboratories. And of course, the reason why I'm here today, uh, is that,

uh, for about thirty years I've been, uh, studying crime-related secondary effects. I want to emphasize that. Uh, there are many types of secondary effects. I have no expert opinions on any except crime-related, uh, secondary effects. In the last thirty years, I have, uh, studied the secondary effects of gambling casinos, convenience stores, fast-food restaurants, uh, transportation depots, train and bus stations that is, and, uh, sexually oriented businesses. I have, uh, uh, over approximately as I said thirty years, I have probably been inside four- or five-hundred, uh, sexually oriented businesses. A lot of expertise that way, and I've done a lot of actual, uh, studies. Now I'd like to give you my opinions. These are expert opinions. Uh, I'm calling them facts. Uh, these are opinions that I've testified to in court, and I think that I have been relatively, uh, persuasive or compelling. First, sexually oriented businesses pose large significant ambient public safety hazards. Uh, these hazards show up in three broad categories of

crimes. These are victimless crimes like prostitution, drugs, uh, and so forth; uh, predatory crimes, robbery, uh, auto theft, uh, assault; and finally, opportunistic crimes, which, uh, are crimes like vandalism and burglary that occur, uh, uh, just as, as a matter of opportunity. The hazard applies to all sexually oriented business, uh, subclasses--live entertainment, off-premise book stores, on-premise video arcade, so on and so forth--all of the classes, that, that you have, uh, uh, identified in your, uh, code. And, uh, crime ris-rises after dark, it peeks at bar closing hours, and, uh, uh, strong rationale for that--darkness favors the criminal and policing becomes less effective in darkness. Uh, you have to, in, in any examination of, uh, the science here, any examination of the empirical facts or in any examination of the likelihood that your code is going to work, you have to calculate in policing. Uh, alcohol aggravates the ambient crime risk of secondary, excuse me, of sexually oriented businesses, obviously

lowering inhibition, uh, and clouding, uh, judgment. Crime risk can be mitigated by regulation. There are probably four or five different, uh, different ways that codes, uh, are effective, in, in mitigating, uh, uh, secondary effect, distancing sins--a sensitive uses, excuse me, target hardening, removing alcohol from the high-risk zone, uh, limiting operation during high-risk times and a very, very general category of broken windows enforcement, which I'll talk about a little bit. Final opinion, the link or the correlation between sexually oriented businesses and crime is a scientific fact. Uh, it's not arrogance. What I mean by a scientific fact and what most working scientists mean by a scientific fact is first, it's predicted by a very strong, uh, well validated and accepted theory; and second, it's been confirmed empirically again and again and again. I would like to start with the theory. We've heard a lot of, uh, uh, talk about theories. There's, there's, believe it or not, quite a bit of agreement

between for example, Doctor Danner and myself about the theory. Doctor Danner and I are both trained as criminologists, so that's not surprising. Some of the theories that you've heard have been primary-effect theories. Uh, that confuses crime and criminals. I would not argue ever that sexually oriented businesses cause criminals. That is somebody doesn't walk by a, uh, uh, a strip bar or something like that and all of a sudden go crazy, become a criminal. But sexually oriented businesses cause crime. The primary effects theory that argue, uh, uh, that, uh, uh, sexually oriented businesses cause criminals, that's kind of like arguing that banks cause bank robberies or bank robbers, excuse me, and they don't, but they do cause bank robberies because, of the, of the opportunity. Uh, the general, uh, theory is that crime risk is a function of three factors: the number of targets on site, the softness of those targets, and the numbers of offenders at that site. Uh, now, sexually oriented business patrons are notoriously soft

targets, because first they're disproportionately male; second, they're open to vice overtures; third, they travel, uh, long distances to get to the site; uh, next, they carry cash, but most important of all, uh, when they're victimized, they are, uh, reluctant to involve the police, so they make perfect victims. What happens, all of these perfect victims are attracted to a site. This attracts predatory, uh, criminals to the site, uh, and, uh, uh, the, the, uh, uh, criminals who are, uh, attracted to the site see these, uh, uh, uh, customers or patrons of the sexually oriented businesses as having very, very, uh, low risk, largely because, the, the victimization is not reported and second, having a high pay off--cash, for example. Uh, the high density of soft targets at the site attracts two types of, uh, criminals. First off, we've got vice purveyors. I'm gonna use that term. Uh, I include both prostitutes, for example, and, uh, uh, uh, drug, uh, dealers, vice purveyors who dabble in crime. That is who are not above, uh, committing the

odd crime when the opportunity presents itself. And second, uh, predators who use vice to lure and lull victims, uh, to an out-of-the-way dark place so that a crime can be committed. Uh, I also want to point out that crime is a relatively, uh, rare event, and so you don't have to attract many of these predatory criminals to the site to have a real crime wave. And we'll see some of that, uh, shortly. The ambient crime risk again, results in victimless crimes, drugs, prostitution, predatory crimes, robbery, auto theft, et cetera; and crimes of opportunity that these, uh, people who are attracted to the site commit while they're waiting for a victim. And that, uh, generally tends to be things like burglary, vandalism, uh, break-ins, that sort of thing. Finally, the theory says very, very clearly, the ambient crime risk can be ameliorated by reducing target density--excuse me, I'm, I've a dry throat here--reducing target density. In other words, reducing the number of, of, uh, uh, potential victims at a site, hardening the

targets through police patrolling for example or other mechanisms; and finally, reducing offender density. Thank you. So, that's the theory. Now, I want to show you the empirical corroboration. This, uh, theory has been tested many times over thirty years. I have some of the, uh, uh, studies here that you have, or that, you've, you've considered. Excuse me. Uh, the Phoenix, Arizona, study, nineteen seventy-nine, uh, I was a professor at Arizona State University when this was, uh, conducted, and I was, uh, uh, consultant to that study, found effects of, oh as high as five-hundred percent and as low as thirteen percent, uh, depending on what particular type of crime, uh, you're looking at. Is that a big effect? Let me tell you that if you bring your sheriff in here and ask him if a thirteen percent or fifteen percent effect is large, your sheriff will tell you yes. That's an effect that's large enough to bring down a government, to vote people out of office. That's an effect that's large enough to bring people in, uh, here complaining. That's an

effect that's large enough to get, uh, newspapers looking into it, so on and so forth, substantively very large. Indianapolis in nineteen eighty-four, uh, the effects are in the same range; Austin, Texas, nineteen eighty-six, uh, same range; Garden Grove, nineteen ninety-one, uh, that's enough a study that I did with, a, a colleague, Professor Jim Meeker, and it was the first study that really, uh, was able to use a before/after effect. We looked at sexually oriented businesses before and after they opened at an address, and we compared them, of course, uh, to sexually oriented businesses that were already in place, and what we discovered was that every time a sexually oriented business opens, crime, ambient crime, for about a block around the sexually oriented business, uh, typically doubles. Uh, Times Square study, nineteen ninety-four; Newport News, nineteen ninety-six; San Diego, California, uh, two thousand and three. Uh, San Diego is, uh, uh, another hallmark study here, because instead of, uh, using crime incidents, it uses calls

for service, or nine-one-one calls, and we're gonna talk about that some more. Uh, Centralia, Washington, which I've got some results here to show you; Montrose, Illinois; and Sioux City, Iowa. Those are studies that I've done, uh, within the last three or four years. Now, I would like to look at the evidence, uh, specific to subclasses of sexually oriented businesses. All sexually oriented businesses, uh, pose ambient public safety hazards for the theoretical reasons that, I, I told you, but the nature of the effect can vary from business to business. First off, adult cabarets. The first study that I wanna show you was conducted by Professor Dan Linz. It was commissioned by, uh, a, uh, consortium of sexually oriented businesses in Greensboro, North Carolina. Professor Linz looked at nine-one-one calls and, uh, compared, uh, neighborhoods in Greensboro that had, uh, liquor serving establishments and adult cabaret establishments to neighborhoods that had neither. And these are the effects here. Uh,

what you see, uh, are, uh, some very, very clear obvious, uh, findings. This is not rocket science here. Uh, what we see is that the liquor neighborhoods, the liquor serving, uh, uh, neighborhoods, neighborhoods with liquor-serving establishments have more crime in every type of crime, although this is a weak indicator--remember, this is nine-one-one calls--than control neighborhoods. But the adult cabaret neighborhoods have more crime yet. And that's a rather interesting finding. All of these results, uh, if one corrects for, uh, for the fact that we're looking at nine one one calls, they're statistically significant. I'm gonna talk about significance, uh, shortly. The next study, Daytona Beach, two thousand and four, essentially is a replication. This was done by, uh, Doctor Linz and, uh, Doctor Randy Fisher, whom you've heard from, uh, here, uh, tonight, and, uh, here again, we find pretty much the same effect. Uh, this was the same design, same sort of study, same crime indicator, and the same effect. If you go

over to the total crime, uh, what you discover is that, uh, the liquor neighborhoods, and these are census blocks, have more crime, total crime than control neighborhoods, and the adult cabaret neighborhoods have even more crime, uh, than either. And of course, these are also statistically significant. Uh, this is a rather startling finding, uh, very, very startling finding. I'd like to, uh, to show you, uh, the, the, uh, actual numbers here. This last column here is the effect, and for personal crime, two point eight two. That's a ratio. That's a two hundred eighty-two percent, uh, difference. For property crimes, uh, relatively no difference. Get down here for drug crimes and all other crimes, uh, two point seven three; for total, crime is about double. That's the effect. And again, those are statistically significant. Uh, this presents a problem, I think, uh, for the authors, and what, uh, what they say is there are analyses reported below where there are small but statistically significant relationships due to the exceptionally large N

sample size employed in the analyses, at times, over eleven-hundred census blocks. Below, we favor, uh, strength over a technical significance, and on and on and on. Essentially, what they're doing is they're ignoring their, uh, results. I want to make a claim here right now that as a statistician, I have seen only two types of studies, studies that find large significant secondary effects, crime-related secondary effects, and studies that are statistically inconclusive. Next, peepshows. A rather interesting, uh, little study. This is done in Centralia, Washington. Centralia, Washington, is, a, a town that's on I-five, uh, just south of Olympia, the state capital--excuse me--just north of Olympia, the state capital, and, uh, a peepshow, classic peepshow opens up. And here we see, uh, before/after comparison, a seventy percent increase. In the rest of the city, uh, crime, total crime went down slightly during that same period of time. And in the, uh, areas, uh, ambient, uh, effects for, uh, four other businesses that opened at that same time, we

see a reduction. This is pretty clear. Again, uh, rather, uh, uh, stark evidence of secondary effects, and not that it makes any difference, but these are statistically significant. Next, peepshows in San Diego, uh, California. Dr. Dan Linz, uh, my, uh, my colleague at University of California Santa Barbara compared, uh, again nine-one-one calls for service around, uh, nineteen peepshows in nineteen control areas. And what he discovered was a sixteen percent increase in crime; a sixteen percent, uh, uh, effect. Again, is that significant? Substantively, that's significant. Uh, that amounts to two entire police precincts in the city of San Diego, uh, tens of millions of dollars per, uh, per month. So, very, very large. Um, Doctor Linz concluded that, uh, because that effect was not statistically significant, uh, that it did not exist, that it was zero. My colleague, Professor, uh, Jim Meeker and I were able to, uh, correct some of the statistical analyses for the fact that nine-one-one calls were used. And as you see, when

we take into account the fact that nine-one-one calls were used instead of crime incidents, uh, we get a very, very statistically significant effect. This effect would only happen less than one time in one hundred by chance alone. I wanna point out one thing right now. Nine-one-one calls are the preferred measure, uh, of public safety by studies commissioned by the sexually oriented, uh, business industry, in my opinion for two reasons. First, uh, police calls for service typically do not include a lot of the vice crimes that, uh, we're talking about. It's very seldom that you see prostitution, uh, crimes come in through the nine-one-one system and result in, a, a call for service. Second, uh, they have much more background noise. They have a much lower signal, uh, uh, signal-to-noise ratio, and therefore, it's very, very difficult to get statistically significant results, uh, out of, uh, uh, police calls for service. Next, takeout book and video stores. These are stores that do not have, uh, video viewing booths. Recently there have been some

attacks on the criminological theory saying that the criminological theory of secondary effects didn't apply to book stores that didn't have viewing booths. As a consequence, a number of people have done studies looking at, uh, stores that don't have booths. This is the first one. Montrose, Illinois. Uh, this is a store, an adult superstore; very, very large; about 3,000 square feet on I-seventy. Uh, I'm comparing here annual crime rates while the store was open and while it was closed. And you see the effect here, uh, ranges from a low of practically nothing, uh, to, uh, three, four, five, six, eight hundred percent. The overall effect, looking at every sort of crime was one point four five. These statistics, just the rate, ignore the qualitative effects. This is a very, very small community in rural Illinois where the, uh, modal crime was somebody drove through my cornfield--literally. This was a village that had not had in recorded history, an armed robbery. After the store opened, uh, two armed robberies in the first, uh, six months.

Second one, a lingerie boutique in Sioux City, Iowa, that essentially, uh, made the same argument that, uh, we don't have a secondary effect, uh, because we don't have booths, because we're a different, uh, business model. Here we have, uh, before/after effects. These are annual effects again. We have a doubling from before, uh, to after. Now what I wanna do, I wanna conclude, uh, with some of the arguments that, uh, the industry's made in about the last five years. First off, government-sponsored studies find effects only because they're methodologically flawed. Uh, well, first off, all nonexperimental studies; these are nonexperimental. We cannot randomly assign sexually oriented businesses to neighborhoods. We can't tell the police to lay off, don't enforce, so on and so forth. So, all nonexperimental studies are flawed. Most of these flaws have benign effects. That is, it doesn't matter. It doesn't matter. But no single flaw explains the broad consensus finding of this literature. Governments' experts have flipped the coin

thirty to forty times and it has come up heads every single time. Second, industry-sponsored studies satisfy the highest methodological standards. These better studies find either no effect or often a salutary effect. This is not true in my opinion. Industry-sponsored studies are designed to support, uh, industry arguments, but even then, these studies almost always find effects. Next. All peer-reviewed secondary effects study show that sexually oriented businesses have either no effect or a salutary effect. That's false. No peer-reviewed secondary effects study shows anything other than an adverse effect or an inconclusive result. Next. Generalized ability. Studies conducted blank years ago in blank are irrel-irrelevant to sexually oriented businesses in Hillsborough County today. Well, the criminological theory of ambient crime risk is two-hundred years old and it applies to every city in every time frame. We have to factor differences into the theory, but the basic theory has withstood tests for two hundred years. Second.

Criminological theory says that a blank type of sexually oriented business shouldn't have secondary effects. That's false. That's absolutely false. Any sexually oriented business that draws patrons from a long distance to a central point, patrons who are predominantly male, who are open to vice overtures, who carry cash, and who when victimized, are reluctant to report fully to the police will have a secondary effect. Oops. Excuse me. Uh, but no study has ever proved that blank type, whatever, fill-in-the-blank type of sexually oriented businesses pose ambient crime risks. Well, even if this is true, this argument is irrelevant. You can always come up with some arbitrary, uh, subcategory, some arbitrarily defined sub-type of sexually oriented business and say you haven't proved it for this. We can't. Theory says all sexually oriented businesses. Uh, finally, to prove that sexually oriented businesses in Hillsborough County have secondary effects, you have to do a study in Hillsborough County. That is false. That is

false. I don't want to go any further in that. Uh, next. Effect sizes. Maybe sexually oriented businesses do have secondary effects, but they're no larger than the secondary effects of bread stores, gas stations, so on and so forth. Uh, I think that's irrelevant first, but criminological theory predicts that gas stations and bread stores will have secondary effects, but smaller effects, and qualitatively different effects. The patrons of gas stations and bread stores are not soft targets. Uh, if the secondary effect isn't statistically significant, that proves that there is no secondary effect. That is not true. That is absolutely not true. It is very, very easy to do a study that is designed so poorly and so weakly that you do not find an effect. That sort of logic is, uh, similar to me not being able to find my car keys in the morning and I conclude, well, maybe my car keys don't exist. In fact it's much more likely that I either did not look hard enough for my car keys but I looked in the--or that I looked in the wrong

place or both. That's something we call statistical power and, uh, that is what I've been talking about with an inconclusive, uh, study. Thank you very much. I, I think I'll end it here. I see, uh, the time, and, uh, just thank you.

CHAIRMAN NORMAN: Thank you.

ATTORNEY LEE: Mister Chair, I believe that, uh . . .

CHAIRMAN NORMAN: Does that conclude the . . .

ATTORNEY LEE: That does . . .

CHAIRMAN NORMAN: . . . the comments?

ATTORNEY LEE: . . . the formal presentations by, uh . . .

CHAIRMAN NORMAN: Okay.

ATTORNEY LEE: . . . the attorneys, and I would ask that you would open the public hearing to the public now.

CHAIRMAN NORMAN: All right. This, uh, this public comment is on, uh, this is the second public hearing to consider adoption of amendments to the Hillsborough County Land Development Code relating to adult uses. Uh, like I said earlier, there will be, uh, two minutes per speaker, and you'll be alerted with a, uh, a buzzer or a bell to let you know when there's

thirty seconds remaining on your time. So, you know, floor's open. Please come forward and make your comments.

MR. MICHAEL WILSON: Thank you. Thank you for this opportunity to allow Hillsborough County citizens to address the Commission about sexually orientated businesses, which I am against. I am from Hillsborough County, and I am from the Winter Strawberry Capital of Florida, Plant City. Uh, it's a beautiful community. But every day when I watch TV and I see young kids being killed by sexual predators and I listen to the many news stories . . .

CHAIRMAN NORMAN: Sir. Would, would you hold on one second, please? There's an echo that's echoing all of a sudden throughout the room. I want you to be able to--okay. All right, please proceed sir.

MR. WILSON: Do I lose my two minutes.

CHAIRMAN NORMAN: No, no, you don't lose it. No.

MR. WILSON: I am so tired, of, of listening to news stories where sexual predators are on the Internet going after our youngsters. Uh, it just doesn't seem like there are many safe

havens for our children where they can grow up without being subjected, uh, to pornographic poison. This country was founded on the ideas of one nation under God, indivisible, with among other things, life, liberty, and the pursuit of justice. These sexually oriented businesses are feeding pornographic poison to sexual predators who are taking the lives of our children. These businesses are using the defense of liberty to take away the life and liberty of our children. We are a nation of laws and justice to protect its citizens, especially the defenseless, our children. Since the motto of our country is in God we trust, please stop this pornographic poison, do whatever you can for the protection of God's children, our children. Thank you.

CHAIRMAN NORMAN: Sir, I need your, uh, name for the record.

MR. WILSON: I'm sorry?

CHAIRMAN NORMAN: I need your name for the record, please.

MR. WILSON: Mike Wilson, Plant City, Florida.

CHAIRMAN NORMAN: Thank you. Next, please.

MS. PATTY MCCLURE: My name is Patty McClure. I live at two six one eight Durant Oaks Drive, Valrico, Florida.

I've been a resident of eastern Hillsborough County for thirty-five years. Now I am a fan of the Home Depot, and I like to go to Home Depot like every week. I have a Home Depot credit card. Well, they put a bikini bar next to my Home Depot. So, a couple of weeks after they opened the bikini bar, my girls and I on a Saturday morning, went to Home Depot to get some mulch. I'm also a big fan of mulch. And I showed up in the Home Depot, and I parked my car out in the parking lot, out by the mulch. I got out of the car, in my flip flops, and stepped on something. There was used condoms all over the floor of my Home Depot. You know what? As an expert mom, that is a negative secondary offense to me. That is a negative secondary affect as a mom in the car at Home Depot.

CHAIRMAN NORMAN: Folks, folks, please.

MS. MCCLURE: A couple of weeks later, I decided that I was gonna go buy some furniture for my daughter's room. Well, on the other side of the new bikini bar in Valrico is an unfinished furniture store. So, got up that morning with

my kids, because I am an expert mom, and I decided that I was gonna go to that unfinished furniture store, on a Saturday morning, with my daughters. I pulled up in the parking lot, and I got out of my side of the car and I said, girls, don't get out of the car, because there was pornographic material, which I--it was a quarter after eight--it was naked women in compromising sexual situations. That's pornographic material. I had to move my car so that they did not see the used condoms and the pornographic material on the, all over the parking lot, because we were gonna go buy a piece of furniture. Thank you very much, and I urge you to vote yes. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

REV. TRAVIS SMITH: Good afternoon. It's a privilege to be able to address you on this issue. My name is, uh, Travis Smith. I reside at fifteen one two three Arbor Hollow Drive in Odessa. I am the senior pastor of Hillsdale Ministries, which includes Hillsdale Baptist Church, Hillsdale Preschool, and Hillsdale Fine Arts Academy. We're located on Ehrlich Road in the Citrus

Park area of Northwest Tampa. I've put my words on paper here, because I'm a pastor and I don't necessarily keep the time. So, I wanted to share this with you. I'm here to speak to you because I'm a father, and I represent over three hundred families that are part of Hillsdale Ministries. It's been a sorrow for me to see the proliferation of ungodliness and immorality represented by the nude adult businesses in Tampa. I've been here twenty-one years now. Sadly, the number of adult businesses nowhere gives an account of the lives, marriages, and families that have been devastated by the predators of this trade in flesh and the lives of young women that have been ruined. I don't stand before you today with scientific data. I stand before you as a pastor that has counseled with young ladies that have rebelled against fathers and ended up turning to this trade, destroying their lives. I stand before you as a pastor that has dealt with families that have been devastated by the choices of a father who ends up compromising his marriage

and losing his family. The magnitude of trade in human flesh through adult businesses is a blight upon the cities and, uh, I thank you for the opportunity to address you.

CHAIRMAN NORMAN: Thank you sir. Next please. I told them.

MR. JOE REDNER: My name is Joe Redner. I live at thirteen ten Alicia. First I want to thank you Ronda for taking care of any competition I might have in the County. Thank you. What's the worst sin, Jim, having a little fun amongst consenting adults that isn't sex or gambling? What's the worst sin Ronda, having a little fun amon- amongst consenting adults that isn't sex or lying and cheating? What's the worst sin Brian, having a little fun amongst consenting adults that isn't sex or getting messed up? If it wasn't for the signs outside these buildings, you wouldn't know what's going on inside them. There are no characteristics outside that would distinguish them from any other places of assembly that are alleged, that are allowed in the very areas you're trying to zone them out of, bars for example. The only effect that they have is on the

willing participant and viewers. The question for the courts is what negative effect does the business being regulated have on its surroundings that others that are allowed doesn't have. The evidence shows the property values don't depreciate. There isn't any more crime--isn't more crime in the area than what goes on inside is none of your busi--oh, there isn't more crime, and what goes on inside is none of your business if it isn't a health risk. If you can really prove there is prostitution or drugs going on in these clubs, you can not only close them down with the RICO statute, you can actually take the property. What we do know is that this law will cost millions of dollars, millions to litigate, and millions to enforce. Let me tell you what you should real-really be dealing with: overcrowded schools, gridlock traffic, and environmental rape. That's what you should be fixing. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

DR. TOM BILES: Good afternoon Mister Chairman, Commissioners. My name is Tom Biles, and I'm the executive

director of the Tampa Bay Baptist Association, which is composed of a hundred and sixty churches, primarily in Hillsborough County, with approximately sixty-two thousand members. First of all, I wanna thank you for giving the people of our County the opportunity to voice our opinions regarding sexually oriented businesses by putting a referendum on the ballot this November. Your effort to address the moral values of our County is greatly appreciated. Second, on behalf of all of our ministries and members, I would like to voice strong support for the ordinance provisions related to the adult businesses that you're considering at this public hearing, and I want to encourage you to do all that you can to see that they are enforced. You have the opportunity and you have the, uh, backing of a majority of the people in Hillsborough County. We want to encourage you to stand fast. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

ATTORNEY DAVID GIBBS III: May it please the members of this Commission, my name is Attorney David Gibbs and I

represent through the law firm, Gibbs Law Firm, two hundred churches and schools, uh, that are located directly in Hillsborough County. Uh, I ask that my comments be incorporated into the record for D seven, D eight, and D nine, all of the related proposals. Uh, overwhelmingly, the churches and the schools are wanting this regulation passed. They are completely in support of it. Uh, it's not just all that you've heard dealing with the crime and the property values and the other issues, but the predominant factor deals with the quality of life and, as they look at their children and as they look at their grandchildren, what kind of Hillsborough County are you gonna leave for them. I would ask that you take these efforts to clean it up, make sure these businesses obey the law and give them the community that these people are looking for.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. DAVID CATON: Chairman and Board members, my name is David Caton. I'm the president of Florida Family Association. I reside at one zero zero two

zero Oxford Chapel Drive in Tampa, Florida. I represent four thousand five hundred and sixty-seven members that live in Hillsborough County from Florida Family Association, and representing them, thank you very much for moving this, uh, this uh, ordinance forward, these ordinances forward. Uh, anybody that can complain or try to complain that do, due diligence has not been executed here, need only go back to see the record. It started in January two thousand and three, over three years that this Commission has patiently waited for jurisprudence and the proper timing developing the proper statistics and information, and I encourage you to follow the counsel that you've given and the documentation that he has provided in en-enacting all these ordinances. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. JESSE GILBERTSON: My name is Jesse Gilbertson. I am here just to say I am against any stricter regulations and/or zoning to the adult nightclub industry. Adding more regulations to an already highly regulated industry will cripple a lucrative

source of income for their employees in this industry, not to mention drive local patrons to other communities to spend their money. Having professional, well managed, and law abiding adult entertainment establishments like ourselves, helps curtail and reduce the rise in prostitution and escort services, which we know are not professionally managed and regulated. Help us keep the money here in Hillsborough County and prevent the rise of any illegal activity by not regulating any more rules and laws to this industry. Thank you.

CHAIRMAN NORMAN: Thank you sir. Next, please.

MR. CHRIS SMITH: My name . . .

CHAIRMAN NORMAN: Welcome sir.

MR. SMITH My name is Chris Smith. Um, I'm here to express my opposition to the proposed adult use ordinance. I have been in the adult industry in the Tampa Bay area for almost ten years, and in those ten years, I've seen a lot of changes. Today's owners and managers are truly interested in following the rules, regulations that already are in place fitting,

uh, and, fitting into the communities that we serve. The new regulations would only serve to put honest people out of work and force an underground, unregulated adult industry to develop. Make no mistake. There is a demand for adult entertainment in the Tampa Bay area. Shutting down or severely regulating honest businesses would only diminish the demand. Keep the current rules and regulations in place. Punish those who do not follow the rules, and allow honest businesses to create jobs, tax revenue, and tourist opportunities. On a personal note, please allow me to support my family. My two children will have a better life than I did. Thank you.

CHAIRMAN NORMAN: Thank you sir. Next, please.

MR. MARK RANDAZZA: My name is Mark Randazza, and I am here to speak against this ordinance. I'd like to show some great respect to Councilman Scott who said earlier, during an earlier presentation, that he believed in keeping his word to his constituents. All of you gave your word when you took office. You did more than that. You took an oath. You took an

oath to uphold and defend the Constitution of the United States and the state of Florida. You took that oath on the Bible, not the other way around. Now if you do not like the message that these clubs, that these businesses transmit, that is your right. That is your prerogative. I saw a particularly inspiring story on the History Channel about the lawyer who defended the Nazis' march on Skopje. Nazis. There is a place in our society even for people so low as Nazis, and a Jewish lawyer took that case, because he loved his country. He loved his constitution more than he loved his desire to sensor their message. That is the challenge I'm throwing down to you. You've got to look inside yourselves and believe in that oath you took more than you believe in the censorship that a few radical elements and outside individuals are pushing you to promote right now. They are pushing you to promote an unconstitutional and antifreedom agenda. They're using the good people of Tampa Bay as their pawns. Take the people of this area off the chessboard.

The public should be outraged. If you think it'll end here, you're wrong. This is where the Taliban, the Nazis, the Communist, they all began with social control like this. And as a patriotic American, I believe the Constitution should and will prevail and protect us all if you do not. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

REV. DAVID WHITTEN: Good afternoon Chairman and Commissioners. My name is David Whitten. I am the senior pastor at Fishhawk Fellowship Church in Lithia, Florida. I'm here on behalf of our six hundred and ten members and regular attenders to encourage you to vote in favor of this. Uh, this is, guess I'm one of the radicals that was just mentioned too. Uh, we live in a very family, oriented, oriented community. We love our community. We love our County. But our reputation for a County is not about the Bucs, it's not about how great the tourism is. Our reputation pretty much State/nationwide is about our adult industry. It's time for us to take a stand. It's time for us to vote in favor of these, and give our community back to

the families and protect our children and the families, which make up this community.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. LENNY GILLESPIE: Thank you for your time. My name is Lenny Gillespie.

CHAIRMAN NORMAN: Welcome, sir.

MR. GILLESPIE: I don't represent an organization. Um, I represent my wife, myself, and I'm one of the people. This is a country of by the people, for the people, unlike that other person said. Uh, child pornography also brings a lot of money into areas. That don't make it right. I'm speaking from both sides of the fence. I spent most of my life being customers of clubs like this. All over the world, in the rest of the world, we call them red-light districts. You want to spread the red-light district all out throughout the neighborhoods, like, like we recently done in Brandon, and we're talking about property values. Put up another nude bar in Brandon and I'm selling my house. I don't want to live there. Tampa has a reputation of being a place to visit for nude bars. If that's the reputation we want, it's

your job to help us get it. By the people, for the people; I should be the boss, and I didn't hire fifteen lawyers with doctorate degrees. I used to fly F-fifteens. I'm not stupid. I traveled all over the world, and I don't need a study to tell me what's right or wrong. My dad taught me. And I don't want it in my neighborhood. I can go to sin city and get it, and they don't have that name for nothing. Thank you very much.

CHAIRMAN NORMAN: Next please.

MR. CHRIS GOULD: Uh, good afternoon. My name is Chris Gould, and, uh, it's good to be here. I want to thank you for your, uh, effort as commissioners to stand for what is right and, uh, I am responsible for, uh, the broadcasting of four local, uh, Christian and family-themed radio stations here in the community. Uh, part of a company that has radio stations across the country. And we are here to deliver a message today to you. Uh, a couple of years ago a group called Citizens for Decency delivered ten thousand petitions to this commission, and we asked you to put a

question on the ballot, the referendum, and so I'm really grateful today to stand here and know that that question is gonna be on the ballot and I also stand here grateful that we're gonna have an opportunity to enforce and, uh, and basically, uh, pass an even stronger set of ordinances here in our community. Uh, it's needed. Uh, we hear it from our listeners. We hear it from folks in our community that we indeed are, uh, better known for the sex industry than we are for, uh, building families. Uh, this from ministries all across the country that are, uh, broadcasting their message here in Tampa Bay--Focus On the Family, Family Life Today, and even local fellowships like, uh, First Baptist Church in Brandon. I mean, these folks are trying to reach our community with a positive message, uh, to impact this culture and, uh, this is a first step. We, I just wanna encourage you to continue to walk forward, stand strong, and do the right thing. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MS. TONI DERBY: My name is Toni Derby. Um, I've been living in this community for twenty-two years. It's a very diversified community. Uh, there is a lot of hate in this community also, and it's just continuing and continuing. Uh, Chamberlain High School is gonna be fifty years old this year. Uh, we still do not have lights on our baseball field or softball fields for our kids. School started August third. Our kids do not have books, enough to go around for all the kids in the classroom. We can go on and on and on. I'm a good mom. I'm involved in Lake Magdalene, Adams, Chamberlain P T As. We have to go out to the communities to get money to raise things. And, uh, I feel this is really a waste of my taxpayer's money. You know, your problem is with talking to your children, teaching them. That's all about education and starting that education; that's my responsibility as a parent. Not you to tell me how to raise my child or what they can see or what they can't see. It takes me an hour and ten minutes to get to work every day for fourteen miles and

back. That is a problem. That's because there's so much growth. We're not addressing that either. I'm very nervous right now, but we also have ordinances or State laws about the kids can drink when they're twenty-one, at twenty-one is legal drinking age, but we allow our alcohol clubs to allow eighteen-year olds. Let's do a study about that. We have two resource officers at every high school. Do you know how much violence there is in high schools? Do a study about that. That's where your money should go, to our kids and to our education, not to this, because it is gonna cost millions and it's gonna cost a lot on both sides. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MS. DENISE GOSSAGE: Hello.

CHAIRMAN NORMAN: Welcome.

MS. GOSSAGE: Mister Chairman, Commissioners, my name is Denise Gossage. I live in Valrico, Florida, and as a concerned citizen, wife, and parent who loves her family, who loves this country, who loves this County, I want to say I'm very grateful to each of you. I can see first hand

now the pressure and the amount that you have to decide on quickly, and I thank you for your wisdom and consideration. Uh, I read on the Internet recently that there is a problem with stereotypes and misconceptions, and I just wanted to address that. Wanting modesty and decency in Hillsborough County and for my own family and friends, is not a stereotype or misconception problem. It is about the welfare of citizens. It's about what is right with Hillsborough County and it is, unfortunately, a matter about money. How are we going to spend our money wisely? So, it is about women. It is about men. It is about children, and no matter your religion or your profession of work, I want you to please consider the next two weeks that there are many voices that could not come here today, but I'm here, and I'm putting the quarters in the meter, and I appreciate you greatly if you consider me and my voice for many others, which says please vote yes for this ban and for the regulations for the adult sex-oriented business. I prefer not to have any at all.

But if we can't choose for people how to live right, then we must regulate it, and we must have standards that can be enforced. And as a Christian, I do wanna say that I am glad I have the freedom in America to honor Christ's name, to be a Christian, and to believe the Bible, and God said modesty and decency is important and should be of value. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. OTHONIEL VALDES: Othoniel Valdes, forty-six O five Farmhouse Drive. I'm originally from Cuba. I came to United States in nineteen sixty-eight. The big difference between my birth country and my adopted country is one of voting. For me, one thing that this proves is that we all are biased. My position has not changed and it won't change. Yours, probably not. But at least I have the opportunity, the freedom to vote my bias if I'm allowed to. So I'm encouraging you to really represent the people by giving them the privilege to vote. Let the people vote and let the courts decide. That's America. That's the constitution. And that takes place every day. The constitution was

written, the constitution was challenged, the constitution is interpreted, but it all starts when we allow people to spread their values and their views. The courts rules and then we abide by their rules, and I will be very disappointed as a citizen of this city since nineteen eighty-nine for an issue as difficult and as, uh, impacting for us to go around circles and discuss how much will the court costs be. I am one taxpayer does not like to pay taxes, but I pay them, and I believe that if you spend whatever it takes to give the people the opportunity to vote and let the courts decide, then you will have represented me well . . .

CHAIRMAN NORMAN: Thank . . .

MR. VALDES: . . . and I can go home and sleep and tell my children, my family . . .

CHAIRMAN NORMAN: Thank . . .

MR. VALDES: . . . I'm proud to live . . .

CHAIRMAN NORMAN: Thank you sir . . .

MR. VALDES: . . . in America.

CHAIRMAN NORMAN: Thank you.

MR. VALDES: Thank you.

CHAIRMAN NORMAN: Next, please. Welcome.

MS. TERRY FECHTEL: Hi and good afternoon. I'm Terry Fechtel. I reside in Tampa. Uh, I'm very concerned about the twelve billion dollar industry that adult sexual-oriented businesses, um, uh, I, I appreciate they bring money into the community, but its money I'd rather not have in my community. Uh, an interesting statis- statistic that came up during one of the talks was the high crime around Tampa stadium. It doesn't take a rocket scientist to see why, because within a mile's reach, there are several adult businesses that strategically place themselves around those sporting facilities because those are the customers. Those are the ones. You cannot open a sports page without seeing, uh, sexual ads, and I can't even let my sixteen-year-old son read the sports page because of all the ads. Um, it doesn't take a rocket scientist to figure that out, so I don't think that that really stands. One thing that I've noticed that, um, that the pornographic industry is, um, doing, is they're defending themselves. Can they

stand here and share anything good that their industry does for community, for people, for women, for children, for students? What good do they do? They were in defense of themselves. Um, I can stand attested that it ruins families. There was a young man that was working in my husband's office who is addicted to pornography, could not handle it, was on the computer all the time, we had to let him go. He has a two-year-old son at home. It does no good but to wreck families, bring divorce, and produce crime. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. KEVIN WRIGHT: Hello. My name is Kevin Wright. I'm a small business owner here in Tampa, Florida, and, uh, uh, I'm here, uh, to speak in favor of, uh, this, uh, consideration, this, uh, legislation you're proposing, and I just wanted to throw a couple of ideas out there for you to hold in your thoughts. Uh, it's traumatic for me to have to get up here and speak in front of you, and it's just mind-boggling to me that we should have to argue for wholesomeness. It really is. You know, I

jus--the, the world that I grew up and what it's actually become, it's, uh, it's heartbreaking, and I think if there's not a person in this room that won't weep for what our city's becoming, then I don't know what we're doing here. I really don't. I just had a vacation. We went to the Grand Canyon, and I had to go through Las Vegas, and you can't walk in the streets in Las Vegas without having literally dozens of people come up to you and push handbills and magazines full of prostitutes at you. Is that what we really want? Is that where we want to go in our city? We need to think deeply about this. I'm here to speak for a couple of other people that couldn't make it here today, and, uh, one of them is named Ted Bundy, and his last testimony to this society was that he was a monster and he knew it, and he just wanted to warn everybody that what started him on his deep slide to depravity and murder was pornography. And if you can't hold that in consideration, I don't know what your oath of office is about. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. TERRY KEMPLE: Commissioners, thank you. My name's Terry Kemple. Uh, I'm director of the Community Issues Council. Uh, we send out about four thousand e-mails and newsletters each month to people who are interested in this kind of issue. I wanna thank you all for really tackling a job that's, uh, really obviously contentious. I wanna thank two people in particular, Commissioner Storms and also David Caton for the work that they've done over the ongoing process over the years to bring this to where we are right now. I'd also like to do one thing. Most of the people who were here, a good many are gone, but just so you can see how many of you out here are for improving the ordinances and--raise your hands, let'em, let'em see, raise your hands . . .

CHAIRMAN NORMAN: Hey . . .

MR. KEMPLE: --so assuming that that's the same--is that wrong?

CHAIRMAN NORMAN: No. I, I, I'm not going to have any yelling and screaming in this audience any longer.

This is not gonna get out of hand folks. So, please, go ahead.

MR. KEMPLE: I didn't ask them to yell or scream, just to raise their hands. Sorry. And it--that's all I really need to say. Sorry, Commissioners, really.

MR. ROBERT GUSTAFSON: Commissioners, I'm Bob Gustafson. I'm with the Hillsborough County Christian Educators Association. On behalf of our membership, we would just like to thank you, and I mean that. Many have already said that today, but we appreciate, I think, the courage that I've seen this Board. I've been coming down here I guess for over thirty years now, and I've never seen a Board quite like this, that is willing to take the stands that you've been willing to take. And I have great admiration for you, and I just wanna thank you from the bottom of my heart. But, one final comment. There are a number of pastors here and, I, I can only share this with you, that we do see the secondary effects, and, uh, they're traumatic and maybe they're not listed on nine-one-one calls and might not be in a

journal or in a survey, but they're very real, very powerful. Thank you for the leadership that you have shown and I know you are gonna continue to show. We appreciate it. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. STEVE STRATOS: Commissioners, I, my name is Steve Stratos. I repr--I reside in Riverview. I represent an adult club here, in, in town. I know this is an emotional issue and it's very charged. Everybody's got a lot of emotion on both sides of the issue. And I also noticed that there's a lot of Christian organizations that are here, and you as government officials understand that there is a definite separation of church and state. You are charged with both defending people that are on the religious side as well as on the business side. And if the businesses are running legally and they're doing but right, they should be defended, and I am fully a, aw-aware ther-there are com--there are people that are not doing things the right way, and they should be dealt with. But, you're gonna take

away income from many of peop--many people. I represent probably two hundred people that work in my club, not just entertainers, but D Js, and, and barbacks, and security personnel, because those secondary effects that you're concerned about, I'm concerned about. I have security in my parking lot so there are no random crimes, no victims in my parking lot. And I get up every day and do the right thing for the people that work for me so that they can have a good living and ha--make a better living for their children, and for those people who talk about the negatives effects of this business, fifty percent of my staff is in school and is paying for their education, not on grants from the government, but through the income that they make through this business. And I have a lot of customers that come to my doors that are not sexual predators, but they're businessmen, they're wearing suits and ties, and these are the people that, uh, that actually patronize my club and these are also the people that will vote. And they may not

show up here at this meeting, but they will show up at a polling booth. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

DR. RICHARD DOMINGUEZ: I am Doctor Richard Dominguez. I'm pastor, senior pastor of Causeway Baptist Church in Riverview in Tampa, Florida, that part of town. I was born in Ybor City, not far from here, in a clinic. And when I went away to seminary and came back home to take my church, I did not recognize my city anymore. The sewers backed up and we're facing it. Not just for our kids but for the future. And I ask you to vote yes for this ordinance, because you know its right in your heart. Thank you.

CHAIRMAN NORMAN: Thank you sir. Next, please. Welcome.

MS. TYRA WOLFE: My name is Tyra Wolfe. I am an undergraduate student at U S F in the field of biology, and I speak for myself. And I simply want to say that the issue at hand today is far greater than any particular ordinance or regulation. The issue at hand is whether a government has the right to regulate morality, and the answer is no.

CHAIRMAN NORMAN: Thank you. Next, please. Welcome.

MR. LARRY CAFRON: My name is Larry Cafron. I am an evangelist with Biblical Research Center here in Tampa. You know that lady was absolutely right, and I, but I commend you for what you're doing, but it's really not your job. Okay. It's the job of all these guys, these pastors, that, that lead all these Christians to get them off their butt, and I'm saying this in love, but you need to get off your lazy butts and get out there and share the gospel in front of these clubs and shame these people that are going in and using these women and exploiting these women, and then they will not be making any money. Okay. And they will stop going, and they will drop out. The Christians here need to get off--you need to wake up, you need to wake up and get out there and do this, because the laws that are being broken are God's laws. All right. God says not to commit adultery, not to covet, not to lie, not to bear false witness, not to dishonor your parents. Those are the laws. All right. It's up to us Christians as sons of God to

represent our Father and basically let people know, reprove 'em, rebuke 'em, and in exhort 'em to, to share the gospel, to accept Jesus Christ as the Lord and Savior. So, I commend you guys, because you're doing what all these people are telling you that are, you know, throwing accolades at you. You're doing what they're supposed to be doing, and that's sharing the gospel to these people, reprove 'em, rebuke 'em for their sin, because what they're doing is deviant behavior. It's immoral. See it's the moral, the moral laws, that's what we're dealing with; not criminal, not civil, not money. It's not about money. It's about eternal life. It's about standing for something and for bringing people to Jesus Christ. We all, all Christians have the ministry of reconciliation. We're called to reconcile sinners. Okay, so get out of your churches, 'cause you don't need to feed the full, you need to feed the hungry. I'm talking to you Christians behind me. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

REV. DAVID STOCKARD: My name is David Stockard. I'm associate pastor of Providence Baptist Church in eastern Hillsborough County. I've been a resident of Hillsborough County for twenty-two years. I just ask this Commission, please, and thank you for your time today allowing us to come and speak. I ask you to consider our families. I also work with families and teens and children. I ask you to vote for our families, vote for our teens, vote for our children, vote to uphold morality and purity, help us do our job more effectively. Certainly, I, I commend you men today, and you ladies, for allowing us to come and share our thoughts. Please stand with us in protecting our families. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please. Welcome sir.

MR. CHARLES SCHWARTZ: My name is Charles Schwartz. Uh, basically, I'm a voter and a taxpayer and I do not want my money spent this way. Uh, Tampa spent millions and millions of dollars to get this ordinance of theirs straightened out, and at the end of the day, it, it seemed like it was more of a personal issue. Uh, it's gonna take

more than five hundred thousand most likely to straighten this out. It's gonna be millions and millions and mill-millions of dollars. I do not want my money spent this way. I'm sure Mister Lirot could tell you how much the city of Tampa paid into the adult industry because of this, and that's about it. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. LARRY ALLEN: My name is Larry Allen. I'm, uh, I'm from Valrico, Florida. Uh, I grew up in the Tampa Bay area. I'm one of the few nat--Floridian natives maybe left, but I grew up here, and uh, one of the, one of the days in my history I do not look fondly on is the day I heard the word Mons Venus. And I have two little boys, and I detest the day when they come to me and ask me what those two words mean. And, uh, Commissioner Norman and I think Ronda Storms, there may have been someone else. Forgive me. But I was here a couple of years ago when we set thousands of, of, of, uh, ballots here or signed signatures and we demanded, we asked, we begged for you to do something and I remember, forgive me Commissioner Norman, but

when you said the meeting was over with, it wasn't you at the time, but when the meeting was over with, I, I did yell, and I said where is the leadership? Where is the leadership? Uh, now is the time for leadership, and will you take that stand today. And that evangelist that came back here, I, uh, I, I don't know his personal beliefs, but I beg to disagree on this one issue. It is not enough to light the light; you must curse the darkness too. And, uh, if we're gonna take a stand, let us not only say what's right with Hillsborough County, but let us curse the darkness too. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. IRVIN JOHNSON: My name is Irvin Johnson. I live in Brandon. I've been a resident of this County since nineteen fifty-three. I, uh, oh, uh, thank you. Just one thought that I guess nobody has really thought about, you know, a lot of this, one young lady said you can't legislate morals; well, yes you can legislate morals. I mean we have laws against bank robbery, but people still rob banks. We have laws against

murder, but people still get murdered. So, you can legislate morals, you can't necessarily be a hundred percent successful, but you can legis-legislate it, and we always do. Now, one thing I was thinking about though, you know, I read in the paper or on the news that some guys, I guess over in Plant City, got arrested for having dog fights. They raise dogs to fight and to kill each other. And, uh, also, I've, in the past, people have, uh, these cock fights where these roosters are put in there and, you know, to fight 'til one is dead or disabled or whatever. And that's against the law they say. Well, now, you mean to tell me that, uh, wel-well, because it's inhumane, and you know, we got to, we got to protect these poor animals, which is good. I agree with that. Well, now, uh, is a dog an-an-and a rooster more important, than a, than a woman? A lot of women that are doing this in these pornographic places are ruining themselves. They don't realize it, but these th-the-this society is taking advantage of them, and

they're ruining themselves. I think yes, if we can protect roosters and dogs, we can-- should protect women from destroying themselves and society with it. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please. Welcome sir.

MR. RUBEN NANCE: My name is Ruben Nance. I reside at eighteen seventeen South Valrico Road, and I want to say today that I do commend you on your decision to put this before the voters. We should be the last one to speak, and we thank you for that today. Share just one thing with you. I have four children and nine grandchildren, but within a half a mile of my home is a strip club on Highway Sixty. I saw Seven-Elevens come in and I saw other stores and other businesses come in, but I want to tell you that my heart skipped a beat when I saw them putting up that sign at that place only a half a mile from where my children ride their bikes and play in the yard and pick oranges and say man, this is Florida. Would you please help us today to have a moral spirit in our community, and again, I thank you so much.

CHAIRMAN NORMAN: Thank you. Next, please. Welcome.

MR. JOSEPH MESTRO: Hi. Thank you for letting me come before you today. Oh, and my name's Joe Mestro, and I live in Riverview, Florida, and I'm not educated. I'm a sixty-five-year-old man. Uh, I am opposed to this industry. I believe that fifty years ago, I don't believe this would've ever even have come up. You know, I don't think that we would even be here today. Oh, uh, you know, I just--our, our country--you know, we say to ourselv--you don't--you can't leave your house now without locking your doors and making sure everything's up tight, and that's because of the moral decline and we need to stan--you know, we need to get ourselves straight. I really appreciate you guys. You've done a wonderful job so far. Please continue. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

REV. DON TANNER: To this Commission I'd like to say thank you. My name's Don Tanner. I, I reside in Ruskin, Florida. I'm the administrator of a preschool and also pastor of a church. It is incumbent upon me to pick up a lot of pieces. In this

industry, which is in question today, has been part and parcel of a lot of broken families and homes. I'd just like to say to you that I commend you in having courage eno--moral courage enough to take on such a serious set of moral conditions. I'd like to just quote you a scripture. You would expect that to come from a preacher. The Bible says righteousness exalteth a nation, but sin is a reproach to any people. Thank you.

CHAIRMAN NORMAN: Thank you. Next, please.

MR. MICHAEL KAVOUKLIS: Good afternoon. My name is Michael Kavouklis, and I live here in Tampa. I'm not going to make any long comments about this, except to remind you about basically what the U.S. Constitution is about, as I used to know it. Up until the nine--mid seventies, it was against the law to curse in public. You could be prosecuted and be convicted of a crime, a misdemeanor. This is the mid-seventies. In the mid-seventies, the pornography places were closed down. Very briefly, in thinking about your decision, I think I, I think I know what it's going to be and I want to commend you on

it. Freedom of speech in the Constitution means freedom of political speech. That's what it's meant for over two hundred years, up until the nineteen seventies, and then they started talking about freedom of expression. Freedom of expression means running around naked, being pornographic, and, and, and cursing. So, that's--consider all this, 'cause I think this has to be revised, this thought process about our Constitution. It doesn't take a genius to be--to understand the Constitution. It really doesn't. I know lawyers would like to make you think that, but it doesn't. It's really commonsense. It's very simple. It was not written by lawyers for lawyers and it wa-was not written by judges for judges; it was written by people, and some were lawyers and some were not. And I guess you might know that you don't even have to be a lawyer to be a member of the U.S. Supreme Court. Have a good decision. Thank you.

CHAIRMAN NORMAN: Thank you. Anyone else? All right. Um, uh, questions by Board members. Commissioner Storms.

COMMISSIONER STORMS: Mister Chair, I did have a couple of questions for the, uh, previous, uh, experts presented by Mister Lirot.

CHAIRMAN NORMAN: You need to, which expert are you referring to. There were several.

COMMISSIONER STORMS: I just--I don't--well . . .

ATTORNEY LEE: (inaudible)

COMMISSIONER STORMS: Okay, so I'd like to ask questions, to, of Mister Fisher, Miss Hanna, or Doctor Fisher, Doctor Hanna, and Doctor Danner. If I could ask those questions.

DR. FISHER: Commissioner Storms, I'm Doctor Fisher.

COMMISSIONER STORMS: Hi, Doctor Fisher. Um, Doctor Fisher, are you paid to be here today?

DR. FISHER: Yes.

COMMISSIONER STORMS: And have you--and who, who's, who's paying for you to be here today?

DR. FISHER: Uh, I'm being paid through the trust account of Mister Lirot's law firm.

COMMISSIONER STORMS: Okay. Have you done previous work for the adult entertainment industry?

DR. FISHER: Yes I have.

COMMISSIONER STORMS: How much work have you done for the adult entertainment industry?

DR. FISHER: Uh, I probably completed about fifteen or twenty, uh, methodological reviews.

COMMISSIONER STORMS: Paid for by the adult entertainment industry?

DR. FISHER: In all but one instance, yes. I did once work for the city of Cocoa Beach many years ago.

COMMISSIONER STORMS: How, how long ago?

DR. FISHER: Uh, that was in the early eighties, I believe.

COMMISSIONER STORMS: And how did you come to have a relationship with the adult entertainment industry?

DR. FISHER: Uh, I met Mister Lirot through, uh, an Orlando attorney by the name of Dick Wilson, who's also a First Amendment lawyer.

COMMISSIONER STORMS: He approached you?

DR. FISHER: Uh, Mister Wilson, uh, talked to me many years ago. This was back in the seventies as a matter of fact.

COMMISSIONER STORMS: So you've been working for the adult entertainment industry since the seventies.

DR. FISHER: I've never really worked for the adult entertainment industry. Uh, I've consulted

with attorneys who are representing adult clients.

COMMISSIONER STORMS: Okay. So you've been paid by the adult entertainment industry since the nineteen seventies.

DR. FISHER: That's correct.

COMMISSIONER STORMS: Thank you. Uh, thank you very much. That's all. Doctor Danner.

DR. DANNER: That's correct.

COMMISSIONER STORMS: Doctor Danner, you're a professor from Saint Leo?

DR. DANNER: Yes, I am.

COMMISSIONER STORMS: And you do some work on, uh, drug use and some analysis on drug use and I think you've published some papers on, uh, soc-social--psychosocial drug use?

DR. DANNER: Um, not specifically. No. I do teach a good deal about drug abuse and drug identification, primarily to police officers.

COMMISSIONER STORMS: And, and what sort of work have you done, uh, on, drug, drug use and the impact of crime?

DR. DANNER: Uh, original research? None whatsoever.

COMMISSIONER STORMS: Okay. Wh-What are some of the positions you've published on drug use and, uh . . .

DR. DANNER: I have not published research directly on drug use, only indirectly looking at the, uh, crime trends in the Ybor City Historic District. There was some drug use data in there, but I don't . . .

COMMISSIONER STORMS: And how long ago was that?

DR. DANNER: Uh, that was published about si--I want to say, estimate six years ago, maybe.

COMMISSIONER STORMS: Six years ago?

DR. DANNER: Yes ma'am. In, in your position on, uh, recreational drug uses has been what, you've advocated, what is your position on criminology and the recreational use of drugs?

DR. DANNER: Uh, could you clarify that question a little bit? I'm not quite sure I understand what you're asking.

COMMISSIONER STORMS: Sure. What's your perspective? What's your professional perspective on recreational drug use?

DR. DANNER: Uh, as in sho--legalization or . . .

COMMISSIONER STORMS: Yeah, sure.

DR. DANNER: Oh, uh, controlled substances are very dangerous technologies. They need to be carefully controlled.

COMMISSIONER STORMS: And so your experience with, uh, with illicit drug sales has been what?

DR. DANNER: In what respect? Studying it professionally or . . .

COMMISSIONER STORMS: Yes.

DR. DANNER: Oh, I do not study drug sales per se other than looking at crime statistics that might include drug de--drug sales.

COMMISSIONER STORMS: And, and what has been your experience, your professional experience in studying, uh, the percentage of crimes related to drug sales?

DR. DANNER: Uh, I haven't done studies specifically on drug sales and crime, but, uh, everyone knows there's a drug/crime connection for sure. That's a fairly standard knowledge.

COMMISSIONER STORMS: And what about prostitution?

DR. DANNER: And the question?

COMMISSIONER STORMS: And the question, is, is what sort of studies, criminological studies have you conducted on prostitution?

DR. DANNER: Oh, I've not done anything on prostitution specifically, except again look at patterns of prostitution as they're associated with economic activities.

COMMISSIONER STORMS: And what are those patterns that you've shown?

DR. DANNER: Well, the one that I showed you today is that during the development of the adult entertainment industry in Tampa, that the prostitution data provided by the Police Department, has, has declined over the last ten or fifteen years.

COMMISSIONER STORMS: And you've looked at, uh, and you've looked at that from an investigation perspective, or you've looked at that just from a prosecution perspective?

DR. DANNER: Uh, from a statistical analysis perspective of trying to understand crime trends and how they're associated with economic development.

COMMISSIONER STORMS: So, the statistics you looked at were they actual prosecutions or were they investigations?

DR. DANNER: They were arrests.

COMMISSIONER STORMS: So basic arrests?

DR. DANNER: Yes, they were.

COMMISSIONER STORMS: And so that would be the result of an investigation, but not ongoing investigations.

DR. DANNER: Uh, yeah, the Tampa Police Department keeps fairly detailed data on all of the

prostitution arrests they make, uh, it's not based on the adjudication of that arrest or anything. It's simply based on pure arrests.

COMMISSIONER STORMS: And so do, you, you didn't, you didn't study whether or not they were investigating prosecu--prostitution more or not, you just studied the number of arrests that were made.

DR. DANNER: Yes, that would be accurate. Yes ma'am.

COMMISSIONER STORMS: Okay. So you wouldn't know if they're not investigating prostitution or they're not conducting investigations into prostitution, you wouldn't know that, you would just measure the number of arrests.

DR. DANNER: Yes. Pro-prostitution arrests, as you are suggesting, are very much proactive enforcement. That is agencies invest resources in doing that and that can increase the probability of arrests being made or they cannot invest the resource and decrease it.

COMMISSIONER STORMS: And are you comfortable discussing, uh, secondary, uh, im--uh, effects and primary effects?

DR. DANNER: Uh, certainly, I'll be glad to . . .

COMMISSIONER STORMS: If I give you a hypothetical, will you be able to tell me it's a primary effect, secondary effect, or just correlative?

DR. DANNER: As long as it's okay if my opinion is based on my reading of court decisions.

COMMISSIONER STORMS: That's right.

DR. DANNER: I'm not an attorney.

COMMISSIONER STORMS: That's fine.

DR. DANNER: Okay.

COMMISSIONER STORMS: Okay. So, she was three years old the first time her mother was arrested for prostitution. Her mother was a dancer. Her father was an adult club owner. She was sev--nineteen years old the first time she was arrested for, allegedly for indecent exposure, and when she was thirty-six years old, she was arrested recently for turning tricks for twenty-five dollars on a park bench. Is that a primary, secondary effect of her mother being a prostitute adult entertainment dancer and her father being an adult owner? Or is it merely correlative?

DR. DANNER: I, I think the courts in my reading, and again I'm not an attorney, would say that it's

neither primary nor secondary. There are many things that go into life paths, and, uh, I think what the courts are looking at is does the activity of a business impact the community in which that business exists. Now, we can't count all of the life stories. All we can do, if you want concrete evidence, is look at arrests, crime statistics. I mean, that's the--you cannot . . .

COMMISSIONER STORMS: Could you do that within th--

DR. DANNER: . . . that's impossible for us . . .

COMMISSIONER STORMS: . . . could you do that within the population of the girls, who, who are in the industry? Would it be appropriate to discover whether or not, uh, there's a primary or secondary effect in that subpopulation?

DR. DANNER: I'm not an expert on it. I do think there has been some research done with, uh, employees, but I'm not an expert on that particular area.

COMMISSIONER STORMS: Last two questions Doctor. Uh, if, uh, recently we had an arrest of an individual who owns an adult book store and apparently he had some, uh, videos of children performing sex acts, including one with himself, uh, uh,

additional videos of himself performing sex ac--sex acts with children. Is that a primary secondary effect, uh, secondary effect, or no effect, in your professional opinion?

DR. DANNER: Well, again, I'm going on the court's opinions, not my opinions. And the primary effects are things that are directly involved in the enterprise and secondary are the impact it has on the community. So anything that happens outside the business as a result of the business would be secondary.

COMMISSIONER STORMS: So, if he, for instance, performed those sex acts and videotaped them in his home, that would be a secondary impact; but if he sold those or had those in his adult book store, that's a primary effect?

DR. DANNER: My understanding is that's what the courts have said, yes. Again, I'm not an attorney, I'd defer to those . . .

COMMISSIONER STORMS: So in that particular case, we would have both a primary effect and a secondary effect in one case.

DR. DANNER: That's conceivable the way you describe it. Yes.

COMMISSIONER STORMS: Thank you. And were you, are you paid by the adult entertainment industry?

DR. DANNER: Of course.

COMMISSIONER STORMS: And how long have you been paid by the adult entertainment industry?

DR. DANNER: Uh, I've been doin--I have also been employed by, uh, governmental agencies to do the same thing, but, I, uh, in terms of, uh, adult entertainment, I'd say, prob-probably ten to fifteen years.

COMMISSIONER STORMS: And how many cases have you advocated on behalf of the adult entertainment industry?

DR. DANNER: I would just be able to give you a rough estimate, uh, six, eight, ten--something in there.

COMMISSIONER STORMS: Are those for individual club owners or also for the association of club executives?

DR. DANNER: Both.

COMMISSIONER STORMS: Both?

DR. DANNER: Both. Yes.

COMMISSIONER STORMS: Okay. Thank you very much.

DR. DANNER: Certainly.

CHAIRMAN NORMAN: Commissioner Sharpe.

COMMISSIONER MARK SHARPE: Some questions for Mister Bergthold. In looking at the, uh, analysis done by different government entities studying the, uh, detrimental impacts and, uh, the, uh, New York City Department of City Planning cites, uh, studies conducted by the city of Annap--uh, Indianapolis, Indiana, where they showed that property appraisers, uh, responded that, uh, seventy-five percent of property appraisers responded that, uh, a, a adult use located within one block of a residential neighborhood would have a negative effect on the value of both residential and commercial properties. Are you familiar with this study that wa--that was, uh, conducted, uh, in, in Indianapolis, Indiana?

ATTORNEY BERGTHOLD: Yes. I believe it's one of the studies in the record. It was done in nineteen eighty-four, and it was a national survey of real estate appraisers. I think it's kind of relevant that you bring it up Commissioner Sharpe, because one of the more recent studies, the September two thousand four Dallas study of real estate appraisers showed very similar

results, even though those are spanning twenty years.

COMMISSIONER SHARPE: There was a study by the city of Austin, Texas, and it showed that sex-related crime rate was sixty-six percent higher in areas having two or more adult businesses. And I found that interesting, because they talk about where there're the--they--the studies, where there are sex--adult use facilities, and there might just be one. Is there a difference in the potential level of crime where you might have one by itself and then maybe five, six, or seven concentrated together?

ATTORNEY BERGTHOLD: Certain studies have studied that concentration issue, and the, the, there seems to be an aggravating effect, where they feed off of one another an-an-and maybe have an exacerbating affect where there's, uh, two or more in a given area. However, the courts have also recognized in the Renton case that we talked about at the outset. It's kind of the cornerstone in this area of the law that, uh, cities and counties can regulate to

prevent the secondary effects caused by even one such establishment.

COMMISSIONER SHARPE: Phoenix, Arizona, had a similar study talking about, uh, an overall increase of si--uh, six times the number of sex crimes in areas where there was a large number of adult-use facilities. Uh, I was interested though, in New York City--I've been trying to get some information on this. You know, uh, Mayor Giuliana--hardly a right-wing, in fact not a friend of the, of the Christian community, but, uh, but an advocate of, of, uh, urban renewal--uh, revitalized New York City, made it a place where people actually would wanna go, because they felt safer. Is there any analysis or studies that have demonstrated what happened when they zoned? They didn't outlaw, because we're not trying to do that, are we? We, we're just, we're strengthening our zoning, is that correct?

ATTORNEY BERGTHOLD: Oh, absolutely not. Outlaws leave you with no law.

COMMISSIONER SHARPE: Right. So, we're zoning, we're strengthening our zoning. But, wh-what, is there any

analysis which shows the impact that, uh, that we had in New York Ci--or that was in New York City when they cleaned, when they strengthened their zoning?

ATTORNEY BERGTHOLD: I don't know that they've done a f-a follow-up study after that series of litigation. It's relatively recent and mostly began in nineteen ninety-eight, nineteen--the mid nineteen nineties, and some of it is still continuing, and we've actually garnered some of the principles for defining adult uses from the New York study. There were two studies there. One by, done by private businesses called the New York Times Square business district study; the other one was done by the ci-city department of city planning, the D C P . . .

COMMISSIONER SHARPE: Is . . .

ATTORNEY BERGTHOLD: . . . and they found similar results.

COMMISSIONER SHARPE: Is that Times Square study, because I, you're, one of your expert witnesses was talking about, uh, one block in particular, and they were--and this study talked about in nineteen eighty-four, they did an analysis of one block where they had a high concentration of adult-

use facilities, and they had over two thousand three hundred crimes--this was in eighty-four--in that one block, in that one block alone . . .

ATTORNEY BERGTHOLD: Um huh.

COMMISSIONER SHARPE: . . . and they, when they were able to begin to, uh, lessen the concentration, crime . . .

ATTORNEY BERGTHOLD: Decreased.

COMMISSIONER SHARPE: . . . reduced. Now, h-how, how, how is it argued then, that there is no detrimental impact when you have a high concentration of, of adult-use facilities? I'm trying to understand.

ATTORNEY BERGTHOLD: Again, it, it goes to the way you define secondary effects. That's what the debate's about. It's not about what the facts are, it's how you interpret the facts and how you define the term secondary effect. You, you got into the discussion on the New York study by taking a jump off of the Phoenix study from nineteen seventy-nine that showed five hundred and six percent higher sex crime rates in areas with sexually oriented businesses. Now, they would come in, and they have done this,

and they've critiqued that study from nineteen seventy nine. In fact, Doctor McCleary isn't on the study, but he did some consulting when he was a professor at Arizona State at the time. And this is a perfect example. It, it, it's an example that over a two-year period in Phoenix, and this is reported in a decision called, uh, Ellwest Stereo Theatre versus Wenner. It's a Ninth Circuit decision from nineteen eighty-two where the parties stipulated that there were seven hundred and eighty-three sex-related arrests in the eleven adult book stores in Phoenix over a two-year period. Now the planners would say you can't--that doesn't mean anything because you didn't compare it to something else. And our argument is no, it does mean something, and you can regulate to control those secondary effects independent of the comparison.

COMMISSIONER SHARPE: Mister Chairman. I'm sorry. I want to ask one last question. Uh, we had a speaker who talked about, uh, going to one of her favorite stores and getting out and, uh, stepping into, uh, products. Uh, how, how is that weighed?

I mean, it, it, it seems to me that, you know, if I'm sending off, you know, a, a family member to, to, uh, go to a st--uh, you know a Home Depot or whatever it might be, and there are, uh, these adult-use facilities in the, in the area, and, and that, uh, could then potentially effect the business climate, because you might have people say, you know, I'm not going to travel to that Home Depot, because they've got, you know, I just don't want to have to mess with them. I'm going to go somewhere else. Is that a detrimental--um, would that be . . .

ATTORNEY BERGTHOLD: Secondary effect . . .

COMMISSIONER SHARPE: . . . considered a secondary--detrimental effect?

ATTORNEY BERGTHOLD: Absolutely. In fact, some of the testimony in this record, and the gentle--lady's comments are well taken, because one of the cases that's cited in the very text of the ordinance, and we've compiled the same legislative record that the city of Spokane, Washington, had--it was called World Wide Video versus Spokane. And that zoning

ordinance dealt with six retail-only adult book stores, and they required all six stores to relocate their stores to manufacturing zones, to l-leave after they'd been in places, some of them over a decade. And the testimony in the legislative record was picking up sexually explicit box covers, uh, used condoms, and the things like that. Sort of what the planner experts would call anecdotal, but the Ninth Circuit Court of Appeals in San Francisco said in the legislative context, that type of citizen testimony is very relevant for lo-local legislators to consider, and they upheld the ordinance in large part because the expert studies did not challenge the public citizen testimony in that case. And there's another case dealing with nude dancing called Fantasy Land Video versus County of San Diego that I was involved with that dealt . . .

CHAIRMAN NORMAN: Uh, uh, uh, okay, let's . . . okay.

ATTORNEY BERGTHOLD: The answer is yes, it's relevant . . .

CHAIRMAN NORMAN: Okay . . .

ATTORNEY BERGTHOLD: . . . I think the eyes glazing over gives me the indication its time to wrap up and, and . . .

CHAIRMAN NORMAN: We've got two more public hearin--we've really got to get this moving.

ATTORNEY BERGTHOLD: Absolutely.

COMMISSIONER SHARPE: Thank you Mister Chair.

CHAIRMAN NORMAN: Okay. Commissioner Hagan.

COMMISSIONER KEN HAGAN: Uh, good afternoon Mister Bergthold. Uh.

ATTORNEY BERGTHOLD: Good afternoon.

COMMISSIONER HAGAN: I've got just one quick question for you. Uh, during our public comment period, I heard a term that, uh, I think it's the second time that I've heard it used, it was the term theatrical experience. And the first time I think I actually read it in the paper, it was used to describe a, a, uh, adult entertainment establishment that was, uh, busted or raided, if you will, and in the backroom they found, uh, condoms and spermicide and the quote from their attorney was it just added to the theatrical experience of the, uh, of the establishment. And then this afternoon, I heard that comment used again relating to lap

dances. Uh, personally, whenever I hear that term, I find it bogus and offensive, and it insults my intelligence, but I'm curious. Uh, you know, is this an industry code word or, uh, I mean, what are your thoughts on that? I mean, wh-what's your opinion?

ATTORNEY BERGTHOLD: The answer is yes. It's an industry code word that the courts have not accepted. Basically, the physical contact overtakes any expressive elements. Wh--the way I understand the theory is that we're so good at erotic dancing that in order to convey the message, we have to get on top of you and engage in the physical contact. But the courts have said that's conduct, not speech.

COMMISSIONER HAGAN: Okay. Thank you.

CHAIRMAN NORMAN: Commissioner Storms.

COMMISSIONER STORMS: Um, just, just, uh, two things. Can we specifically incorporate--I'm sorry. I'm being an attorney here. So, I--stop me where I don't need to be doing this. But, uh, can we specifically incorporate by reference two things that we've dealt with on previous times? One is when we blighted, when we, we,

when we found, uh, Drew Park as a C R A. Everybody talks about, uh, and the adult entertainment industry will come here and say well look at--and, and the expert said three clubs, take the three clubs on Dale Mabry. And so they want you to compare the properties beside it and beside it and the Rooms to Go and the Home Depot and things like that. They don't want you to look at the neighborhood immediately behind Odyssey that's blighted and that has broken windows and crime, et cetera. Same thing with Drew Park. They'll use, uh, the, those clubs on Dale Mabry, but they don't want to look at the whole Drew Park area that we had to declare as a blight. The city of Tampa came to us and said because of the adult entertainment industry in Drew Park, it has blighted this area. That information was unrebutted by the adult entertainment industry. We are spending millions of dollars to, to, uh, revitalize Drew Park as a result of it. And can I specifically incorporate that by reference today?

ATTORNEY BERGTHOLD: I, I believe so. I don't know why you can't.

COMMISSIONER STORMS: Okay. So, the, the third--second thing I want to specifically incorporate by reference then, is the, is the testimony that we received from citizens along Ninety-Two who came here during a land use to discuss with us on Highway Ninety-Two of the, of the sister, uh, club to the one on Highway Sixty. It's right on County Line Road, and the people who live there came and testified to the condoms that they found in their yard, the gunshots, the, the crime, the al--everything associated with that. And I'd like to specifically incorporate that by reference. And then finally, I'd like to ask you, uh, um, that's all I'm going to ask, but I'd just like to ask your professional opinion today on what we should do.

ATTORNEY BERGTHOLD: Well, uh, I can do that in ninety seconds or less. Bob, I can name that note in two minutes. Uh, I promise. The, the bottom line is this started a long time ago. It started before I ever heard of this situation. But ten months ago there was a review commissioned. That review resulted in a

sixty-page report that identified a lot of needs and issues that needed to be addressed in the code. Since then, the review has included research of the relevant secondary effects and the case law from the Supreme Court on down. There's been a diligent review of all sides of the debate. People have given plenty of opportunity to speak, and additional data came in as late as last night, and we are responding to that data. We are reviewing it and will obviously follow-up with our expert and get information so that this Board can proceed and vote as it has in the last year, and that is in due diligence, on a complete record, with all sides considered. And I think that, uh, that's why Miss Lee, at the outset, indicated that it would probably be best to wait until September to take an actual vote, uh, but to incorporate all the information that's been presented, uh, to this Board patiently . . .

CHAIRMAN NORMAN: That's longer than two minutes . . .

ATTORNEY BERGTHOLD: . . . into the next two public hearings--not only this public hearing, but the public

hearing, the official public hearing on the next two ordinances.

CHAIRMAN NORMAN: Uh, uh, all right. Thank you. Commissioner Scott.

COMMISSIONER THOMAS SCOTT: Well, Mister Chairman, I think we would all agree that we have been inundated with a lot of information over the last several months and in particular last week or so in terms of, uh, documentation, studies, and report. Um, some of it have, uh, caused us to fall asleep on. Some of it has been lengthy. Uh, lot of information. Lot of information. I think when at the end of the day and when the vote is finally taken, we'll probably be well knowledgeable in terms of the adult industry. Uh, I would say though, Mister Chairman and to my colleagues today with regard to all of the studies that we talked about and all of the information, all it takes is for one child or one mother whose daughter is affected by this industry to have an affect on a family. Thank you for all the studies, all the information, but one daughter, one family can be affected. I have one daughter. One. I would not wanna

wish upon any family this kind of environment or the crime that's associated with it. The second thing I want us to conclude with and say Mister Chairman, as a pastor, and I appreciate what Doctor Gustafson said. I will tell you that many college students who go off to college, they find themselves in this industry. I have had young people come into my office and talk about what they had to do and how they have engaged in this kind of industry to get money to meet their tuition obligations and that and for some reason they were not able to move beyond that. That's fact. We can talk about the secondary effects and all of that, but it's real. It's reality to our college students, to our children, and to our family. Thank you sir for all your information and all that we heard today. Mister Caton, thank you and Commissioner Storms. Mister Caton, uh, has been dealing with this going back really to Reverend Sykes, back in the early nineties, and, uh, forward, and Commissioner Storms, her leadership in

particular on this issue, uh, issue before the Board. So thank you.

CHAIRMAN NORMAN: I, I really don't, and maybe next time when we vote or something--I don't want you to talk . . .

ATTORNEY BERGTHOLD: I'm feeling that vibe Mister Chairman.

CHAIRMAN NORMAN: Let, let, let me just say though, uh, when they say there, there has to be proven secondary e-effects and those sorts of things. Uh, we participated in strong legislation that created twenty-five-hundred-foot buffers from elementary schools. If there's no secondary effects, how do these laws stay on the books and how are they, uh, enforceable if there's no effects. Because, clearly, uh, there must be an effect for, those, those laws to be able to exist. There, w-why wouldn't there, because when we took that challenge on, there was actually approved land use designations of a-adult uses across the street from elementary schools. That changed. So, if there's no secondary effects, how in the world would those laws be able to stay on the books. Uh, and just want to tell you about a lot of money

being spent and how strongly, this, this Board is passionate. Some years ago, we actually put up hundreds of thousands of dollars to build, a, an enormous wall between a neighborhood and an adult use that was being built, being approved--it, it, it was actually adult use club, uh, video store, that kind of thing. And we spent the money because of how passionate we are of protecting neighborhoods. And we, without, uh, we tried it, we took it basically in our own hands to try to protect neighborhoods when the law wouldn't stand with us. So, to everyone, we're trying to make a difference, and we believe there is secondary effects even with the information I've read, and we've walked the walk, so, for what it's worth. Uh, what I, I need a motion to close the public hearing on that point.

COMMISSIONER STORMS: So moved.

CHAIRMAN NORMAN: Is there a second.

COMMISSIONER SCOTT: Second.

COMMISSIONER HAGAN: Second.

CHAIRMAN NORMAN: Please record your vote and, uh . . .

RECORDING SECRETARY: Motion carried seven to zero.

CHAIRMAN NORMAN: I need a motion to continue, uh, this first item, until, do you have a date . . .

COMMISSIONER SCOTT: So moved.

ATTORNEY LEE: September seventh.

COMMISSIONER STORMS: Second.

CHAIRMAN NORMAN: Okay. Please record your vote.

RECORDING SECRETARY: Motion carried seven to zero.

CHAIRMAN NORMAN: Okay. At this time, I'm gonna open up, uh, the public hearing for, uh, uh, consider adoption of an ordinance regarding licens- licensing requirements and, uh, regulations for sexually oriented businesses. Uh, the floor is open for anyone who would like to make a comment. Okay, hearing none; seeing no one coming forward.

COMMISSIONER STORMS: Uh, move . . .

CHAIRMAN NORMAN: . . . If you're gonna speak, come forward right now if anyone's gonna speak to that.

COMMISSIONER STORMS: Mister Chair, can we just incorporate the--can we just incorporate the public comment that we took from the previous public hearing?

CHAIRMAN NORMAN: Wel-we, we, we can, but . . .

COMMISSIONER STORMS: Okay.

CHAIRMAN NORMAN: . . . it's uh, it's three different items . . .

COMMISSIONER STORMS: Oh.

CHAIRMAN NORMAN: . . . that I want to open to the floor. That was the stipulation.

COMMISSIONER BRIAN BLAIR: Would you mind re-explaining why we're doing this to the public.

CHAIRMAN NORMAN: Th-these are three separate action items of our Board . . .

COMMISSIONER BLAIR: . . . so they know . . .

CHAIRMAN NORMAN: There is a land use issue, a, a land development code; there is a, uh, a regulation of licensing for the sexual-oriented businesses; uh, and then there is a third, with, dealing with the alcoholic beverage issue with adult industry. So, uh, but you're right Commissioner, there could be a motion that incorporates all of the previous testimony . . .

COMMISSIONER STORMS: Right.

CHAIRMAN NORMAN: . . . uh, when I close the public hearing.

COMMISSIONER STORMS: Okay.

CHAIRMAN NORMAN: Okay.

COMMISSIONER STORMS: So, move to close the public hearing.

COMMISSIONER BLAIR: Second.

CHAIRMAN NORMAN: And to incorporate the, all . . .

COMMISSIONER STORMS: And to incorporate previous comments . . .

CHAIRMAN NORMAN: Okay.

COMMISSIONER STORMS: . . . into this.

CHAIRMAN NORMAN: Okay. Okay. Commissioner Blair, do you . . .

COMMISSIONER BLAIR: No. That's okay.

CHAIRMAN NORMAN: Uh, Commissioner Hagan.

COMMISSIONER HAGAN: I've just got one question for Mister Bergthold.

CHAIRMAN NORMAN: Sure.

ATTORNEY BERGTHOLD: Commissioner Storms I'd just note that not only the comments and testimony, but all the documents . . .

COMMISSIONER STORMS: Right, yes.

ATTORNEY BERGTHOLD: . . . that have been received obviously are part of that motion.

COMMISSIONER STORMS: Yes sir.

COMMISSIONER HAGAN: Um, I'll be quick. I think I've asked you this before. Last year w-we experienced for the first time to my knowledge, uh, strip club buses, if you will, and I've adamant--been adamant that we include language that sufficiently covers this type of activity, and

I just wanna make sure that, uh, again, have it on the record that you're comfortable with the language that's included. I believe you call it mobile adult cabarets.

ATTORNEY BERGTHOLD: Yes.

COMMISSIONER HAGAN: And that sufficiently covers this type of activity?

ATTORNEY BERGTHOLD: I think so. It doesn't require licensing, because that's difficult, but it require-- governs conduct.

COMMISSIONER HAGAN: Thank you.

CHAIRMAN NORMAN: Uh, Commissioner Storms.

COMMISSIONER STORMS: Mister Chair, the only thing I would add to Commissioner Hagan is it probably goes to that study that the, uh, that the expert from, uh, from the adult entertainment industry used and said he studied around the stadium and found an increase, uh, in crime, and of course they did. They're bussing it in there.

CHAIRMAN NORMAN: Uh, Commissioner, to, to make this-- Commissioner make this extremely accurate, would you restate your motion, uh.

COMMISSIONER STORMS: Yes sir. I'll restate my motion to, uh, to close the public hearing to include all of the

previous testimony in addition to all of the public records and documents associated with the, uh, with the item.

ATTORNEY BERGTHOLD: Close the public, uh, testimony portion of the public hearing.

COMMISSIONER STORMS: Mo--close the public testimony portion.

CHAIRMAN NORMAN: Okay. Is there a second.

COMMISSIONER SCOTT: Second.

COMMISSIONER BLAIR: Second.

CHAIRMAN NORMAN: Please record your vote.

RECORDING SECRETARY: Motion carried seven to zero.

CHAIRMAN NORMAN: Can we have a motion to, uh, continue this item . . .

COMMISSIONER SHARPE: So moved.

CHAIRMAN NORMAN: . . . until the seventh of September.

COMMISSIONER STORMS: Second.

CHAIRMAN NORMAN: Please record your vote.

RECORDING SECRETARY: Motion carried seven to zero.

CHAIRMAN NORMAN: Okay. At this time we'll open up a public hearing, uh, regarding conduct regulations and estab-establishments dealing in alcoholic beverages. Uh, is there anyone here today that would like to speak to that item?

MR. KEMPLE: Just real quickly. Commissioners, again, I'm Terry Kemple, and I won't create any commotion. I apologize. Uh, I believe that this may be the most insidious attack on the values in our community, because it purports to be something other than what it actually is. So, I appreciate your desire and your fortitude in isolating, this, this business-type and creating regulations to protect the community from the secondary effects of what is purported to be a bar. Thank you.

CHAIRMAN NORMAN: Thank you. Anyone else?

COMMISSIONER SCOTT: Move to close the public hearing.

COMMISSIONER SHARPE: Second.

COMMISSIONER BLAIR: Second.

COMMISSIONER STORMS: (inaudible) and to (inaudible)

CHAIRMAN NORMAN: Okay. Wait . . .

COMMISSIONER BLAIR: Include . . .

COMMISSIONER SCOTT: The same, same, all of the same (overlay of voices) including all the documents

CHAIRMAN NORMAN: . . . all of the previous comments . . .

COMMISSIONER SCOTT: Right. Yes.

CHAIRMAN NORMAN: . . . previous public comments and all the documents . . .

COMMISSIONER SCOTT: Yes.

CHAIRMAN NORMAN: . . . are included in the motion.

COMMISSIONER SCOTT: That is accurate.

CHAIRMAN NORMAN: And there is a second.

COMMISSIONER BLAIR: Second.

CHAIRMAN NORMAN: Please record your vote.

RECORDING SECRETARY: Motion carried seven to zero.

Requested by: Ms. Sue Miller
Date Requested: July 9, 2007
Prepared by: Sue Dennis, BOCC Records
Date Prepared: July 16, 2007

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH
THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF verbatim transcript of Items D-7, D-8 and D-9, August 16, 2006, BOCC meeting.
WITNESS MY HAND AND OFFICIAL SEAL THIS 19th DAY OF July 2007.
PAT FRANK, CLERK
BY: GM Litzinger D.C.

BOARD OF COUNTY COMMISSIONERS HILLSBOROUGH COUNTY

# CRIME-RELATED SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES:

## REPORT TO THE HILLSBOROUGH COUNTY COMMISSION

Richard McCleary, Ph.D.
August 30th, 2006

Expressive activities that occur inside sexually-oriented businesses (SOBs), such as X-rated bookstores, video arcades, peep-shows, or erotic dance clubs, have broad First Amendment protection. Nevertheless, governments are allowed to regulate the time, manner, and place of expressive activities so long as regulations are motivated by and aimed at ameliorating the potential secondary effects of SOBs.[1] Governments typically attempt to regulate SOBs through zoning or planning codes, business licensing codes, and where applicable, through alcoholic beverage control codes. Regardless of the mechanism, of course, regulations must be aimed narrowly at the secondary effects of the business.

Crime is one of the most important secondary effects. By virtue of my education, training, and experience, I am an expert in criminology and statistics. Throughout my 30-year career, I have applied my expertise in these fields to the problem of measuring site-specific public safety hazards, especially the hazards associated with SOBs. I have testified in a dozen or more lawsuits and, as a community service, have advised local, county, and state governments on secondary effect problems. Based on my background and research, I have three general opinions that are relevant to the Hillsborough County Commission:

> **Opinion 1**: The criminological theory of ambient crime risk, known as the "routine activity theory," predicts that SOBs have large, significant crime-related secondary effects. The effect is the product of three factors. (1) SOBs draw patrons from wide catchment areas. (2) Because they are disproportionately male, open to vice overtures, reluctant to report victimizations to the police, *etc.*, SOB patrons are "soft" targets. (3) The high density of "soft" targets at the site attracts predatory criminals, including vice purveyors who dabble in crime and criminals who pose as vice purveyor in order to lure or lull potential victims.
>
> **Opinion 2**: In the last thirty years, empirical studies employing a wide range of quasi-experimental designs have found that SOBs have large, significant crime-related secondary effects. Since these studies are quasi-experiments, each can be criticized on narrow methodological grounds. Since no single methodological critique applies to all (or even most) of these studies, however, the consensus finding of the literature is scientifically robust.
>
> **Opinion 3**: Given that strong criminological theory predicts the effect, and given that the prediction is corroborated consistently by the empirical literature, it is a *scientific fact* that SOBs pose ambient crime risks.

This report will expand on and explain these opinions. I will begin with an introduction to the relevant criminological theory. The secondary effects "debate" often misses this important point: Criminological theory *predicts* that SOBs will generate ambient public safety hazard. After developing the theoretical foundation, I will review the studies that parties to the "debate" have used to test the theory. *With virtually no exceptions*, these studies corroborate the theory predictions. Finally, I will discuss a few of the practical considerations that underlie secondary

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[1] *City of Renton, WA v. Playtime Theaters, Inc.* 475 U.S. 41 (1986).

effect studies.

## 1. THE CRIMINOLOGICAL THEORY OF SECONDARY EFFECTS

It is a *scientific fact* that SOBs, as a business class, pose large, statistically significant ambient public safety hazards. The public safety hazard is realized not only in terms of "victimless" crimes (prostitution, drugs, *etc.*) but, also, in terms of the "serious" crimes (assault, robbery, *etc.*) and "opportunistic" crimes (vandalism, trespass *etc.*) that are associated with vice.

**Table 1 - Secondary Effect Studies Relied on by Legislatures**

| | | | |
|---|---|---|---|
| Los Angeles, CA | 1977 | Times Square, NY | 1994 |
| Whittier, CA | 1978 | Newport News, VA | 1996 |
| St. Paul, MN | 1978 | Dallas, TX | 1997 |
| Phoenix, AZ | 1979 | San Diego, CA | 2002 |
| Minneapolis, MN | 1980 | Greensboro, NC | 2003 |
| Indianapolis, IN | 1984 | Centralia, WA | 2003 |
| Austin, TX | 1986 | Daytona Beach, FL | 2004 |
| Garden Grove, CA | 1991 | Montrose, IL | 2005 |
| Manhattan, NY | 1994 | Sioux City, IA | 2006 |

I call the SOB-crime relationship a "*scientific fact*" because, first, it is predicted by a strong scientific theory; and second, because the theoretical prediction has been corroborated empirically. On the second point, Table 1 lists eighteen empirical studies whose findings corroborate the claim that SOBs pose large, significant ambient public safety hazards.[2] The remarkable range of time-frames, locations, and circumstances represented by these studies suggests that the consensus finding is general and robust.

The consensus finding of this literature becomes *scientific fact* when it is interpreted in the context of a scientific theory. In this instance, the SOB-crime relationship is predicted by modern criminological theory. The central "organizing theory" of modern scientific criminology, the so-called routine activity theory,[3] answers the what-when-where questions of victimization

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[2] Most of these studies either do not report subclass-specific secondary effects or, else, do not include SOBs that feature live entertainment. The Greensboro (2003) and Daytona Beach (2004) studies are exceptions. I will discuss the findings of these two studies at a later point.

[3] This theory is due to L.E. Cohen and M. Felson, Social change and crime rate trends: A routine activity approach. *American Sociological Review*, 1979, 44:588-608. See also, M. Felson's *Crime and Everyday Life, Second Edition* (Thousand Oaks, CA: Pine Forge Press,

risk. In this particular application, *e.g.*, the theory holds that the *CRIME RISK* at a site is determined by three factors:

(1) the number of potential victims (or *TARGETS*) at the site;
(2) the relative "*SOFTNESS*" of the targets; and
(3) the number of potential *OFFENDERS* at the site.

Ignoring mathematical technicalities, this three-factor theory can be written formally as:

$$CRIME\ RISK = TARGETS \times SOFTNESS \times OFFENDERS$$

If any of the three factors is zero, no matter how large or small the other two factors might be, *CRIME RISK* is zero. When none of the factors is zero, however, increasing or decreasing one of the factors while holding the other two constant yields an increase or decrease in *CRIME RISK*.

To illustrate the *CRIME RISK* equation, Figure 1 plots the *CRIME RISK* functions for sites with predominately *SOFT* and *HARD TARGETS*. The horizontal axis of Figure 1 gives the range of *TARGET-OFFENDER* densities at the two sites.[4] (Since *TARGETS* attract *OFFENDERS* to the site, we, targets at *CRIME RISK* functions are generally sigmoidal or s-shaped.)

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1998). The routine activity theory that predicts the SOB-crime relationship is one of the most widely tested and accepted theories in modern social science. In 2005 alone, according to the *Social Science Citation Index*, the 1979 Cohen-Felson article was cited 621 times. In the last 30 years, the routine activity theory of crime risk has been tested thousands of times. Each test has confirmed the theory.

[4] Since *TARGETS* attract *OFFENDERS* to the site, so a three-dimensional is unnecessary – fortunately. Otherwise, *CRIME RISK* functions are generally nonlinear with sigmoidal or s-shapes as plotted in Figure 1.

**Figure 1 - Crime Risk as a Function of Target-Offender Density**


The high ambient risk at SOB sites follows from the extraordinary conjunction of all three factors. Specifically:

- SOBs draw large numbers of potential victims or *TARGETS* from long distances to a common site.[5]

- The *TARGETS* drawn to the SOB site are relatively *SOFT*. They are disproportionately male, *e.g.*; are open to vice overtures; carry cash; and when victimized, are reluctant to co-operate with the police.[6]

- The relatively high density of *SOFT TARGETS* drawn to the site attracts *OFFENDERS*. These *OFFENDERS* are "professional" criminals in the sense that they lack legitimate means of livelihood and devote substantial time to illegitimate activities. Some are vice purveyors who dabble in crime; others are criminals.

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[5]In 1990, as part of an investigation, Garden Grove police officers ran registration checks on motor vehicles parked at SOBs. Virtually all of the vehicles were registered to addresses outside Garden Grove. The 1986 Austin, TX study arrived at the same finding. More recently, the Effingham County Sheriff's Department ran registration checks on motor vehicles parked at an SOB in the Village of Montrose. Except for employees' vehicles, all were from outside the county.

[6] Three of the armed robbers interviewed by Richard T. Wright and Scott H. Decker (*Armed Robbers in Action: Stickups and Street Culture*, Northeastern University Press, 1997) worked as prostitutes: "From their perspective, the ideal robbery target was a married man in search of an illicit sexual adventure; he would be disinclined to make a police report for fear of exposing his own deviance (p. 69)."

who promise vice to lure and lull victims.[7]

The routine activity theory's causal mechanism, thus, can be reduced to two sentences: SOBs attract *SOFT TARGETS*. *SOFT TARGETS* attract *OFFENDERS*.

### 1.1 WHAT DOES CRIMINOLOGICAL THEORY SAY ABOUT SUBCLASSES?

No narrow SOB subclass is exempt from criminological theory. To the extent that two SOB subclasses draw similar patrons from similarly wide catchment areas, theory predicts similar ambient crime risks. In short, similar causes (high *TARGET* density, soft *TARGET*s, *etc.*) have similar effects (*i.e.*, high ambient crime risk). This theoretical expectation applies to all SOB subclasses and, furthermore, is consistent with the relevant data.

In lawsuits, SOB plaintiffs have argued that they belong to an SOB subclass that is exempt from criminological theory. Variations on the general argument include:

- "Our patrons are up-scale."
- "Many of our patrons are women."
- "Our patrons park, run in, make their purchase, and leave."

While these arguments have commonsense appeal, criminological theory contradicts common sense. Since "up-scale" patrons are especially attractive *TARGETS*, *e.g.*, high socioeconomic status may attract more predators to the site. Likewise, the presence of female patrons can make an SOB site more attractive to male patrons. SOBs have advertised that their patrons include unattached females, especially exotic or nude entertainers; SOBs often attract unattached females with offers of lingerie gifts.

The final example is at the center of several lawsuits. The patrons of SOBs that sell merchandise exclusively for off-premise use, according to the argument, spend only a few minutes on the premises. Since they spend little time in the SOB, their presence should not attract predators to the neighborhood. This argument does not hold up, however. No matter how long the patrons spend *inside* the SOB, they are perceived to be relatively "soft" targets and, thus, their presence in the neighborhood attracts predatory criminals. I will have more to say about

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[7] The relationship between predatory criminals and vice purveyors has been a popular plot device for nearly 250 years. John Gay's *Beggar's Opera* (*ca.* 1765), *e.g.*, centers on the trials and tribulations of a predatory criminal (MacHeath) and a vice ring (Peachum, Jenny, Lucy, *etc.*). Empirical studies of the phenomenon begin go back at least 75 years to Clifford R. Shaw's case study of "Stanley" (*The Jack-Roller: A Delinquent Boy's Own Story*. University of Chicago Press, 1966 [1930]).

this topic later.

This is not to say that subclass differences are irrelevant. On the contrary, while each subclass will have *some* crime-related secondary effect, subclass characteristics may affect the qualitative nature of the effect. To illustrate, since adult cabarets and adult peep shows attract "soft" *TARGETS* to their sites, both SOB subclasses will pose ambient public safety hazards. The qualitative nature of their hazards (and in particular, the optimal strategies for mitigating their hazards) may vary, however.

### 1.2 THE THEORETICAL ROLE OF ALCOHOL

Proximity to alcohol is a key component of the routine activity theory's *SOFT*ness factor. Alcohol aggravates an SOB's already-high ambient *CRIME RISK* by lowering the inhibitions and clouding the judgments of the SOB's patrons. In effect, alcohol makes the *SOFT TARGETS* found at the SOB site *SOFT*er.

The available data corroborate this theoretical expectation in all respects. Predatory criminals prefer inebriated victims,[8] *e.g.*; and SOBs that serve alcohol (*e.g.*, adult cabarets) or that are near liquor-serving businesses pose accordingly larger ambient public safety hazards.[9] Governments rely on this consistent finding of crime-related secondary effect studies as a rationale for limiting nudity in liquor-serving businesses.

### 1.3 THE THEORY OF MITIGATION STRATEGIES

The routine activity theory of crime points to strategies for mitigating the crime-related secondary effects of SOBs. In principle, the effects of a mitigation strategy can be *direct* or *indirect* . *Direct* effects are typically realized through *direct* manipulation of the risk factors.

- Reducing *TARGET* density. Residential victimization risk can be reduced by mandating long distances between SOB sites and residences. Codes that disperse SOB sites mitigate *CRIME RISK* by reducing *TARGET* density.

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[8] *E.g.*, Wright and Decker (1997): "[E]ach of (the armed robbers) expressed a preference for intoxicated victims, who were viewed as good targets because they were in no condition to fight back. (p. 70); "Several [armed robbers] said that they usually chose victims who appeared to be intoxicated because, as one put it, 'Drunks never know what hit them.'" (p. 87).

[9] My 1991 Garden Grove study found a large, significant increase on crime risk when an alcohol-serving establishment opened within 500 feet (*ca.* one city block) of an SOB. Secondary effect studies in Greensboro (2003) and Daytona Beach (2004), to be discussed shortly, found that alcohol-serving SOBs had larger secondary effects than retail alcohol outlets.

- Hardening *TARGETS*.[10] Codes that mandate on-site security (lighting, uniformed guards, *etc.*); or that facilitate intensive police patrolling; or that limit alcoholic beverages mitigate *CRIME RISK* by this mechanism.

- Reducing *OFFENDER* density. Codes that disperse *TARGETS* across sites make sites less attractive to *OFFENDERS*. Codes that mandate on-site security also "work" through this mechanism, of course.

The effects of these example mitigation strategies are *direct* effects because each is realized *directly* through one of the routine activity theory's risk factors.

In practice, of course, mitigation strategies often have complex effects, working *directly* through one of the theory's risk factors, or, more often, working *indirectly* through some distal mechanism. The mitigation strategies with *indirect* effects can be dived into two categories:

- Optimization/reallocation strategies. Minor modifications of a code can sometimes reduce the costs of compliance (to the SOB) or the cost of enforcement (to the government) of both. Resources saved by the modification can then be reallocated to other strategies.

- "Broken windows" enforcement. By focusing police resources and attention on SOB sites, codes can reduce risk through a complex set of pathways.[11] Codes that regulate the internal environment of the SOB site are an example of this mechanism. Regular inspections and routine, visible police presence in the neighborhood have the effect of reducing *CRIME RISK*.

The effects of optimization/reallocation and "broken windows" strategies are *indirect* in the sense that neither aims *directly* at one of the theory's risk factors. Rather, both types of strategy aim at extra-theoretical factors.

The distinction between *direct* and *indirect* effects is not useful in all instances. Nor is it always feasible to distinguish the unique contributions of several factors to a mitigation

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[10] The classic statement on target-hardening is Oscar Newman's *Defensible Space: Crime Prevention Through Urban Design*. (New York: MacMillan, 1973).

[11] The best known statement of this effect is "Broken windows: The police and neighborhood safety." by J.Q. Wilson and G.L. Kelling, *Atlantic Monthly*, 1982, 249:29-38. Wilson and Kelling argue persuasively that police visibility in a neighborhood can have a greater impact on victimization risk than police activities that target crime *per se*. Modern police methods are based on this theory.

strategy's *direct* and *indirect* effects. Some example mitigation strategies may be useful at this point.

### 1.3.1 VISIBLE POLICE PRESENCE

From the government's perspective, visible police presence is an expensive (and thus, impractical) mitigation strategy. From the perspective of the SOB and its patrons, on the other hand, visible police presence is highly intrusive. Nevertheless, *visible police presence at the SOB site is the most effective strategy for mitigating an ambient public safety hazard*. When the routine activity theory of crime was originally proposed, 30 years ago, police presence appeared in the denominator.[12]

$$CRIME\ RISK = \frac{TARGETS\ X\ SOFTNESS\ X\ OFFENDERS}{POLICE\ PRESENCE}$$

Holding the numerator constant, an increase in *POLICE PRESENCE* drives *CRIME RISK* down; while a decrease in *POLICE PRESENCE* drives *CRIME RISK* up.

Although the *POLICE PRESENCE*-*CRIME RISK* relationship is complicated and complex, criminologists generally accept the aphorism "more police, less crime."[13] In most jurisdictions, due to budgetary limitations, increasing the level of *POLICE PRESENCE* in an SOB neighborhood is unfeasible. Accepting that fact, *virtual* increases in *POLICE PRESENCE* are still possible:

- Minimizing (or eliminating) circumstances that reduce the effectiveness of patrolling.
- Increasing police visibility; using uniformed officers in marked vehicles for patrol functions (instead of plain-clothes officers in unmarked vehicles).
- Making enforcement easier and/or more efficient; relying on technology to make patrol functions more effective.

I will offer several examples of these general methods in the sections following.

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[12] In their 1979 article, Cohen and Felson called this factor "guardianship."

[13] See, *e.g.*, S.D. Levitt. Using electoral cycles in police hiring to estimate the effect of police on crime. American Economic Review, 1997, 87:270-290. "Increases in police are shown to substantially reduce violent crime but have a smaller impact on property crime. The null hypothesis that the marginal social benefit of reduced crime equals the costs of hiring additional police cannot be rejected." (p. 270) Some "victimless" vice crimes are an exception to the rule, of course.

### 1.3.2 LIMITING "HOURS OF OPERATION"

The ambient public safety hazard of an SOB can be mitigated by limiting its "hours of operation." Criminological theory reduces to the aphorism, "more targets, more crime." And in the overnight hours when businesses close and people go home, the crime rate drops. While the crime *rate* drops, however, the per-target risk rises. When a business stays open around-the-clock, its victimization risk rises steadily after sundown, peaking in the early morning. Darkness softens a target, increasing its appeal to predatory criminals.

Several mechanisms operate here but the most salient is that routine policing is more difficult and less effective in darkness. When bars and taverns close, police resources are stretched thinner yet, making soft targets even softer. Governments typically mitigate this risk by closing high-risk public places (playgrounds, beaches, parks, *etc.*) from dawn to dusk; by imposing curfews on high-risk persons (teen-agers, parolees, *etc.*); and limiting the operation of high-risk businesses (bars, SOBs, *etc.*) during times of acute risk. Not surprisingly, this theoretical prediction is confirmed by the empirical evidence.

### 1.3.3 POLICE OFFICER SAFETY

A commonly overlooked (but nevertheless important) component of ambient crime risk consists of incidents that occur inside the SOB. The majority of these incidents fall into six categories: (1) crimes against the SOB *per se* (*e.g.*, robbery, vandalism); (2) "victimless" crimes committed by patrons (*e.g.*, lewd behavior); (3) patron-on-patron crimes (*e.g.*, assault); (4) patron-on-employee crimes (*e.g.,* battery); (5) employee-on-patron crimes (*e.g.,*, battery); and (6) crimes against police officers charged with enforcing regulations inside the SOB (*e.g.*, battery).

Crimes categories (3), (4) and (5) occur most commonly inside SOBs that offer live entertainment; and of course, since alcohol aggravates the risk of all three crime-types, the risk is particularly acute in adult cabarets. In adult cabarets, crime risk can be mitigated by structures designed to separate entertainers and patrons. A raised stage creates a tangible "wall" between employees and patrons, thereby reducing the risk of patron-on-employee crimes. The "wall" also minimizes inadvertent "touching" of entertainers; and since "touching" precipitates a response from employees, a raised stage can also reduce the risk of employee-on-patron crimes.

A tangible "wall" has both *direct* and *indirect* effects on *CRIME RISK*. If minimum distances between entertainers and patrons are mandated, *e.g.*, a "wall" can facilitate compliance by the SOB and verification of compliance (or non-compliance) by police officers. By minimizing the time that an officer spends inside the SOB, a "wall" minimizes the risk of crimes against officers. Cost-benefit analyses are difficult when officer safety is one of the costs. Nevertheless, this optimization/reallocation example illustrates the indirect effects of a mitigation strategy.

### 1.4 TAILORING REGULATIONS TO FIT LOCAL NEEDS

Differences among SOB subclasses often suggest differences in codes and/or enforcement strategies. A code or strategy that is optimal for one subclass may be less than optimal for another subclass. This principle leads to minor variations from jurisdiction to jurisdiction. If a local variation is aimed at rationalizing regulation and optimizing mitigation, it should be encouraged.

This principle applies as well to relevant local conditions. By definition, local conditions are too numerous to list. Nevertheless, the principle is straightforward. Legislatures adapt and modify codes to take advantage of local idiosyncracies. In most instances, modifications are designed to facilitate compliance and minimize enforcement costs. Toward that end, legislatures often consult local enforcement officers and, to the extent possible and appropriate, incorporate the views of experts concerning the regulations.

### 1.5 CONCLUDING REMARKS: CRIMINOLOGICAL THEORY

The legal debate over crime-related secondary effects ignores the crucial role of criminological theory. *Without exception*, criminological theory predicts that SOBs will generate ambient public safety hazards. Plaintiffs' witnesses produce study after study to show that SOBs have *no* crime-related secondary effects or, sometimes, that SOBs have salutary public safety impacts on their neighborhoods. I will discuss the details of these studies at a later point. For present purposes, the criminological theory that I have described is internally consistent and compelling – it makes sense in other words. As it turns out, the theory also agrees with the data.

## 2 EMPIRICAL CORROBORATION

Scientific theory leads us to *expect* secondary effects in SOB neighborhoods and, in fact, *that is exactly what we find*. Table 1 lists eighteen studies conducted over a 30-year period in rural, urban, and suburban settings; the studies span all regions of the U.S. and every conceivable SOB subclass. Despite this diversity, these eighteen studies have one thing in common. Each reports what I call the "consensus finding" of the literature: a substantively large, statistically significant crime-related secondary effect. Given the theoretical prediction, this consensus finding is a scientific fact.

The eighteen studies listed in Table 1 are also *methodologically* diverse. Some of the studies use a before/after difference to estimate a secondary effect. Others use SOB-control differences for that purpose.[14] Some of these SOB-control studies select control zones by

[14] My authority on quasi-experimental design is *Experimental and Quasi-Experimental Designs for Research* by D.T. Campbell and J.C. Stanley (Rand-McNally, 1966). Campbell and

"matching." Others use statistical models (regression, *e.g.*) to adjust irrelevant differences between the SOB and control zones. Methodological attacks on the literature typically focus on idiosyncratic design features of each study. Despite their methodological idiosyncracies, the studies all report remarkably similar findings. *This consensus renders any methodological challenge implausible*.

Ideally, one could read each of the eighteen studies listed in Table 1 and draw inferences from their similarities and differences. Given the broad consensus finding, however, there is little to learn from the minor details of specific studies. My review will focus on SOB subclasses and, to a lesser extent, on methodological idiosyncracies. I will return to the methodological issues in subsequent sections.

### 2.1 SOB-CONTROL CONTRASTS: PHOENIX, 1979

In many respects, true experiments are the strongest designs.[15] But since true experiments are not possible, crime-related secondary effect studies rely on *quasi-experimental designs*. Except for random assignment, quasi-experimental and true experimental designs use similar structures to control threats to validity. The strongest quasi-experimental design compares ambient crime risk at a site before and after the opening of an SOB. Before-after contrasts are not always possible, unfortunately.

A somewhat weaker quasi-experimental design compares ambient crime risk at an SOB site to ambient crime risk at a control site. Though weaker in principle, SOB-control contrasts are often more practical. The validity of an SOB-control contrast is a function of similarity of the SOB and control sites. Barring out-and-out dishonesty, the differences will be small and roughly random, thereby favoring neither side.

In 1979, the City of Phoenix conducted a study of crime-related secondary effects. Although the actual work was conducted by City employees, Arizona State University faculty served as advisors and consultants. I was a Professor of Criminal Justice at Arizona State University at that time and met on a weekly basis with the City employees who conducted this research.

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Stanley call before/after designs "pretest-posttest" designs; they call SOB-control designs "static group comparison" designs. In general, before/after comparisons are prone to fewer threats to internal valid and, hence, are "stronger" than SOB-control designs.

[15] An experimental design controls common threats to validity by random assignment. To estimate the crime-related secondary effects of SOBs experimentally, *e.g.*, we would compile a list of the business sites in a jurisdiction and open SOBs in a random sample of sites. Random assignment (and hence, experimenting) is not possible, of course.

To estimate the crime-related secondary effects of adult businesses, the researchers compared crime rates in areas with adult businesses to crime rates in "matched" control zones (*i.e.*, areas that were similar but that had no adult businesses). The comparisons are summarized in my Table 2. The property and personal crime rates reported in Table 2 were estimated from Uniform Crime Report (UCR) data. The percentages reported in the right-hand column (in red) are the secondary effect estimates derived from the crime rates. Compared to crime rates in the control zones, the UCR property crime rate was 39.8 percent higher; the UCR personal crime rate was 13.7 percent higher; and the UCR sex crime rate was 480.2 percent higher in the adult business areas. By any reasonable standard, these are *large, significant* crime-related secondary effects.

**Table 2 - Secondary Effects in Phoenix, AZ**

| | *Adult Business Areas* | *Control Areas* | *Secondary Effect* |
|---|---|---|---|
| *Property Crime Rate* | 122.86 | 87.90 | 139.8 % |
| *Personal Crime Rate* | 5.81 | 5.11 | 113.7 % |
| *Sexual Crime Rate* | 9.40 | 1.62 | 580.2 % |

Source: ADULT BUSINESS STUDY, City of Phoenix Planning Department, May 25, 1979; Table V

In the 30 years following this study, legislatures around the U.S. have accepted and relied upon its findings. Witnesses retained by SOBs and SOB plaintiffs, on the other hand, have argued that the 1979 Phoenix study is "fatally flawed" and that its findings are wholly implausible. This position is wrong, in my opinion. Although the design of this study leaves much to be desired – especially by today's standards – many of the study's methodological shortcomings minimize the size of the effect. A stronger design would have produced a larger effect estimate.

### 2.2 BEFORE-AFTER CONTRASTS: GARDEN GROVE, 1991

Prior to 1990, virtually all crime-related secondary effect studies compared crime rates in police districts with SOBs to crime rates in districts without SOBs.[16] By contemporary standards, the design of these studies was weak. Existing police districts comprised areas of

[16] Studies in Los Angeles (1977), Amarillo (1977), Whittier (1978), St. Paul (1978), Phoenix (1979), Indianapolis (1984), and Austin (1986) used this design.

several square miles, *e.g.*, and sometimes had several SOBs. Researchers handled these problems as best they could by matching and, rarely, by statistical adjustment. The wide use of weak "static group comparison" designs was dictated by economics, of course. Prior to 1990, relatively few police departments had sophisticated management information systems.

Citing these methodological flaws, witnesses hired by the SOB industry characterized these studies as exemplars of "shoddy research" whose findings are not to be trusted. Ironically, the methodological flaws in these early studies favor a null finding – no effects; stronger designs would most likely have yielded larger, more significant effect estimates. Ignoring this point, the "static group comparison" design assumes that SOB and control neighborhoods are equivalent on relevant crime risk factors. If this assumption is unwarranted, observed secondary effects cannot be attributed to the SOBs. The surest, simplest way to control this threat to validity is to use a before-after design.

In the early 1990s, James W. Meeker and I conducted a secondary effect study in Garden Grove, CA that is considered to be the most scientifically rigorous, valid study of crime-related secondary effects in the literature.[17] The design of our 1991 Garden Grove study differed from what had been done previously in many respects. We had location-coded crime incidents, *e.g.*, so we could estimate crime rates within 500 feet of an SOB; we had ten years of crime data, so we could use relatively stronger before/after contrasts; and we had several nearly ideal control businesses for our contrasts.

Observing ambient crime before and after an SOB opened in a neighborhood, Meeker and I found that crime risk rose whenever an SOB *opened* its doors for business; when an SOB *closed* its doors, crime risk fell. The validity of a before/after design requires that other plausible explanations for the rise and fall of crime be ruled out. The change may be a coincidence, *e.g.*; perhaps crime rose or fell throughout the city. To control these common "threats to internal validity," Meeker and I replicated each before/after analysis for other SOBs in Garden Grove. We reasoned that, if a rise or fall in ambient crime were a coincidence, we would observe the effect at other Garden Grove SOBs. If we did not observe the same effect at these control sites, on the other hand, the effect could be attributed confidently to the newly opened SOB.

Secondary effects for three business openings are reported in Table 3. When a new SOB opened, total "serious" crimes in a 500-foot radius around the site rose, on average, 67 percent. To control for the confounding effects of city-wide crime trends, changes in police activity, and other common threats to internal validity, these before-after differences were compared to the analogous differences for the addresses of existing SOBs. Total "serious" crimes in a 500-foot

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[17] *Final Report to the City of Garden Grove: The Relationship between Crime and Adult Business Operations on Garden Grove Boulevard.* October 23, 1991. Richard McCleary, Ph.D. and James W. Meeker, J.D., Ph.D.

radius around these "control" sites rose, on average, only 6 percent. The secondary effect observed when new SOBs open is, thus, substantively large and statistically significant.

**Table 3 - Secondary Effects in Garden Grove, CA: Business Openings**
**Total "Serious" Crime, One Year Before/After**

| | *Test Sites* | | | *Control Sites* | | |
|---|---|---|---|---|---|---|
| | ***Before*** | ***After*** | | ***Before*** | ***After*** | |
| **March, 1982** | 71 | 106 | **1.49** | 76 | 78 | **1.03** |
| **March, 1986** | 31 | 68 | **2.19** | 80 | 92 | **1.15** |
| **August, 1988** | 32 | 50 | **1.56** | 41 | 40 | **0.98** |
| **Total** | 134 | 224 | **1.67** | 197 | 210 | **1.06** |

Source: *Final Report to the City of Garden Grove*, pp. 26-28

Social scientists (and their government clients) learned two things from the 1991 Garden Grove study. First and foremost, when relatively stronger before-after quasi-experimental designs are possible, the same ambient public safety hazards are found. The Garden Grove findings corroborate the findings in the Los Angeles (1977), Phoenix (1979), Indianapolis (1984) studies. Second, however, and more important, the 1991 Garden Grove study taught us how expensive a crime-related secondary effect study can be. I will have more to say about this shortly.

### 2.3 SOB SUBCLASSES

Although Jim Meeker and I did not report subclass-specific effects, the Garden Grove study included both on-premise and off-premise-only SOBs. One of the effects reported in Table 3 was an off-premise-only SOB. Since the three effect estimates are within sampling error of a common mean – no difference between the subclasses, in other words – one could infer that subclass differences are minor.

And indeed, in the most important respect, subclass-specific effect differences are minor. Nevertheless, recent lawsuits (and decisions) have questioned whether the subclasses have similar effects. To address these questions, researchers have begun to report subclass-specific effects. After reviewing the effects reported for three SOB subclasses, I will return to the issue of criminological theory to describe one relevant subclass difference.

#### 2.3.1 ADULT CABARETS

Adult cabarets are the oldest and, in some respects, the most interesting SOB subclass. In principle, furthermore, estimating the secondary effect of an adult cabaret is straightforward. If we agree that live nude entertainment is the essential difference between adult cabarets and other businesses that sell alcohol by the drink (or "taverns" as I will call them), the secondary effect can be estimated by comparing the ambient crime rates for adult cabarets and taverns. Although the differences between adult cabarets and taverns are often more complicated than this simplest, straightforward design admits, several studies have used taverns as controls for adult cabarets. *All find that adult cabarets have higher ambient crime rates than taverns*.

### 2.3.1A GREENSBORO, NC (2003)

In 2003, Dr. Daniel Linz conducted a crime-related secondary effect study in Greensboro, NC.[18] Analyzing police calls-for-service (CFSs) Dr. Linz concluded that:

> The presence of adult cabarets and adult video/bookstores in "neighborhoods" was unrelated to sex crimes in the area. We found that several of an (sic) adult video/bookstore were located in high person and property crime incident "neighborhoods." We examined the "neighborhoods" and local areas surrounding the adult video/bookstores (1000 foot radius) further and we found that the adult video/bookstores were not the primary source of crime incidents in these locations ... (T)here is no support for the City of Greensboro's theory that adult businesses produce adverse secondary effects. The results of our study show that adult businesses are not associated with crime events.[19]

Due to the technical nature of Dr. Linz' statistical analyses, the City of Greensboro retained me to "translate" Dr. Linz' numerical results into plain words.[20]

Dr. Linz' report was a difficult read, even for statisticians. The numbers on which his conclusion was based were scattered across 18 pages of computer output in an appendix. Few report readers consult appendices under any circumstances. But in this instance, a critical reading of the report's appendices required technical skills (that most of the report's readers lack) and great tolerance for numerical detail. When the actual numbers were finally examined,

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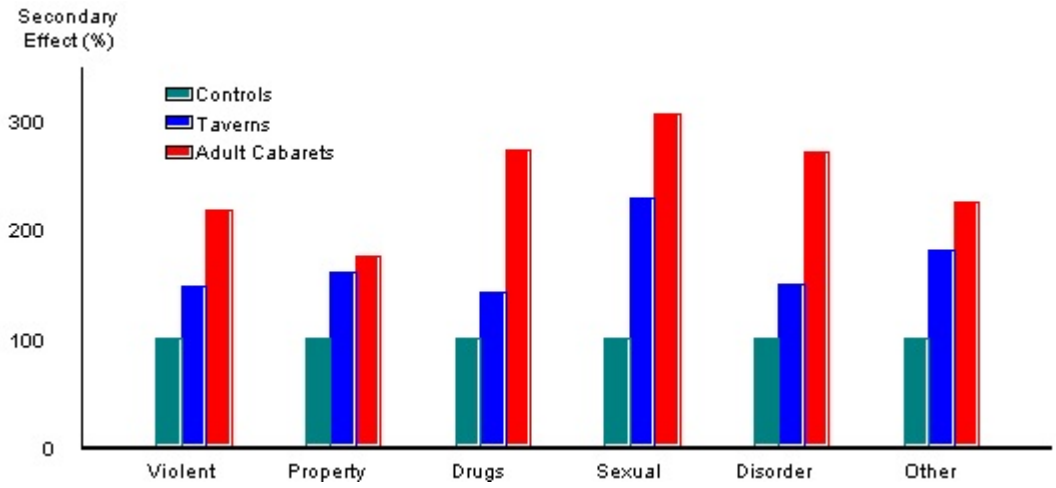
[18] *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Greensboro: A Study of Calls for Service to the Police* by Daniel Linz, Ph.D. and Mike Yao, November 30th, 2003. A Professor of Communication at the University of California, Santa Barbara, Dr. Linz is a prolific witness for SOB plaintiffs, often in collaboration with Dr. Fisher.

[19] P. 3 (counting the title sheet as p. 1) of the Linz-Yao Greensboro *Study*.

[20] R. McCleary. *A Methodical Critique of the Linz-Yao Report: Report to the Greensboro City Attorney.* December 15, 2003.

it became clear that Dr. Linz had overstated the basis of his strongly-worded conclusion. Put simply, Dr. Linz' numbers contradicted his words.

**Figure 2 - Results of the 2003 Greensboro Study**




Source: Tables 14-19, *Evaluating Potential Secondary Effects of Adult Cabarets and Video/ Bookstores in Greensboro: A Study of Calls for Service to the Police*. Daniel Linz and Mike Yao, November 30th, 2003.

The results of Dr. Linz' analyses are plotted in Figure 2. The green bars in Figure 2 report the ambient crime levels[21] for Greensboro's "control" neighborhoods; these neighborhoods have no taverns and no SOBs. The blue and red bars report the ambient crime levels for neighborhoods with taverns and neighborhoods with adult cabarets, respectively. To facilitate interpretation, I have fixed the ambient crime levels in control neighborhoods at 100 percent; the ambient effects in tavern neighborhoods (blue bars) and adult cabaret neighborhoods (red bars) are easily interpreted, thus, as multiples of the control neighborhood effects (green bars).

Since the social, demographic, and economic variables that are presumed to "cause" crime vary across neighborhoods, unadjusted crime levels may be deceiving. To control for these confounding effects, Dr. Linz adjusted his raw numbers with a statistical model. I will not discuss the technical details of Dr. Linz' statistical model here.

As the adjusted effects plotted in Figure 2 show, Dr. Linz found that ambient crime in

[21] I use the term crime "levels" because, strictly speaking, crime "rates" are difficult to tease out of police CFSs. I will return to this issue later.

tavern neighborhoods (blue bars) range from 148 percent (violent crimes) to 229 percent (sexual crimes) of the ambient crime in control neighborhoods. Since taverns (and tavern neighborhoods) are the criminological "gold standard" of ambient crime, that result was expected.[22] What Dr. Linz did not expect to find, however, was that adult cabaret neighborhoods (red bars) would have more crime than the tavern neighborhoods (blue bars).

Crime-related secondary effects in Greensboro's adult cabaret neighborhoods ranged from 175 percent (for property crime) to 307 percent (for sexual crime) of the ambient crime levels in control neighborhoods. These effect estimates are large in every sense and, of course, they are not surprising. To me, the only surprise was that the estimates in Figure 2 were reported in a study commissioned by a consortium of SOB plaintiffs.

### 2.3.1B DAYTONA BEACH, FL (2004)

In 2004, Dr. Linz collaborated with Dr. Randy D. Fisher on a Daytona Beach secondary effect study.[23] With minor exceptions, the design of the Daytona Beach study was identical to the Greensboro design.[24] Analyzing CFSs once again, Drs. Linz and Fisher concluded that adult cabarets, had no significant crime-related secondary effects:

> We are able to account for crime events in Daytona Beach with a moderately high level of accuracy using variables found by other researchers to be related to crime…The social disorganization variables and especially the presence of an (*sic*) alcohol beverage retail sale establishments in the blocks (that did not feature adult entertainment) accounts largely for this explanatory power. The presence of an adult cabaret in the census block explained only to (*sic*) a trivial amount of variability in crime incidents when these other variables were considered ... From these analyses we are able to reliably conclude that once we control for variables

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[22] Most of the research on the relationship between taverns and ambient crime risk is due to my colleague of 30 years, Dennis Roncek. See D.W. Roncek and M.A. Pravatiner. Additional evidence that taverns enhance nearby crime. *Social Science Research*, 1989, 73:185-188.

[23] *Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach, Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496* by Daniel Linz, Ph.D., Randy D. Fisher,Ph.D. and Mike Yao, April 7th, 2004. Dr. Fisher is an associate Professor of Psychology at the University of Central Florida. He is also a prolific witness for SOB plaintiffs.

[24] Since the Daytona Beach SOBs were adult cabarets, Linz, Fisher, and Yao excluded bookstores and video arcades from the study. Instead of defining "neighborhoods" as Census Block Groups, in Daytona Beach, Linz, Fisher, and Yao used Census Tracts. The Greensboro and Daytona Beach designs are otherwise identical.

> known to be related to crime there is not a meaningful relationship between the presence of an adult cabaret in the neighborhood and crime events.[25]

This conclusion is worded more cautiously than the conclusion in Greensboro. Indeed, the authors go so far in the Daytona Beach report as to admit that, as in Greensboro, the Daytona Beach results amount to statistically significant crime-related secondary effects:

> There are analyses reported below where there are small but statistically significant relationships due to the exceptionally large N (sample size) employed in the analyses (at times over 1,100 census blocks)...[But] we favor "strength" over a technical "significance."[26]

This is a highly technical statistical issue, of course. In my opinion, Drs. Linz and Fisher misunderstand the assumptions of their model as well as the statistical problem of an "exceptionally large N" that, in their opinion, obviates the statistical model. Put simply, they are incorrect.

Not withstanding the large *statistical* size of their effect estimates, the effect estimates reported by Drs. Linz and Fisher in Daytona Beach are *substantively* large. Figure 3 plots the results of the Daytona Beach analyses using the same conventions used in Figure 2 (for Greensboro). The ambient crime levels in control neighborhoods (green) are fixed at 100 percent again so that the levels in tavern neighborhoods (blue) and adult cabaret neighborhoods (red) can be interpreted as multiples of the controls. With two exceptions, adult cabaret neighborhoods have higher ambient crime levels than tavern neighborhoods. Given the well-known relationship between taverns and ambient crime, the Daytona Beach analyses corroborate the consensus finding of the literature. Like the broader SOB class, adult cabarets, pose large, statistically significant ambient public safety hazards.

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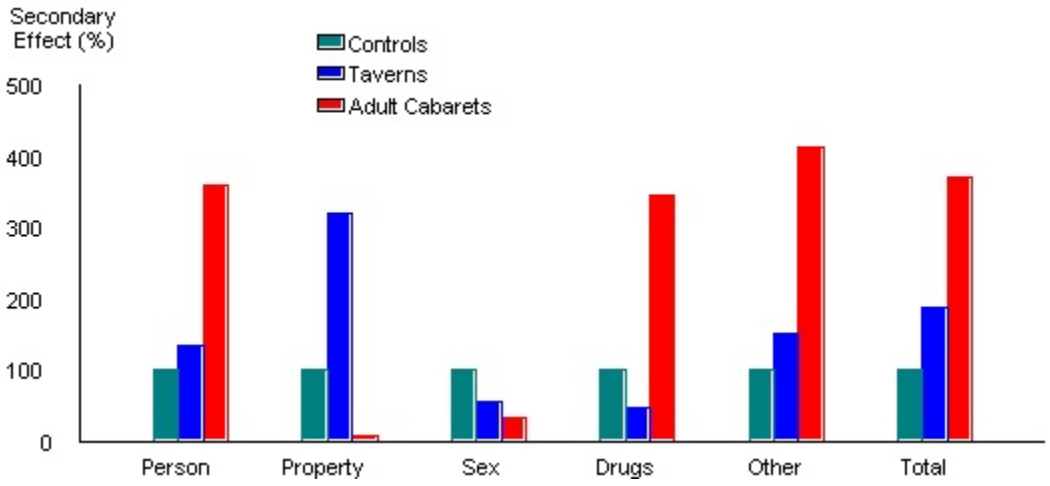
[25] P. 36 (counting the title sheet as p. 1) of the Linz-Fisher-Yao Daytona Beach study.

[26] P. 23 (counting the title sheet as p. 1) of the Linz-Fisher-Yao Daytona Beach study.

**Figure 3 - Results of the 2004 Daytona Beach Study**




Source: Tables 7-19, *Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach, Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496*. Daniel Linz, Ph.D., Randy D. Fisher, Ph.D. and Mike Yao, April 7th, 2004.

Figure 3 speaks for itself. Tavern neighborhoods (blue) have 90 percent more total crime than control neighborhoods (green). Adult cabaret neighborhoods (red) have 270 percent more total crime than control neighborhoods (green). In substantive terms then, taverns have *large* secondary effects and adult cabarets have even *larger* secondary effects. The fact that these effect estimates are also *statistically* large adds little to our understanding of Figure 3.

The estimates *are* statistically large, of course – *i.e.*, statistically *significant* – and that poses a dilemma for Drs. Linz and Fisher. If the estimates were statistically small, Drs. Linz and Fisher could argue that the estimates were due to chance (regardless of their substantive size). Denied this solution to the dilemma, Drs. Linz and Fisher argue that statistical significance of the estimates is an artifact of an "exceptionally large N." This is a specious argument, however, on two grounds. First, samples of 1,100 are not large enough to obviate the statistical model used by Drs. Linz and Fisher. But second, if samples of 1,100 *were* large enough to obviate the statistical model, as claimed, *all* of effect estimates would be statistically significant. In fact, of the 84 parameter estimates reported by Drs. Linz and Fisher, 42 are statistically significant and 42 are not.

### 2.3.2 PEEP SHOWS

As I use the term, "peep show" refers to an SOB where patrons can view (or preview) DVDs. In his *Alameda Books* opinion, Justice Souter characterizes this SOB subclass as the

"commercially natural, if not universal" business model.[27] The industry changes rapidly, however, as new business models arrive and prove their commercial viability. At the same time, older business models become less viable and evolve or go out of business. The internet plays a major role in this process, of course.

### 2.3.2A CENTRALIA, WA (2003)

Centralia, WA lies is a small city (*ca.* 14,000 population) on Interstate 5 between Olympia and Portland. In December, 2003, an adult bookstore opened in a building that had been a residential dwelling. In addition to selling videos for off-premise viewing, the SOB had coin-operated viewing booths. Shortly after opening its doors for business, the City moved to enforce zoning ordinances prohibiting SOBs in residential neighborhoods. When the SOB filed a lawsuit,[28] the City defended itself with the crime incident statistics summarized in Table 4.

In the impact zone, defined by a 250-foot radius around the SOB site, serious crime rose by nearly 90 percent after the opening. In the rest of Centralia, during the same period, serious crime dropped by nearly four percent. The statistical significance of these before-after contrasts can be tested by comparing the value of the odds ratio reported in Table 4 to its standard error. By chance alone, odds ratios larger than this one occur by chance less than eight times in one thousand trials or samples.

**Table 4 - UCR "Serious" Crime, Centralia, WA**

| | Before | After | Change | Odds Ratio |
|---|---|---|---|---|
| **SOB Area** | 9 | 17 | **1.889** | **–** |
| **All Other Centralia** | 3358 | 3358 | **0.966** | **1.956** |
| **Control Areas** | 23 | 19 | **0.826** | **2.058** |

Although it is highly unlikely that the effect reported in Table 4 is due to chance, it is always possible that effect is due to some uncontrolled threat to internal validity. If that were the case, we would expect crime to rise when any other type of business – say, a bread store – moves

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[27] *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 2002. Justice Souter's characterization refers to the practice of "previewing" DVDs prior to purchase. Although some patrons may use the booths to inform their purchasing decisions, in my experience, this is a relatively minor function of the booths.

[28] Washington Retailtainment, Inc. *et al. v.* City of Centralia, Washington. U.S. District Court for the Western District of Washington at Tacoma, Case No. C03-5137FDB

into a vacant residential structure. In fact, three businesses *did* open in Centralia during this time frame. But as reported in Table 4, ambient crime in a 250-foot radius around the sites dropped when these non-SOBs opened.

### 2.3.2B SAN DIEGO, CA (2002)

In terms of validity, the Centralia findings are credible because they are based on a before-after design. Because Centralia is a relatively small town, on the other hand, and because the findings are based on only one SOB, common sense might argue that the Centralia findings do not generalize to all peep shows or to large cities. Common sense turns out to be wrong, of course.

In the preceding year, Dr. Daniel Linz conducted a study of 19 peep shows in San Diego.[29] Comparing police calls-for-service (CFSs) in the peep show and control zones, Dr. Linz found no statistically significant differences. In statistical terms, *i.e.*, the 19 peep show area had approximately the same number of CFSs to the police as the control zones. When Dr. Jim Meeker and I were retained by the City to re-analyze the data, we discovered that Dr. Linz had glossed over several important points.[30]

First, the difference between peep show and control zones was 15.7 percent; in other words, compared to controls, the peep show zones had 15.7 percent more CFSs to the police. Although a 15.7 percent difference in 911 calls is large by any *substantive* standard, in *statistical* terms, the difference was small (or insignificant). How can an effect be *substantively* large but *statistically* small? Dr. Meeker and I attributed this discrepancy to two aspects of Dr. Linz' design:

- *Ambient impact:* Dr. Linz defined the impact zones to extend 1,050 feet from the site (*vs.* 250 feet in Centralia).

- *Crime measurement:* Dr. Linz used police CFSs to measure crime (*vs*. UCR crime incidents in Centralia).

Both of these design features affect the *statistical power* of a design. No matter how large or small the effect might be in substantive terms, both design features minimize the statistical size

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[29] *A Secondary Effects Study Relating to Hours of Operation of Peep Show Establishments in San Diego, California*. September 1, 2002. Daniel Linz and Bryant Paul. Submitted in Mercury Books v. City of San Diego. U.S. District Court, Southern District of California (00-CV2461).

[30] R. McCleary and J.W. Meeker, *A Methodical Critique of the Linz-Paul Report: A Report to the San Diego City Attorney's Office.* March 12, 2003.

of the effect.

Table 5 reports the consequences of one of the two design idiosyncracies in Dr. Linz' San Diego study. Using publicly available data, Jim Meeker and I were able to calculate the statistical reliability of San Diego CFSs; using this number, we were able to adjust the statistical size of the reported effect.[31] Although our adjustment left the substantive size of the reported effect unchanged, it quadrupled the statistical size of the effect. As shown, had Dr. Linz used UCR crime incidents (*vs.* police CFSs), the statistical confidence level of his finding would have exceeded 99 percent!

**Table 5 - Police CFSs in San Diego**

| | *Linz-Paul* | *McCleary-Meeker* |
|---|---|---|
| ***Peep show zones*** | 1552.6 | 1552.6 |
| ***Control zones*** | 1342.2 | 1342.2 |
| ***Substantive Effect Size*** | 1.157 | 1.157 |
| ***Statistical Effect Size*** | **0.629** | **2.521** |
| ***Statistical Confidence*** | **44.7 %** | **99.2 %** |

The consequences of Dr. Linz' other design idiosyncracy are more insidious. Theory leads us to expect an ambient effect over a several-block area around the SOB site. The substantive size of the effect decays with distance from the site, however. Enlarging the impact beyond a certain reasonable area dilutes the effect, making it more difficult to detect with conventional power. I will return to this topic shortly.

### 2.3.3 "TAKE-OUT" SOBS

Although "take-out" SOBs have been around since the advent of home video-tape players, recent lawsuits have raised questions about these SOBs. Prior to the recent lawsuits, governments had paid little attention to the subclass. Since the causal variables implicated by criminological theory were common to all SOBs, researchers assumed that subclass distinctions were irrelevant. In line with this assumption, most of the secondary effect studies listed in Table 1 did not report separate effect estimates for each subclass. It was enough to report that *all* subclasses had adverse crime-related secondary effects.

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[31] For details, see McCleary R. and J.W. Meeker. Do peep shows "cause" crime? *Journal of Sex Research*, 2006, 43:194-196.

My 1991 Garden Grove study is typical in that respect.[32] The SOBs that Dr. Jim Meeker and I studied in Garden Grove included at least one "take-out" SOBs; and we reported that *each* of the SOBs studied posed large ambient public safety hazards. One can infer by syllogism, then, that "take-out" SOBs had adverse effects. When the Fifth Circuit Court gave their opinion in *Encore Videos*, however, they noted explicitly that Garden Grove report did not report this explicit point.[33] Following the decision in *Encore Videos*, government-sponsored studies have tried, where possible, to report subclass-specific secondary effect estimates. Given the relevant theory, the subclass-specific effect estimates hold no surprises. Like all SOBs, the "take-out" subclass has large, significant crime-related secondary effects.

### 2.3.3A MONTROSE, IL ADULT SUPER STORE

The Village of Montrose is on I-70 in Effingham County, Illinois. In February, 2003, an SOB opened within a few hundred feet of the Montrose off-ramp. A tavern, motel, and 24-hour convenience market were already operating in the Village. The SOB had no viewing booths and devoted a large proportion of its display-space to lingerie and novelties. It also sold sexually explicit DVDs and sexual toys, of course. The SOB advertised itself as an "adult superstore" and, given the range of merchandise offered for sale, this was no exaggeration.

Since the SOB's sign was visible from I-70, its patrons included cross-country truckers. In 2004, the State sought to enjoin the SOB's violation of a statute requiring a minimum distance (1,000 ft.) between SOBs and certain land uses. The State won its case in a trial[34] and the SOB was closed. The plaintiffs subsequently appealed the verdict and, to the best of my knowledge, the case is currently before the Illinois Court of Appeals.

Table 6 reports annual crime rates for the Village of Montrose before and after the SOB opened for business. In terms of total crime, the secondary effect is modest, though statistically significant nevertheless. In terms of "serious" crimes, on the other hand – including assault, robbery, burglary, and theft – the crime-related secondary effect amounts to a *substantively large* 60 percent increase.

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[32] R. McCleary and J. W. Meeker. *Final Report to the City of Garden Grove: The Relationship between Crime and Adult Business Operations on Garden Grove Boulevard*.

[33] *Encore Videos, Inc. v. City of San Antonio* (310 F 3d 812, 2002)

[34] *People of the State of Illinois ex rel. Edward C. Deters v. The Lion's Den, Inc.*, Circuit Court for the 4th Judicial Circuit of Illinois (Case No. 04-CH-26)

**Table 6 - Annual Crime Before and After an Adult Super Store Opens**

| | *24 Hours* | | | *8 AM to Midnight* | | |
|---|---|---|---|---|---|---|
| | ***Before*** | ***After*** | | ***Before*** | ***After*** | |
| **"Serious" Crime** | 6.29 | 10.07 | **1.60** | 5.39 | 6.89 | **1.28** |
| **Other Crime** | 17.02 | 19.61 | **1.15** | 12.59 | 15.37 | **1.22** |
| **Total Crime** | 23.37 | 29.68 | **1.27** | 17.98 | 22.26 | **1.24** |

Source: Pp. 11-12, *Report to the Kennedale, TX City Attorney on Crime-related Secondary Effects*. Richard McCleary, Ph.D. July 25th, 2005. Reliable Consultants, Inc., et al. v. City of Kennedale (Civil Action No. 4:05-CV-166-A, U.S. District Court, Northern District of Texas, Fort Worth Division

Two qualitative changes revealed by the before-after contrast are more important than the straightforward rise in crime victimization risk. First, following the SOB's opening, crimes reported in Montrose were more likely to involve force and/or weapons. In the decade prior to the SOB's opening, for instance, not one armed robbery had been reported in Montrose. After the opening, two armed robberies were reported in Montrose (both happened to be at the "adult super store"), including one committed by a gang of four men wearing ski masks and armed with shotguns.

The second qualitative change in Montrose concerns crimes reported in the overnight period. The right-hand columns in Table 6 report annual crime rates for the period between eight AM and Midnight. The secondary effect for all three crime categories is approximately 25 percent. If there is any surprise in these statistics, it is that the large, significant rise in "serious" crime is less dramatic during the daytime shift. In Montrose, closing SOBs between midnight and eight AM would have had an important and substantial mitigation effect.

### 2.3.3B SIOUX CITY, IA LINGERIE BOUTIQUE

Sioux City is 100 miles north of Omaha on I-29 on the border of Iowa and South Dakota. SOBs are not a novelty in Sioux City. Not counting adult cabarets, two SOBs with video booths had operated in Sioux City's older downtown neighborhood for decades. Merchandise sold for off-site use was a minor sideline for these SOBs; their revenues came primarily from their video booths. In March 2004, another SOB opened for business. Unlike Sioux City's existing SOBs, the newcomer had no viewing booths. It advertised itself as a "lingerie boutique" and sold a comprehensive inventory of adult merchandise.

Table 7a summarizes the new SOB's inventory in January, 2006. Although virtually all of the merchandise had some adult theme, some of the merchandise (lingerie and swimwear, *e.g.*) was identical to merchandise found at non-SOBs. To accommodate this mixed theme, the

SOB's interior space was divided by an artificial wall of high display racks into two distinct subareas. One subarea of approximately 1,500 square feet housed sexually explicit DVDs, books, and toys or devices. The other subarea housed lingerie, erotic garments, and novelties. Most of this merchandise would not be considered sexually explicit.

**Table 7a - Sample Stock Inventory for a Sioux City Lingerie Boutique**

| | *Count* | | *Retail Value* | |
|---|---|---|---|---|
| ***DVDs/Books*** | **10,630** | **19.3%** | **395,809.39** | **35.0%** |
| ***Toys / Devices*** | **6,727** | **12.2%** | **162,493.60** | **14.4%** |
| ***Leather Goods*** | 363 | 0.7% | 30,821.83 | 2.7% |
| ***Lingerie/Swimwear*** | 11,746 | 21.2% | 362,648.16 | 32.9% |
| ***Novelties*** | 25,742 | 46.6% | 169,111.43 | 15.0% |
| | 55,208 | | $1,130,884.41 | |

The mixed theme of this SOB's inventory questions whether it qualifies as an SOB. Although less than half of its floor space held sexually explicit merchandise, this 1,500 square-foot subarea was larger than the combined floor space of the City's other two SOBs. In retail value, moreover, about half of the SOB's inventory consisted of sexually explicit merchandise. Since the rented space was not zoned for SOBs, the City enforced its zoning code and the SOB sued on First Amendment grounds.

**Table 7b - Total Crime Before and After a Lingerie Boutique Opens**

| | *Before* | *After* | | *After/Before* |
|---|---|---|---|---|
| ***N of Incidents*** | 16 | 29 | ***Mean*** | **2.15** |
| ***N of Days*** | 793 | 668 | ***t-Statistic*** | **2.46** |

Source: Pp. 3-4, Affidavit of Richard McCleary, Ph.D. January 31st, 2006. Doctor John's, Inc., vs. City of Sioux City, IA (CIVIL NO. C03-4121 MWB, U.S. District Court, Northern District of Iowa, Western Division

Although its complaint was complex, the SOB argued that criminological theory did not apply to the "take-out" subclass; and that no study in Sioux City or elsewhere had documented crime-related secondary effects for "take-home" SOBs. To examine this argument, the Sioux City Police Department retrieved all crime incidents recorded for addresses within 500 feet of the address during a four-year before and after the SOB's opening. As reported in Table 7b, the after/before ratio yields a secondary effect estimate of 2.15. This number has a straightforward

interpretation. When the SOB opened for business, ambient crime more than doubled. Needless to say, the estimate is statistically significant.

### 2.4 CONCLUDING REMARKS: EMPIRICAL CORROBORATION

The SOB-crime relationship is a *scientific fact* because, first, it is predicted by a strong criminological theory; and second, because the theoretical predictions have been tested and validated in a broad range of times, places, and situations. The studies listed in Table 1 illustrate this range. The theory has been tested in every geographical region and in rural, urban, and suburban settings; tests of the theory have been based on several quasi-experimental designs and have measured ambient crime risk in several ways. Not withstanding this diversity, all of the empirical tests find that SOBs pose large, significant ambient public safety hazards.

## 3. METHODOLOGICAL RULES

In the last five years, legislatures and courts have been bombarded with opinions from both sides. Plaintiffs' witnesses argue that *every* government-sponsored secondary effect study is "fatally flawed" while *every* study conducted by a plaintiffs' witness is "methodologically rigorous." Plaintiffs' witnesses are incorrect, of course, but ignoring this point for the present, the clash of experts – note that not all persons in the debate are experts – raises this question: How can two sets of experts look at the same data and arrive at different conclusions? The short answer to this question is that the experts are obeying different methodological rules. A more complete answer requires a discussion of the rules.

Like all rules, the rules of statistical inference are unambiguous and binding. Although investigators on both sides of a debate are bound by the same set of rules, the rules can have slightly different interpretations. If investigators frame the research question differently then, or if they make different assumptions, or if they use different statistical models, even following the same rules, they can arrive at different findings. With that point in mind, if an investigator *wanted* to produce a null finding,[35] that goal could be achieved by:

- Using "noisy" measures of crime risk;
- Using impact zones that are "too large" or "too small";
- Using low power statistics to test the significance of an effect.

Each of these three methods generates a bias in favor of the null finding; and each of the three is widely used by secondary effect witnesses employed by the SOB industry.

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[35] By "null finding," I mean "finding that SOBs have no secondary effects."

### 3.1 USING A "NOISY" MEASURE OF CRIME RISK

The most salient difference between secondary effect studies conducted before and after 2001 is the way in which "crime risk" is measured. Prior to 2001, virtually all studies used crime incident reports (*e.g.*, Uniform Crime Reports or UCRs) to measure crime risk. After 2001, studies – mostly commissioned by the adult entertainment industry – began to use 911 calls-for-service (CFSs) to measure crime risk. Although UCRs and CFSs are roughly comparable in some (but *not* all) instances, UCRs are statistically "better" than CFSs.[36] This fact is so well known to criminologists that virtually all research on crime risk is based on UCRs.

Explaining *why* UCRs are a relatively "better" measure of crime risk requires a little algebra. First, write the relationship between a crime risk measure (either CFSs or UCRs, *e.g.*) as

$$CRIME\ RISK\ MEASURE = CRIME\ RISK + NOISE$$

I will give examples of "noise" shortly. For present purposes, think of "noise" as crime reports (in the case of UCRs) or 911 calls (in the case of CFSs) that have nothing to do with crime risk – "bogus" crime reports or 911 calls, *i.e.* With a few algebraic steps, the relationship between the crime risk measure (UCRs or CFSs, *e.g.*) and crime risk leads to the expression[37]

$$SIGNAL\text{-}TO\text{-}NOISE = \frac{CRIME\ RISK}{CRIME\ RISK + NOISE}$$

The signal-to-noise ratio for UCRs is higher than the signal-to-noise ratio for CFSs and, in that crucial statistical sense, UCRs are a "better" measure of crime risk. In light of this well known statistical advantage, one might wonder why any researcher might prefer to use CFSs as a measure of crime risk. The answer is that the relatively low signal-to-noise ratio of CFSs biases statistical tests in favor of a null finding.

#### 3.1.1 SOURCES OF NOISE IN CFSS

Figure 4 depicts the statistical relationship between CFSs and crime risk. In any jurisdiction, CFSs outnumber crimes by a large factor. The relative areas accorded to CFSs (in

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[36] UCRs are statistically "better" than CFSs because UCRs are more highly correlated with *CRIME RISK* (*i.e.*, $r_{CFS,Risk} > r_{UCR,Risk}$). See McCleary, R. and J.W. Meeker. Do peep shows "cause" crime? *Journal of Sex Research*, 2006, 43:194-196.

[37] The terms in the numerator and denominator of this expression are population variances. Although I call this expression the "signal-to-noise ratio," it is the *squared* correlation (or $R^2$) for crime risk and its measure. See McCleary, R. and J.W. Meeker. Do peep shows "cause" crime? *Journal of Sex Research*, 2006, 43:194-196.

red) and crimes (in blue) depicts this aspect of the relationship. The signal-to-noise ratio is proportional to the overlapping area. The larger the overlapping area, relative to the total area, the higher the signal-to-noise ratio. In this case, the signal-to-noise ratio is relatively small.

**Figure 4 - Crimes and Calls-for-Service (CFSs)**


The non-overlapping areas in Figure 4 fall into two categories. The first category consists of CFSs that have nothing to do with crime. Examples include duplicated or unfounded CFSs; CFSs that have no apparent basis; and CFSs that are precipitated by false alarms. The second category consists of crimes that circumvent the 911 system and, thus, have no CFS records. Examples include crimes that the police discover through routine or proactive patrolling and crimes that the police discover through specialized unit activity, especially "victimless" vice crimes, particularly drugs and prostitution.[38]

CFSs in the first category tend to *over*state the crime rate; CFSs in the second category tend to *under*state the crime rate. In addition to errors that *over*- and *under*-state the crime rate, CFSs have errors that limit their use for finer inferences about *where* and *when* crimes occur.

Address-specific ("hotspot") analyses assume that the address recorded on a CFS is the address where the precipitating crime occurred. The address on a CFS instructs responding patrol units where they go to "see the man," however, and this is often not the address of the

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[38] In the *Annex Books v. City of Indianapolis* decision, *e.g.*, "Specifically, the data revealed that the police made forty one (41) arrests at Annex Books for public masturbation between December 5, 2001 and November 5, 2002. Def.'s Br. at 24. In the before/after crime analysis Dr. Linz conducted, we note that he collected police call data for 2001 and 2003, but not for 2002. We need not delve into the intricacies of Dr. Linz's analysis in order to conclude, as we do, that the City has rebutted Plaintiffs' evidence to the contrary on adverse secondary effects. We find the data regarding the number and type of actual arrests at Annex Books for the year period compelling." (333 F. Supp. 2d 773; 2004 U.S. Dist. LEXIS 17341)

precipitating incident. If X calls 911 to report a disturbance at Y's house, *e.g.*, the responding patrol unit will be asked to "see the man" at X's address. Although the disturbance occurred at Y's address, X's address will be recorded on the CFS record.[39]

Time-specific analyses of CFSs are limited by analogous errors. The time recorded on a CFS is not necessarily the time of the crime incident. For property crimes such as burglary and theft, victims call 911 when the crime is discovered. This may be hours (or even days) after the fact. Given these errors, CFSs allow for relatively crude, approximate inferences about the times and places of crimes.

Tables 8 and 9 illustrate the magnitude of the "noise" component in CFSs. In the 2002 San Diego study that I review above (see Table 5, *e.g.*), Drs. Daniel Linz and Bryant Paul analyzed 607,903 CFSs. Table 8 breaks these CFSs down by final disposition. As shown, fewer than 20 percent of these CFSs began with a crime; more than 80 percent were cancelled, duplicated, unfounded, disposed of without report,[40] or had some other non-crime disposition. This 80:20 ratio of CFSs-to-crimes is typical of the overstatement found in many large cities.

**Table 8 - San Diego CFSs by Final Disposition**

| | | | |
|---|---|---|---|
| **88,215** | **CFSs were cleared by report** | **14.6 %** | |
| **31,035** | **CFSs were cleared by arrest** | **5.1 %** | **(19.7 %)** |
| **71,686** | **CFSs were cancelled or duplicated** | **11.8 %** | |
| **32,757** | **CFSs were unfounded** | **5.4 %** | |
| **332,014** | **CFSs were disposed of without report** | **54.8 %** | |
| **52,196** | **CFSs had other or unknown disposition** | **8.3 %** | **(80.3%)** |

Source: *A Methodical Critique of the Linz-Paul Report: Report to the San Diego City Attorney's Office.* R. McCleary and J.W. Meeker, March 12, 2003.

[39] To obscure a business' public safety hazard, the proprietor can ask 911 to send a patrol unit to "5th and Main" instead of to "521 East Main."

[40] CFSs end without a report when the responding patrol unit finds no complainant, informant, victim, or evidence of a crime. Most of the CFSs disposed of as "other/unknown" do not require responses; "all units" CFSs, *e.g.*, describe suspects or vehicles. Strictly speaking, Drs. Linz and Paul should have analyzed only those CFSs that ended in an arrest or report.

**Table 9 - San Diego Burglary CFSs by Initial and Final Disposition**

| | | |
|---|---|---|
| **Total CFSs** | **607,903** | **100.0 %** |
| **CFSs initially classified as burglaries** | **147,127** | **24.2 %** |
| **Burglary CFSs initiated by an alarm** | **110,111** | **18.1 %** |
| **False alarms** | **109,135** | **18.1 %** |
| **CFSs initiated by actual burglaries** | **37,992** | **25.8 %** |

Source: *A Methodical Critique of the Linz-Paul Report: Report to the San Diego City Attorney's Office*. R. McCleary and J.W. Meeker, March 12, 2003.

Table 9 illustrates another aspect of the problem. Nearly 25 percent of the CFSs analyzed by Drs. Linz and Paul were initially classified as burglaries. Of these, 74.8 percent were initiated by burglar alarms, 99.1 percent of which turned out to be false; only 25.8 percent of burglary CFSs were actual burglaries. CFSs initiated by auto and robbery alarms aggravate the problem that are seen for burglaries. Considering "serious" crimes, like burglary, auto theft, and robbery, in most large cities, CFSs overstate the crime rate by a substantial factor.

### 3.1.2 NOISE OBSCURES STATISTICAL SIGNIFICANCE

A low signal-to-noise ratio does not completely disqualify CFSs as a crime risk measure. On the contrary, since CFSs and UCRs are weakly correlated, ambient risk estimates based on the two measures may yield similar *substantive* inferences. Estimates based on the two measures lead to different *statistical* inferences, however, and *in every case*, the difference amounts to a bias in favor of the null hypothesis.

In their 2002 San Diego study, Drs. Linz and Paul found that peep show areas had 15.7 percent more CFSs than control zones. Assuming that CFSs had a perfect signal-to-noise ratio, Drs. Linz and Paul were able to show that the 15.7 percent effect was statistically small – *in*significant – and thus, they were able to conclude that San Diego peep shows had no crime-related secondary effects. The rosy assumption that CFSs are an infallible measure of crime risk is unwarranted, of course. Tables 8 and 9 prove this point. Using public data, Dr. Jim Meeker and I have demonstrated that the signal-to-noise ratio of San Diego CFSs lies in the interval,[41]

$$.25 < \textit{SIGNAL-TO-NOISE} < .30$$

[41] See Table II A in McCleary and Meeker, *A Methodical Critique of the Linz-Paul Report: A Report to the San Diego City Attorney's Office*. March 12th, 2003; also see, McCleary and Meeker, Do peep shows "cause" crime? *Journal of Sex Research*, 2006, 43:194-196.

When this signal-to-noise ratio is incorporated into the statistical hypothesis test, the *substantively* significant secondary effect estimate becomes *statistically* significant as well.[42] The principle illustrated by the San Diego CFSs applies to every study that uses CFSs to measure crime risk. That explains why witnesses retained by the SOB industry prefer to measure crime risk with CFSs.

### 3.1.3 THE DEBATE: UCRS *VS.* CFSS

Until recently, virtually all secondary effect studies used UCR-based measures of ambient crime risk. The millennial year, 2001, marks a historical turning point. Four years earlier, in 1997, the Fulton County, GA Police Department issued a "quick and dirty" report that compared CFSs at the addresses of adult cabarets and taverns.[43] The design of the report reflects an assumption that, other things equal,[44] an adult cabaret is a tavern that offers nude or semi-nude entertainment. The corollary assumption is that any difference in CFSs is the secondary effect of nudity or semi-nudity.

The results of the CFS report showed that over a 29-month period, more CFSs were logged to tavern addresses. From this, the adult cabarets argued that they posed no ambient public safety hazards, and then in turn that Fulton County had no legitimate secondary effects rationale for prohibiting alcohol consumption at adult entertainment establishments. And that, more or less, is how the U.S. Eleventh Circuit Court interpreted the data.[45]

Following the 2001 decision in *Flanigan's Enterprises*, CFSs became the preferred crime risk measure in studies sponsored by the SOB industry. The 2002 San Diego, the 2003 Greensboro, and 2004 Daytona Beach studies reflect this preference.[46] When the use of CFSs is challenged, on the statistical grounds that I have described, the authors of these studies justify their use of CFSs with two claims:

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[42] The corrected statistics are reported in Table 5 above.

[43] *Study of Calls-for-Service to Adult Entertainment Establishments which Serve Alcoholic Beverages.* June 13th, 1997, Capt. Ron Fuller and Lt. Sue Miller.

[44] There is no data, however, in the Fulton County study to suggest that the businesses at the surveyed addresses are equal. The report does not address the relative size or square footage of the establishments, the foot traffic/amount of customers that patronizes each business, or the sales/revenue of the establishments. The report also does not address other criminogenic factors in the areas around the adult cabarets and taverns.

[45] *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001)

[46] These are the studies that I reviewed in § 2.3.2b, 2.3.1a, and 2.3.2b above.

- Governments have relied extensively on CFSs to assess the ambient public safety hazards of SOBs.

- Criminologists routinely use CFSs to measure crime risk.

Both claims are incorrect. Excluding industry-sponsored studies conducted by the researchers who make this claim, the 1997 Fulton County study stands alone in its use of CFSs to measure ambient crime risk. With this exception, every government-sponsored study, including my own, has used UCRs to measure ambient crime risk.[47]

Nor do criminologists use CFSs to measure crime risk. Shortly after the advent of computerized 911 dispatch systems, criminologists experimented with CFSs as a surrogate measure of crime risk. The results of this experiment led to the consensus view that CFSs are not a good measure of crime risk.[48] This is not to say that CFSs play no role in criminological research. On the contrary, CFSs are used for several purposes, particularly in studies of police dispatching problems.[49] In modern times, however, no competent criminologist uses CFSs to measure crime risk.

**Table 10 - Crime Statistics in Criminological Journals, 2000-2004**

| | Total Items | Crime Stats | UCRs | Survey | CFSs |
|---|---|---|---|---|---|
| *Criminology* | 193 | 52 | 37 | 16 | 0 |
| *Justice Quarterly* | 152 | 48 | 23 | 23 | 2 |
| *J of Quant Criminology* | 95 | 47 | 30 | 17 | 0 |
| *J of Crim Just* | 265 | 107 | 44 | 63 | 3 |
| | (705) | (254) | (134) | (119) | (5) |

The statistical shortcomings of CFSs are so well known that criminology journals no

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[47] Two government-sponsored studies have analyzed CFSs *and* UCRs but each has made it clear that CFSs and UCRs measure different secondary effects.

[48] The consensus emerging from this experimental era is spelled out in Klinger, D. and G.S. Bridges. Measurement errors in calls-for-service as an indicator of crime. *Criminology*, 1997, 35:529-541.

[49] These common uses of CFSs are discussed in most undergraduate policing texts. See, *e.g.*, Roberg, R.R., J. Crank and J. Kuykendall, *Police and Society*. Wadsworth, 1999

longer publish crime risk analyses based on CFSs. Table 10 illustrates the modern consensus view. During a recent five-year period, four general criminology journals published 705 items. Most of the items were either non-empirical (essays, reviews, *etc.*) or else, analyzed phenomena other than crime (police behavior, sentencing decisions, *etc.*). Of the 254 articles that analyzed a crime statistic, 134 (52.8 percent) analyzed UCRs; 119 (46.8 percent) analyzed victim or offender surveys. Only five items (1.9 percent) analyzed CFSs.[50] Of these five, *only one used CFSs as a crime risk measure*.

### 3.1.4 CONCLUDING REMARKS ON RISK MEASUREMENT

All large police agencies collect CFSs. Over the course of a day, agencies use CFSs for general operational purposes. Over the course of a year or more, agencies use CFSs for planning and budgeting. In a pinch, an agency can use a computerized CFS database to cheaply generate rough, or "quick and dirty," snapshots of crime risk. But in the long run, police agencies use UCRs to measure crime risk. Criminologists share this view. Few criminologists use CFSs for any purpose whatsoever and no criminologists use CFSs to measure crime risk. Given this widely accepted convention, it is difficult to understand why industry-sponsored secondary effect studies prefer CFSs. There are at least three reasons why an SOB plaintiff might prefer CFSs as an ambient crime risk measure:

- Since relatively few "victimless" crimes (drugs, prostitution, *etc.*) come in through 911 channels, CFSs understate the incidence of these crimes by a large factor.

- Since the address recorded on a CFS is not necessarily the location of the precipitating crime incident, CFSs can mask address-specific public safety hazards.

- Since CFSs have a relatively low signal-to-noise ratio, CFSs can make *substantively large* secondary effect estimates *statistically small*.

I will expand on this last point when I discuss statistical power below.

## 3.2 USING IMPACT ZONES THAT ARE "TOO LARGE" OR "TOO SMALL"

The ambient crime risk of an SOB (or of any other crime "hotspot") diminishes with distance from the site. The surest way that a person can reduce his or her risk of victimization is to move away from the SOB. As the person moves farther away from the site, the person's risk

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[50] Table 10 was compiled from the independent judgements of eight students. Inter-rater reliability among the eight was nearly .95. Because some of the 254 articles analyzed multiple statistics, the rows may sum to more than 100 percent.

grows smaller until, eventually, it is no higher than what he or she experiences (and tolerates) every day. This raises the question of how far from the SOB one must move to be safe. Since the precise distance depends on many local and personal factors, this question has no *general* answer.

When urban planners segregate SOBs from schools and other sensitive land uses, they rely on a heuristic calculus that balances the various local conditions with practical and legal considerations. Planners typically multiply the minimum distances derived from their heuristic calculus by an "insurance" factor. If the local conditions and considerations suggest 1000-foot minimum distances, *e.g.*, to guarantee the safety of citizens, planners might require 1,500-foot minimum distances. Since local conditions and considerations vary, of course, minimum distances vary across jurisdictions. But the procedure for setting minimum distances is the same nevertheless.

In designing a secondary effect study, the researcher is confronted with a similar problem but, unfortunately, cannot rely on the same procedures used by planners. To measure the ambient hazard of an SOB, the researcher must specify a zone around the SOB where the hazard can be observed. If the zone is "too small," it may exceed the precision of the police agency's geo-coding system and, thus, may miss many of the crime incidents that define the hazard. If the zone is "too large," on the other hand, the hazard may be "diluted" to the point where it cannot be measured.

Like Goldilocks, the researcher wants a zone whose size is "just right." Based on the theory and research that I will describe below, a 500-foot impact zone is the most reasonable solution in most cases. Based on the same theory and research, of course, researchers who want to bias their studies in favor of the null finding could specify the zone to be larger or smaller than 500 feet. Needless to say, industry-sponsored studies prefer zones that are "too small" or "too large."

### 3.2.1 THE POISSON THEORY OF DISTANCE

In the early 19th Century, French mathematician S.D. Poisson developed an interest in the distribution of crimes across Paris neighborhoods.[51] Poisson proposed the probability density function that bears his name to describe the spatial scattering of crime incidents. Briefly, if x is the number of crimes that occur in a neighborhood (or any other fixed area) during a year (or any other fixed period of time), the probability that exactly k crimes will occur in the neighborhood during the next year is given by the Poisson density function,

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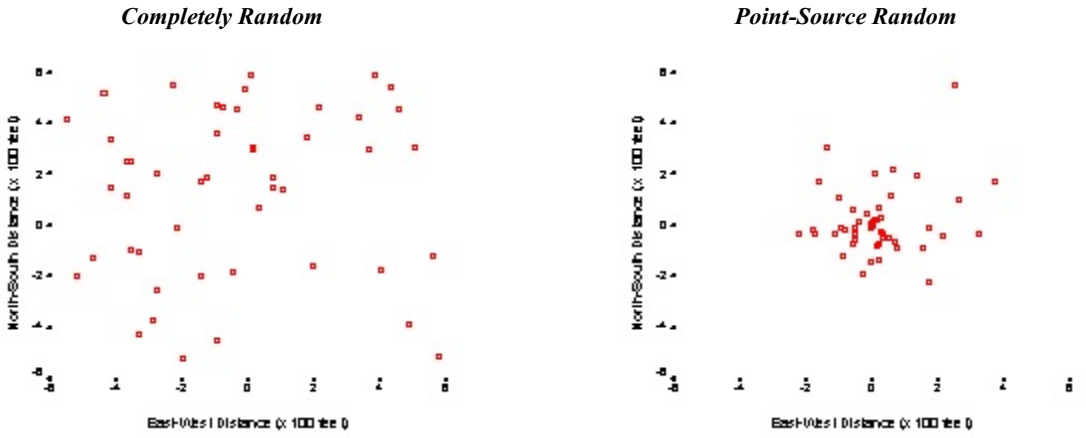
[51] Published in 1837 as *Recherches sur la probabilité des jugements en matière criminelle et matière civile.* Although I'm certain that one exists, I couldn't find an English translation on Amazon.com. In any event, the history and technical details are given in F. Haight, *Handbook of the Poisson Distribution* (John Wiley and Sons, New York 1967).

$$\text{Prob}(x=k) = \lambda^k e^{-k} / k! \qquad \text{where } \lambda \text{ is the crime rate}$$

The simulated distributions in Figure 5 illustrate how crime incidents can be distributed across a neighborhood through a Poisson process. Both of the spatial distributions in Figure 5 were generated with the same crime rate parameter (λ=48 crimes/area/year). The left-hand plot is *completely random*, however, while the right-hand plot is *point-source random*.

The neighborhood in the left-hand plot has a relatively high crime rate but the distribution is *completely random*.[52] Crime risk is distributed evenly across the blocks of the neighborhood. Although the neighborhood in the right-hand plot has the same high crime rate, risk emanates from point-source.[53] As we move away from the point-source, crime risk diminishes exponentially. If an SOB were located near the point-source of this distribution, reasonable people could conclude that the SOB posed a large, significant ambient public safety hazard.

**Figure 5 - Simulated Spatial Distributions of 48 Crimes**




In other fields, statistical models for testing *point-source random* hypotheses are well

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[52] P.J. Diggle (*Statistical Analysis of Spatial Point Patterns, 2nd Ed.*. Arnold, 2002) uses "complete spatial randomness" as a synonym for "Poisson." The Cartesian $(X_i, Y_i)$ co-ordinates of the $i^{th}$ *completely random* crime were drawn from a uniform distribution of the segment (-6,6).

[53] The polar $(\theta_i, \delta_i)$ co-ordinates of the $i^{th}$ *point-source random* crime were drawn from a uniform distribution of the segment $(0,2\pi$ for $\theta_i)$ and an exponential distribution of the segment (0,6 for $\delta_i$). Polar co-ordinates $(\theta_i,\delta_i)$ translate into the Cartesian plane as $X_i = \delta_i \cos(\theta_i)$ and $Y_i = \delta_i \sin(\theta_i)$.

known and widely used.[54] These models are not easily adapted to crime-related secondary effect studies, unfortunately. Unlike the simulated neighborhoods in Figure 5, the two-dimensional plane of a real-world neighborhood is interrupted by obstacles (houses, fences, *etc.*) that distort the underlying Poisson process. At the scale used in Figure 5 (approximately nine city blocks), it is impossible to represent these real-world obstacles in a mathematical model.

The most practical solution to this problem is to examine the Poisson process' outcome at a cruder scale. For the two hypothetical neighborhoods in Figure 5, *e.g.*, the researcher could construct 500-foot impact zones in the neighborhood centers. If the SOB located in the center of the right-hand neighborhood poses no ambient public safety hazard, the total crimes in the two impact zones should be roughly equal. If not, the researcher can conclude that the SOB has a secondary effect. The statistical test involves several technical details, of course, which need not concern the reader.

### 3.2.2 DATA CORROBORATE THE POISSON THEORY OF DISTANCE

The statistical properties of various impact zones can be derived directly from the Poisson density function. Although the statistical properties depend on the type of crime being examined, for many types of crime, the mathematical derivation suggests that a 500-foot impact zone will capture the ambient public hazard.

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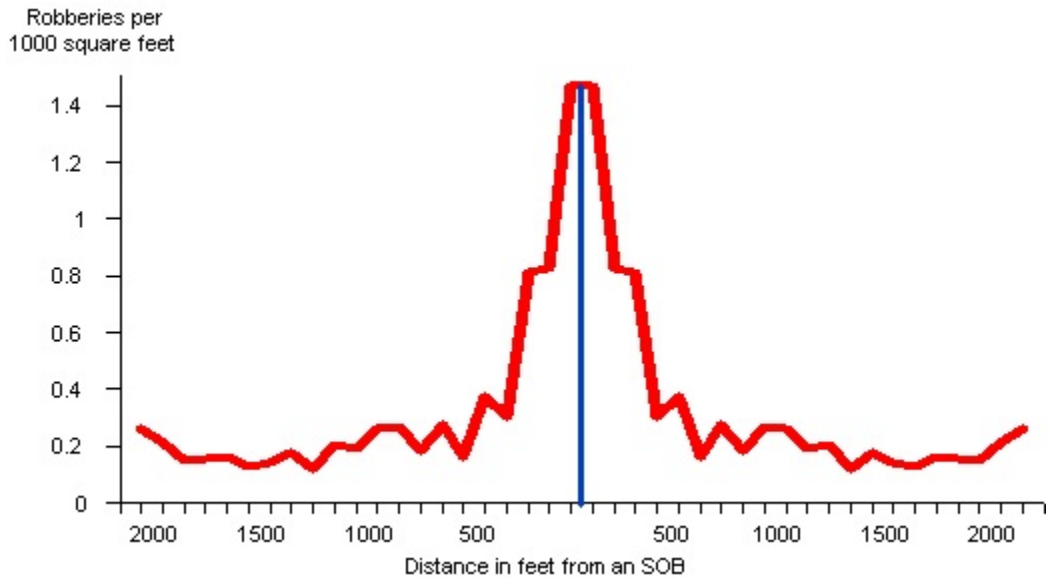
[54] *E.g.*, in "Confirmatory spatial analysis by regressions of a Poisson variable," (*Journal of Quantitative Anthropology*, 1989, 2:13-38) Mark Stiger and I model the spatial distribution of bones at an archaeological site.

**Figure 6 - Ambient Armed Robberies for 28 Greensboro SOBs**




The available data corroborate the theoretical derivation. Figure 6 shows the spatial distribution of UCR armed robberies around 28 Greensboro SOBs during 1995-2004. Although the high-risk zone extends to a distance of 1,000 feet – approximately two long city blocks – a 500-foot radius captures the bulk of the robbery hazard. The spatial distributions of other crimes have a similar (though not identical) shape and lead to the same conclusions about impact zones.

### 3.2.3 CONCLUDING REMARKS ON IMPACT ZONES

Figure 6 speaks for itself in three ways. First, in terms of armed robberies, the spatial distribution in Figure 6 can only be interpreted as the product of a *point-source random* process; *i.e.*, the process that generated the right-hand distribution in Figure 5. Second, the pattern of exponential decay with distance from the *point-source* reinforces my opinion that a 500-foot impact zone captures the bulk of most ambient public safety hazards. Third, specifying a larger impact zone biases the estimate of the ambient public safety hazard toward zero.

### 3.3 USING A LOW-POWER STATISTICAL TEST

In the 2002 San Diego study,[55] Drs. Linz and Paul used CFSs (as opposed to UCRs) in an attempt to measure ambient crime risk in a 1,000-foot linear (as opposed to radial) impact zone around peep show sites. As noted, both design features generate biases in favor of the null

[55] This is the study that I reviewed in § 2.3.2b above.

hypothesis. The biasing mechanism operates through a design characteristic known as "statistical power." To introduce this topic, recall that Drs. Linz and Paul found that peep show zones had 15.7 percent more 911 CFSs than control zones. A 15.7 percent difference in any crime-related statistic is *large* in *substantive* terms, of course, but in *statistical* terms, Drs. Linz and Paul argued that the the effect was small. They contended that, because the effect was *statistically in*significant, the "real" secondary effect was zero:

> ... statistically nonsignificant result and must be interpreted, as meaning that there is no significant difference between these two averages – an indication that the level of criminal activity for [peep-show areas] is equal to the level of criminal activity for [control areas].[56]

In other words, Drs. Linz and Paul claim that the substantively large 15.7 percent increase is not "real." If the effect estimate is not *statistically* significant, then it does not exist, they claim.

A mundane analogy reveals the fallacy in this argument. If I cannot find my car keys, I might conclude that my car keys do not exist. But although this may be true, it may also be true (and certainly more likely) that I did not look hard enough for my car keys or that I looked in the wrong place.[57] By analogy again, if a "quick and dirty" secondary effect study fails to find a statistically significant effect, one might want to conclude that no effect exists. Although this may be true, it may also be true that the study was "too quick" or "too dirty."

### 3.3.1 THE THEORY OF STATISTICAL HYPOTHESIS TESTING

Statistical hypothesis tests of the sort used by Drs. Linz and Paul in their 2002 San Diego study are best understood by analogy to a jury trial. Suppose that an SOB stands accused of posing an ambient public safety hazard. After hearing the evidence, the jury can *convict* the SOB, *acquit* the SOB, or if it cannot reach a decision, the jury can *hang*, resulting in a retrial. Figure 7 plots the jury's three decision-making options against the guilt or innocence of the SOB.

When the jury returns a verdict, there is a small probability that the verdict was incorrect. The incorrect verdicts – errors – are painted red in Figure 7. When the jury convicts an innocent SOB, the incorrect verdict is a "false-positive" error; when the jury acquits a guilty SOB, the

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[56] p.15, *A Secondary Effects Study Relating to Hours of Operation of Peep Show Establishments in San Diego, California*. September 1, 2002. Daniel Linz and Bryant Paul.

[57] Newton made this point with his aphorism "*Negativa non Probanda*." "Finding nothing proves nothing."

incorrect verdict is a "false negative" error.[58] When the jury hangs, of course, there is no verdict and, hence, no possibility of an error.

**Figure 7 - Two Types of Decision Error**

| | In Reality, the SOB is ... | |
|---|---|---|
| | **Guilty** | **Innocent** |
| **The Jury Convicts** | **95% Confidence** | **5% False Positives** |
| **The Jury Hangs** | **?** | **?** |
| **The Jury Acquits** | **20% False Negatives** | **80% Power** |

In real-world courtrooms, the probabilities of false verdicts are unknown. Courts enforce strict procedural rules to minimize the probabilities but we can only guess at their values. In statistical hypothesis testing, on the other hand, the values are *fixed by design* at 5 and 20 percent respectively.[59] The complements of the two error rates give the probabilities of correct verdicts. The correct verdicts are painted blue in Figure 7. The probabilities that jury's verdict was correct are known respectively as statistical *confidence* (the true-positive rate) and statistical *power* (the true-negative rate). If the jury adopts the 95 percent true-positive and 80 percent true-negative probabilities used by scientists, the jury would have 95 percent *confidence* in the SOB's guilt to

[58] False-positives are also called "Type I" or "α-type" errors. False negatives are called "Type II" or "β-type" errors. The terms "false positive" and "false negative," which come from the field of public health screening, are widely used in popular discourse.

[59] The most comprehensive authority on this issue is Chapter 22 of *The Advanced Theory of Statistics, Vol. 2, 4th Ed.* by M. Kendall and A. Stuart (Charles Griffin, 1979). This authority requires a strong background in mathematics. J. Cohen's *Statistical Power Analysis for the Behavioral Sciences, 2nd Ed.* (L.E. Erlebaum Associates, 1988) and M. Lipsey's *Design Sensitivity: Statistical Power for Experimental Research.* (Sage Publications, 1990). Both Cohen (pp. 3-4) and Lipsey (pp. 38-40) set the conventional false-positive and false-negative rates at $\alpha$=.05 and $\beta$=.2, respectively. These rates can be set lower, of course. The convention also sets the ratio of false-positives to false-negatives at 4:1, implying that false-positives are "four times worse than" false-negatives. The 4:1 convention dates back at least to 1928 (J. Neyman and E. Pearson, "On the use and interpretation of certain test criteria for purposes of statistical inference." *Biometrika*, 1928, 20A:175-240). It reflects a view that science should be conservative. In this instance, for example, the 4:1 convention works in favor of the SOB. When actual decision error costs are known, the actual ratio is used.

convict and 80 percent *certainty* in the SOB's innocence – *i.e.*, statistical power – to acquit.

### 3.3.2 HYPOTHESIS TESTING CONVENTIONS

The flaw in the jury trial analogy is that there is no practical way to ensure that juries follow the 95 percent confidence and 80 percent power conventions. But there is this *im*practical way to ensure compliance: We empanel 100 independent juries and have each hear the evidence at a remote location. If at least 95 out of 100 juries returns a guilty verdict, the SOB is *convicted* with *95 percent confidence*. On the other hand, if at least 80 out of 100 juries returns a not-guilty verdict, the SOB is *acquitted* with *80 percent power*. Any other mix of convictions and acquittals is a *non-verdict*, requiring a retrial.

The cost of empaneling 100 independent juries for every trial is prohibitive, of course. Nevertheless, this is, more or less, what scientists do in a statistical hypothesis test. Scientists use a mathematical model to eliminate the expense of conducting 100 independent hypothesis tests; but otherwise, each hypothesis test is interpreted *as if* it had been replicated 100 times. Then, based on the statistical significance of the test, we make one of three decisions:

- If the effect estimate is statistically significant, we conclude with 95 percent statistical confidence that *the secondary effect exists*.
- If the effect is not statistically significant but the statistical power of the effect estimate exceeds 80 percent, we conclude that *the secondary effect does not exist*.
- Finally, lacking both 95 percent statistical confidence and 80 percent statistical power, *the test is inconclusive*.

The second and third decision-making conventions are the source of a debate. SOB industry witnesses interpret any statistically insignificant result – any null finding – to mean that SOBs have no crime-related secondary effects. This interpretation assumes the conventional 80 percent level of statistical power, however, and none of null findings put forward by the industry satisfy that criterion.

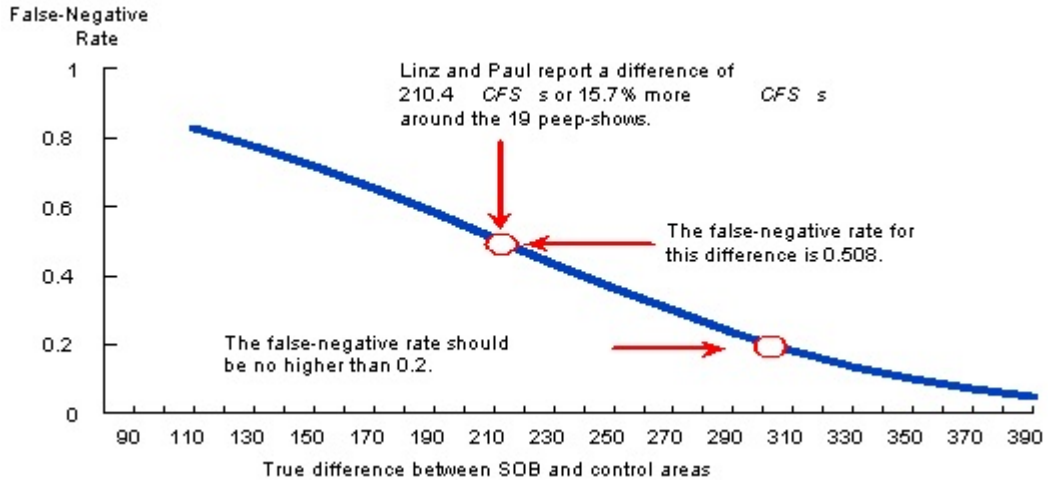
### 3.3.3 AN EXAMPLE

Figure 8 plots the domain of false-negative rates (vertical axis) against a range of secondary effect estimates (horizontal axis) for the 2002 San Diego study.[60] The 15.7 percent

[60] These rates were calculated by a software package called *Power Analysis and Sample Size, Version 6*, distributed by the NCSS Corporation. My calculations assume sample sizes of 19 peep-show and 19 control zones; a false-positive rate of 0.05; and a standard deviation 304.5

difference (210.4 CFSs) reported by Drs. Linz and Paul has a false-negative rate of 0.508. If the actual effect is 15.7 percent, the statistical model used by Drs. Linz and Paul would fail to detect the effect 51 percent of the time. If the actual effect were somewhat smaller, say, ten percent, their statistical model would fail to detect the effect nearly 75 percent of the time.

**Figure 8 - False-Negative Rates for the 2002 San Diego Study**




Judging from Figure 8, Drs. Linz and Paul either did not "look hard enough" for an effect in San Diego or, else, looked "in the wrong place." A false-negative probability of 0.508 means that the null finding reported by Drs. Linz and Paul is more likely (51 percent) to be *in*correct than correct (49 percent). Indeed, the secondary effect would have to be *at least* 22.7 percent before the statistical model used by Drs. Linz and Paul could detect it at the conventional 95 percent confidence level. In substantive terms, a secondary effect that large would constitute a "crime wave" of historic proportions!

### 3.3.4 WHY WE HAVE HYPOTHESIS TESTING CONVENTIONS

The 80 percent power convention was proposed and adopted in the 1920s when statistical hypothesis testing was in its infancy. The convention has survived for eighty years because it serves two useful, crucial functions.

- Anyone with a modest background in research methods can design a study in a way that favors – or even guarantees – a null finding. The convention minimizes abuses by malicious investigators.

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*CFS*s. These are the values that were reported explicitly or implicitly by Drs. Linz and Paul.

- Haphazardly designed "quick and dirty" studies favor the null finding. The convention minimizes the impact of spurious findings generated by naive (but benign) investigators.

The mathematics of statistical power is so demanding that few scientists understand the concept or its importance in statistical research.[61] Mathematical illiteracy explains much of the controversy in the secondary effects debate. The possibility of malicious intent cannot be dismissed, however. Anyone with a modest research background can design a study so as to guarantee a statistically insignificant result. Lay audiences, who must rely on common sense, cannot always distinguish between weak and strong designs or between benign and malicious investigators. Scientific conventions guard against both abuses. In this particular instance, the 80 percent power convention allows the lay audience to trust the validity of a null finding,

### 3.3.5 THE LITERATURE REVISITED

With the conventions of 95 percent confidence and 80 percent power, crime-related secondary effect studies can be categorized as *significant*, *null*, or *inconclusive*.

- An effect is *statistically significant* if its false-positive rate is five percent or less. This implies 95 percent confidence.

- An effect is *null* if it is not statistically significant and its false-negative rate is less than 20 percent. This implies 80 percent power.

- An effect is *inconclusive* if its false-positive rate is greater than five percent and its false-negative rate is greater than 20 percent.

Table 11 breaks down twenty secondary effect studies by these three categories. The first column (red) lists sixteen studies that reported *significant* secondary effects. All sixteen effects were adverse. The second column lists four studies whose results were *inconclusive* by the conventional criteria. The third column (blue) is reserved for studies that report null effects with 80 percent statistical power. To my knowledge, there are none.

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[61] *E.g.*,"I attributed this disregard of power to the inaccessibility of a meager and mathematically difficult literature..." (p. 155, "A power primer." J. Cohen, *Psychological Bulletin*, 1992, 112:155-159).

**Table 11 - Secondary Effect Studies by Finding**

| Significant Effect | | Inconclusive | | No Effect |
|---|---|---|---|---|
| Amarillo | 1977 | Charlotte* | 2001 | None |
| Los Angeles | 1977 | Ft. Wayne* | 2001 | |
| St. Paul | 1978 | San Diego* | 2002 | |
| Whittier | 1978 | Toledo* | 2004 | |
| Phoenix | 1979 | | | |
| Minneapolis | 1980 | | | |
| Indianapolis | 1984 | | | |
| Austin | 1986 | | | |
| Garden Grove | 1991 | | | |
| Times Square | 1994 | | | |
| Newport News | 1996 | | | |
| Centralia | 2003 | | | |
| Greensboro* | 2003 | | | |
| Daytona Beach* | 2004 | | | |
| Montrose | 2005 | | | |
| Sioux City | 2006 | | | |

* Industry-sponsored studies

Table 11 reinforces the statement that began this report: It is a *scientific fact* that SOBs pose large, significant ambient crime risks. Criminological theory predicts the phenomenon; empirical research corroborates the prediction. Table 11 demonstrates the depth and breadth of the corroborating evidence. The theoretical expectation has been tested many times but not once has it been refuted.

## 4 THE AUGUST 16TH, 2006 PUBLIC HEARING

On August 16th, 2006, Mr. Luke Lirot, a lawyer representing Hillsb;orough County SOBs, appeared before the Hillsborough County Commission to speak against the proposed ordinances. Mr. Lirot introduced four experts on various aspects of SOBs:

- Dr. Terry A. Danner, Chair of the Department of Criminology at St. Leo University;
- Dr. Randy D. Fisher, Associate Professor of Psychology and Director of the Survey Research Laboratory at the University of Central Florida
- Dr. Judith Lynne Hannah, an anthropologist from the Department of Dance at the University of Maryland;

- Mr. Richard Schauseil, a real estate agent.

Each of these experts addressed the Commission and (through Mr. Lirot) submitted research reports in support of the proposition that SOBs have no secondary effects whatsoever. In addition to reports from these experts who were present and spoke at the hearing, Mr. Lirot submitted reports by experts who did not attend the hearing:

- Dr. Marty Klein, a therapist by training, whose work addresses the primary (as opposed to secondary) effects of pornography;

- Dr. Daniel Linz, a social psychologist by training, who teaches at the University of California - Santa Barbara;

- Mr. R. Bruce McLaughlin, a land-use planner;

- Dr. Rebekah J. Thomas, a physiologist by training, who has testified on disease transmission.

I was already familiar with the work and opinions of Drs. Danner, Fisher, Hannah, and Linz, Mr. McLaughlin, and Mr. Schauseil. I had already read many of the reports and materials submitted (through Mr. Lirot) by these experts. I subsequently read the few items that were new to me. I was unfamiliar with the work and opinions of Drs. Klein and Thomas but I have now read their materials.

After reading everything submitted by Mr. Lirot and after listening to the public comments of Drs. Danner, Fisher, Hannah, and Mr. Schauseil, I reiterate each of the opinions expressed in this report. In particular, *it is my opinion that the SOB-crime relationship is a scientific fact. Criminological theory predicts that SOBs will pose large, significant ambient public safety hazards. This theoretical expectation is corroborated by a diverse empirical literature.*

Given the volume of material submitted by Mr. Lirot, I will not attempt an item-by-item rebuttal. Instead, I will organize my rebuttal around several thematic arguments and/or functions that are common to the experts' opinions. I will begin with the most relevant thematic argument.

### 4.1 "NEW" SECONDARY EFFECT STUDIES

Mr. Lirot submitted nearly two dozen "new" secondary effect studies to support the claim that SOBs have no crime-related secondary effects. None of these studies was "new," of course, nor did any change my opinion on the central issue of this report. On the contrary, three of the studies reported effect estimates that were statistically significant (not withstanding the claims of

their authors). I reviewed these studies earlier.[62] The remaining studies reported findings that were *inconclusive* when judged by conventional criteria. Although the studies reported statistically insignificant effects estimates, *i.e.*, the false-negative error rates exceeded 20 percent in every case.[63]

In sum, *every secondary effect study submitted by Mr. Lirot is consistent with the consensus finding of the literature. None of the studies supports the claim that SOBs have no crime-related secondary effects.* While my blanket statement may be sufficient for purposes of this report, some of the studies submitted by Mr. Lirot demand special comment.

#### 4.1.1 DR. DANNER'S "CRIMINOGENIC IMPACT ANALYSIS" MODEL

In the last decade, Dr. Terry A. Danner has championed a statistical method that he calls a "criminogenic impact analysis." The method consists of counting the number of crimes recorded in a sample of police patrol districts over a series of year; and then computing Pearson product-moment correlation coefficients between the districts and years. If some of the districts have SOBs, and if the SOBs have "criminogenic impacts" on their districts, Dr. Danner expects to observe a unique pattern of correlations.

Dr. Danner's statistical model requires strong statistical assumptions that, for crime data at least, are unwarranted. Since an explication of this point would require tedious mathematics, my comments are limited to two general observations. First, Dr. Danner's method is *novel*; no authority is cited for the method nor, to my knowledge, has the method been used by anyone but Dr. Danner. Second, when used to test a crime-related secondary effect hypothesis, *Dr. Danner's method is biased in favor of a null finding*.

The bias in Dr. Danner's "criminogenic impact analysis" method accrues from the model's inherently low statistical power. To illustrate this point, Table 12 reports five UCR crime rates for two Manatee County SOBs.[64] The SOBs are located in distinct mile-square grids that the Manatee County Sheriff's Office uses for patrolling, reporting, and other routine police functions. The column labeled "null" (blue) is an estimate of the annual crime rate (per square mile) under the assumption that neither SOB has a secondary effect; the column labeled "200%"

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[62] The 2002 San Diego study, the 2003 Greensboro study and the 2003 Greensboro study and the 2004 Daytona Beach study were reviewed above in §2.3.2b, §2.3.1a and §2.3.1b.

[63] The statistical power of the design was less than 80 percent, in other words. These conventions and the authorities are given in §3.3 above.

[64] Danner, T.A. *Criminogenic Impact Analysis: Peek-A-Boo Lounge of Bradenton (5412 14th Street West, Bradenton, FL) and Temptations II (3824 U.S. 41 North, Palmetto, FL).* December 8th, 2000.

is the analogous estimate under the assumption that:

- Ambient crime risk in a 500-foot radius doubled when the SOBs opened;
- Crimes are realized through the point-source Poisson process depicted in Figure 5 above.

**Table 12 - Criminogenic Impact Analysis, Manatee County**

| *SOB Site* | *UCR Crime* | *Secondary Effect* | | Waiting Time |
|---|---|---|---|---|
| | | *Null* | *200%* | |
| *Peek-a-boo Lounge* | *Assault* | 66.8 | 68.6 | 73 years |
| *(MCSO Grid 2014)* | *Auto Theft* | 32.6 | 33.5 | 148 years |
| | *Burglary* | 94.4 | 97.0 | 51 years |
| | *Rape* | 7.2 | 7.4 | 667 years |
| | *Robbery* | 17.5 | 18.0 | 276 years |
| *Temptations II* | *Assault* | 12.6 | 13.0 | 383 years |
| *(MCSO Grid 0901)* | *Auto Theft* | 6.1 | 6.3 | 790 years |
| | *Burglary* | 22.4 | 23.0 | 216 years |
| | *Rape* | 2.4 | 2.4 | 2037 years |
| | *Robbery* | 3.2 | 3.3 | 1489 years |

Since the impact zones cover less than three percent of the grid area, a doubling of the ambient crime risk has a relatively small effect on the crime rate of the mile-square grid. As a consequence, the statistical power of the model is extraordinarily low.

One way to visualize statistical power is to calculate the time that Dr. Danner could expect to wait before he could detect a *substantively large* (200 percent) secondary effect estimate with the conventional 95 percent confidence. The right-hand column of Table 12 (green) gives the expected time. *In the best case scenario* – UCR burglary in Grid 2014 – Dr. Danner could expect to wait 51 years before his statistical model could detect the 200 percent effect. *In the worst case scenario* – UCR rape in Grid 0901 – Dr. Danner could expect to wait 2,037 years.

Given the extraordinarily low statistical power of the underlying statistical model, I am not surprised that Dr. Danner's "criminogenic impact analyses" have never found a statistically significant crime-related secondary effect. The statistical model's inherent bias virtually

guarantees a null finding.[65]

### 4.1.2 CAN SOBS AFFECT A COUNTY'S CRIME RATE?

To test whether SOBs have crime-related secondary effects, Dr. Randy D. Fisher and his colleagues estimate the correlation between county-level crime rates and the number of SOBs in Florida's 67 counties.[66] Finding no significant correlation, Dr. Fisher and his colleagues conclude that SOBs do *not* have crime-related secondary effects. Given the tight spatial focus of an ambient crime risk – a 500-foot radius, *e.g.* – there is no reason to expect that SOBs will affect the crime rate of a county, of course. Dr. Fisher and his colleagues consider this possibility:

> A related concern is the possibility that adverse effects such as crime emanate only a short distance from nude businesses, and that they are thus not detectable when a much larger unit of analysis, such as whole counties, is examined. This view suggests that these adverse effects can be detected only with designs that examine crime activity within a small radius, such as 1,000 feet, from the business.

Other than misstating the ideal radius for conventional confidence and power (500 ft.), Dr. Fisher and his colleagues are correct. They quickly dismiss the possibility, however.

> Such a position might have some merit, but it assumes that any adverse effects such businesses have on crime are weak and local. Still, one might argue that even weak and local effects, if accumulated over 90 or so businesses, such as in Hillsborough County, ought to have a detectable effect at the county level. If these effects cannot be detected at the level of analysis at which policy decisions are being made, that is, cities or counties, then it is difficult in our view to argue that the possibility of such effects should affect policy decisions made at that level. This is especially true when powerful "effects" of nonsexual businesses on crime are suggested by the robust associations between their prevalence and crime rates.

Because the crime-related secondary effects of SOBs cannot be detected in Florida's county-level correlations, Dr. Fisher and his colleagues argue that the effects are not worth the attention paid

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[65] My students recently estimated statistical power functions for the Manatee County correlation matrices in Dr. Danner's Manatee County analysis. These results are more pessimistic than Table 12.

[66] Fisher, R.D., D. Linz, C.L. Benton and B. Paul. *Examining the link between sexual entertainment and crime: the presence of adult business and the prediction of crime in Florida*. May, 2004.

them by policy-makers. This curious argument reflects a weak understanding of statistical correlation and crime policy.

On the one hand, any correlation that is estimated from a relatively small, highly variable sample is an ephemeral thing. Correlations estimated from Florida's 67 counties are dominated by a half-dozen or so "outlier" counties – Dade, Orange, *etc.* When the undue influence of these "outliers" is controlled (by "Windsorization," *e.g.*), the significant correlations reported by Dr. Fisher and his colleagues wither away and new correlations emerge.

On the other hand, virtually all ambient crime "problems" have their impacts at the local, neighborhood level. With few exceptions, these "problems" cannot be detected at higher, more aggregated levels. Attempting to identify neighborhood problems from aggregate data at the county level, as Dr. Fisher and his colleagues do, introduces an ecological fallacy.[67] Like virtually all crime "problems," the secondary effects of SOBs, at least as they involve ambient crime, are measured at the neighborhood level.

### 4.2 METHODOLOGICAL REVIEWS

Several methodological critiques submitted by Mr. Lirot found "fatal flaws" in the crime-related secondary effect studies relied upon by legislatures. A point-by-point comparison of the methodological critiques reveals a near-perfect unanimity of opinion by industry witnesses. This unanimity does not reflect a convergence of independent opinion, however, but rather, reflects the influence of a methodological review essay by Drs. Bryant Paul and Daniel Linz and Mr. Bradley J. Shafer, an attorney for the adult entertainment industry.[68]

The methodological rules endorsed in this essay are derived, according to the authors, from the rules suggested by the U.S. Supreme Court decision in *Daubert v. Merrell Dow*.[69] I am not convinced that this claim is correct. Nevertheless, I am convinced that the methodological rules endorsed in this article are *not* derived from any primary authority on quasi-experimental

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[67] The authoritative citation for the ecological fallacy is, Robinson, W.S. Ecological correlations and the behavior of individuals. *American Sociological Review*, 1950, 15: 351-357; but see also, Goodman, L.A. Ecological regression and the behavior of individuals. *American Sociological Review*, 18: 663-664.

[68] Paul, B., D. Linz and B.J. Shafer. Government regulation of "adult" businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects. *Communication Law and Policy*, 2001, 6:355-391. Mr. Shafer represents the Deja Vu chain of adult cabarets, which is perhaps the largest strip club chain in the country. *See, e.g., Deja Vu of Cincinnat, L.L.C. v. Union Township*, 411 F.3d 777 (6th Cir. 2005) (*en banc*).

[69] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

design. Nor have the methodological rules endorsed in the article been adopted or cited in any scholarly literature.[70]

### 5. CATALOGUE OF THE ITEMS SUBMITTED BY MR. LIROT

Mr. Lirot submitted hundreds of pages of documents to support his argument against the proposed legislation. For purposes of rebuttal, the items are categorized by their common theme or function. I have read all of the items listed below.

### 5.1 COURT DECISIONS

Although I have read the court decisions submitted by Mr. Lirot, I have no training in the law and, therefore, have no opinion on the decisions or on their relevance to the secondary effect debate issues.

City of Los Angeles v. Alameda Books, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670, (2002).

Erie Boulevard Triangle Corp. v. City of Schenectady, 152 F. Supp.2d 241 (N.D. N.Y. 2001)

Flanigan's Enterprises, Inc. v. Fulton County, 242 F. 3d 976 (lIth Cir. 2001)

Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)

Peek-A-Boo Lounge of Bradenton, Inc et. at. v. Manatee County, 2003 WL 21649675

Daytona Grand, Inc. d/b/a Lollipop's Gentlemen's Club v. City of Daytona Beach, Florida 410 F .Supp.2d 1173, (2006).

United States v. Playboy Entertainment Group, Inc. 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000) and Playboy Entertainment Group, Inc. v. United States, 30 F .Supp.2d 702

Carandola. et. al. v. Fox. et. al.. 396 F.Supp.2d 630, (2005)

XLP Corporation v. The County of Lake. 317 Ill.App.3d 881. 743 N.E.2d 162, (2000)

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[70] In the five years since its publication, excluding citations by the authors, the article has been cited in *Social Science Citation Index* journals only in three obscure law reviews.

### 5.2 EXPERTS' CURRICULUM VITAE

Mr. Lirot submitted *curriculum vitae* for the experts whose reports and materials were submitted. I have read all of the *curriculum vitae*.

### 5.3 REAL ESTATE REPORTS

Mr. Lirot submitted several reports allegedly measuring the impact of SOBs on real estate values. I have read all of the reports of these studies. For the most part, the real estate value reports submitted by Mr. Lirot claim that SOBs have no effect (or even a salutary effect) on the value of neighboring real estate. Although I have not rebutted the studies submitted by Mr. Lirot, the Hillsborough County Commission have reviewed a number of studies whose findings show that SOBs have adverse secondary effects on real estate values. They have also been provided with a certified appraiser's critique of the work of Mr. Shauseil, who authored all but one of the real estate reports.

Schauseil, R. Market Study and Report: A Study of Real property and Negative Secondary Effects in Bradenton, Florida.

Schauseil, R. Market Study and Report: A Study of Real Property and Negative Secondary Effects in Casselberry, Florida.

Schauseil, R. Market Study and Report: A Study of Real Property and Negative Secondary Effects in Tampa, Florida.

Schauseil, R. Market Study and Report: A Study of Real Property and Negative Secondary Effects in Pinellas County, Florida.

Schauseil, R. Market Study and Report: A Study of Real Property and Negative Secondary Effects in Oakland Park, Florida.

Shauseil, R. The Property Value Analysis.

Greer, S,V. Market Study of Six Locations in Four Neighborhoods in Oklahoma City, Oklahoma.

### 5.4 MISCELLANEOUS IRRELEVANT ITEMS

Mr. Lirot submitted a number of items that, in my opinion, are irrelevant to the secondary effects debate. I have read the following items.

Beck, M. The Pornographic Tradition-Formative Influences in the 16th to 19th Century European literature.

Fisher, R.D. *Positive Economic Impact of the Mons Venus: The Impact of the Performers' Incomes*.

Hanna, J.L. Hillsborough County Proposed Sexually Oriented Business Legislation.

Hanna, J.L. Exotic Dance Adult Entertainment: A Guide for Planners and Policy Makers.

Hanna, J.L. Naked Truth: The Christian Right Battles Strip Clubs.

Hanna, J.L. "Charlotte study."

Klein, M. Florida's Strip Clubs: Palaces of Perversion or Refuge for Relaxation?

Thomas, R.J. Excerpts of Testimony in Kentucky Restaurant Concepts, Inc. v. City of Louisville.

Letter to the U.S. Department of Justice to Bryant Paul from Elizabeth Groff of the Crime Mapping Research Center.

Club, Porn Fight Dropped. *Myrtle Beach Sun News, 3-11-06.*

Experts: Porn Shops Don't Hike Crime. JournalInquirer.com, 4-17-06.

### 5.5 SECONDARY EFFECT STUDIES

Mr. Lirot submitted a number of crime-related secondary effect studies whose findings were characterized as *null* (*i.e.*, finding that SOBs have no crime related secondary effects). I have read all the reports and, in my opinion, Mr. Lirot has mischaracterized their findings. In each case, the findings of these studies are *inconclusive* by the conventional *statistical power* criterion that I described in § 3.3 above.

Danner, T.A. *Adult use establishments and crime: searching for a causal link*. October 7th, 1998.

Danner, T.A. *Criminogenic impact analysis. Peek-a-boo Lounge of Bradenton; Temptations II.* December 8th, 2000.

Danner, T.A. *Criminogenic impact analysis: Voyeur Dorm*. July 2nd, 2002.

Danner, T.A. *The effect of Mons Venus Adult Cabaret on neighborhood crime volumes.* April 1st, 2001.

Danner, T.A. *Criminogenic impact analysis: Seven adult cabarets located in Pinellas County*. April 26th, 2001.

Danner, T.A. *Exploring the causal connection between adult use enterprises and the adverse secondary effect of crime: The Casselberry and Seminole County experience*. May 20th, 2002.

Danner, T.A. *Exploring the causal connection between adult use enterprises and the adverse secondary effect of crime: Bedtyme Stories and Fantasy World*. March 22nd, 2002.

Danner, T.A. *Report to the Hillsborough County Commission*. May 7th, 2003.

Danner, T.A. *Exploring the causal connection between* adult use enterprises and the adverse secondary effect of crime: a focus on Jackson, MS. September 12th, 2003.

Danner, T.A. *Adult cabarets and crime related secondary effects*. October 9th, 2003.

Danner, T.A. *A criminogenic analysis: Scarlett's adult cabaret*. December 24th, 2003.

Danner, T.A. *An analysis of adult cabarets crime related secondary effects: focus on the Ybor City Historic District*. November 7th, 2004.

Danner, T.A. *The Effects of the Mons Venus Adult Cabaret on Neighborhood Crime Volumes, in Tampa, Florida: Empirical Analysis of Longitudinal Data*.

Danner, T.A. *The Effects of the Mons Venus Adult Cabaret on Neighborhood Crime Volumes in Tampa, Florida: A 2001 Updated: An Empirical Analysis of Longitudinal Data*.

Fisher, R.D., D. Linz and M. Yao. *Examining the link between sexual entertainment and crime: the presence of adult business and the prediction of crime in Florida*. May, 2004.

Fisher, R.D. *An empirical investigation of crime events in Jacksonville, Florida. Have the "bikini bars" elevated the rate of crime?* August 10th, 2005.

Linz, D., R.D. Fisher and M. Yao, *Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach, Florida: A Study of Calls for Service*

*to the Police in Reference to Ordinance 02-496*. April 7th, 2004.

Linz, D. and B. Paul. *Using Crime Mapping to Measure the Negative Secondary Effects of Adult Businesses in Fort Wayne, Indiana: A Quasi-Experimental Methodology*.

### 5.6 METHOLOGICAL REVIEWS

Mr. Lirot submitted several methodological reviews of the secondary effect studies ordinarily relied upon by legislatures. I have read all of these reviews and, without exception, find that they have no merit.

Paul, B., D. Linz and B.J. Shafer. Government regulation of "adult" businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects. *Communication Law and Policy*, 2001, 6:355-391.

McLaughlin, R.B. Summary of Secondary Effects Analyses, By McLaughlin Consulting Services, Inc.

Thirteen Steps to a Successful Experiment, entered into the record of adoption for Oak Park Ordinance 01-07, March 20, 2001.

## 6. MATERIALS AND AUTHORITIES USED IN THIS REPORT

My opinions are based on my background, training, and experience in criminology and statistics. Nevertheless, whenever possible, I have cited relevant authorities for my opinions, The following authorities are listed by broad areas of relevance. Obviously, the categories are approximate, intended only as a rough guide for the reader.

### 6.1 SECONDARY EFFECT STUDIES ROUTINELY RELIED UPON BY LEGISLATURES

Amarillo, TX, 1977. *A Report on Zoning and Other Methods of Regulating Adult Entertainment in Amarillo*. City of Amarillo Planning Department, September 12th, 1977.

Los Angeles, CA, 1977. *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles*. Department of City Planning, June, 1977.

St. Paul, MN, 1978. *Effects on Surrounding Area of Adult Entertainment*

*Businesses in St. Paul*. Department of Planning and Economic Development and Community Crime Prevention Project, June, 1978.

Whittier, CA, 1978. *Staff Report, Amendment to Zoning Regulations, Adult Businesses in C-2 Zone with Conditional Use Permit, Case No. 353.015*, January 9, 1978.

Phoenix, AZ, 1979. *Adult Business Study*. City of Phoenix Planning Department, May 25, 1979.

Minneapolis, MN, 1980. *An Analysis of the Relationship between Adult Entertainment Establishments, Crime, and Housing Values*. Minnesota Crime Prevention Center, Inc. M. McPherson and G. Silloway, October, 1980.

Indianapolis, IN, 1984. *Adult Entertainment Businesses in Indianapolis, An Analysis*. Department of Metropolitan Development, Division of Planning. March, 1984.

Austin, TX, 1986. *Report on Adult Oriented Businesses in Austin*. Office of Land Development Services, May 19th, 1986.

Garden Grove, CA, 1991. *Final Report to the City of Garden Grove: The Relationship between Crime and Adult Business Operations on Garden Grove Boulevard*, October 23, 1991. Richard McCleary, Ph.D. and James W. Meeker, J.D., Ph.D.

New York Times Square, NY, 1994. *Report on the Secondary Effects of the Concentration of Adult Use Establishments in the Times Square Area*. Insight Associates, April, 1994.

Newport News, VA, 1996. *Adult Use Study*. Department of Planning and Development, March, 1996.

Dallas, TX, 1997. *An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas*. Peter Malin, MAI, April, 1997.

Greensboro, NC, 2003. *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Greensboro: A Study of Calls for Service to the Police*. Daniel Linz and Mike Yao, November 30, 2003.

Greensboro, NC, 2003. *A Methodical Critique of the Linz-Yao Report: Report to the Greensboro City Attorney.* Richard McCleary, Ph.D., December 15, 2003.

San Diego, CA, 2002. *A Secondary Effects Study Relating to Hours of Operation of Peep Show Establishments in San Diego, California*. Daniel Linz and Bryant Paul, September 1, 2002.

San Diego, CA, 2003. *A Methodical Critique of the Linz-Paul Report: A Report to the San Diego City Attorney's Office*. Richard McCleary, Ph.D. and J.W. Meeker, March 12, 2003.

Centralia, WA, 2004. *Crime Risk in the Vicinity of a Sexually Oriented Business: A Report to the Centralia City Attorney's Office*. Richard McCleary, Ph.D, February 28, 2004.

Toledo, OH, 2004. *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Toledo, Ohio: A Study of Calls for Service to the Police.* Daniel Linz and Mike Yao, February 15, 2004.

Toledo, OH, 2004. *A Methodological Critique of the Linz-Yao Report: Report to the City of Toledo, OH.* Richard McCleary, Ph.D. and J.W. Meeker, May 15, 2004.

Daytona Beach, FL, 2004. *Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496.* D. Linz, R.D. Fisher, and M. Yao, April 7, 2004.

Montrose, IL, 2005. *Report to the Effingham County Attorney*. Richard McCleary, Ph.D., April 26, 2005.

Sioux City, IA, 2006. *Affidavit of Richard McCleary, Ph.D.* Doctor John's *vs.* City. U.S. District Court, Northern District of Iowa, Western Division, Civil No. C03-4121 MWB, January 31, 2006.

Daytona Beach, FL, 2006. *A Methodological Critique of Evaluating Potential Secondary Effects of Adult Cabarets in Daytona Beach, Florida: A Study of Calls for Service to the Police in Reference to Ordinance 02-496*. Richard McCleary, Ph.D., May 1, 2006.

### 6.2 METHODOLOGICAL AND STATISTICAL AUTHORITIES

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City of Oklahoma City

COMMUNITY DEVELOPMENT DEPARTMENT

Planning Division

ADULT ENTERTAINMENT BUSINESSES IN Oklahoma City

A SURVEY OF REAL ESTATE APPRAISERS

March 3, 1986

Dear Oklahoma City Appraiser,

The City of Oklahoma has recently adopted a new ordinance that will regulate the location of adult entertainment businesses.

Adult entertainment businesses are defined in our ordinance as those which emphasize acts or materials depicting or portraying sexual conduct. These businesses include '[4]Adult Bookstores," *clubs* with *nude dancers, theatres* which show sexually explicit *movies, etc.*

In an effort *to* more completely analyze the impact of adult businesses on surrounding properties, Planning Division asks for your help in establishing a "best professional opinion' on the matter. As a real estate professional, the opinions you share with us on the enclosed survey forms would be very valuable to us in the development of a local data base for this sensitive land use issue.

Thank you very much for your assistance. Sincerely,

Community DEVELOPMENT DEPARTMENT

Planning Division

CITY OF OKLAHOMA CITY

TO: professional Real Estate Appraisers

Please help us in this brief Oklahoma City survey. The information provided will help us establish an important data base regarding adult entertainment businesses.

The first four questions relate to the hypothetical situation presented below. The last three questions refer to actual situations in Oklahoma City that you might be aware of.

A middle income residential neighborhood borders an arterial street that contains various commercial activities serving the neighborhood. There is a building that was vacated by a hardware store and will open shortly as an adult bookstore. There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the neighborhood.

Please indicate your answers to questions 1 through 4 in the blanks provided, using the scale A through C.

SCALE: A Decrease 20% or more

B Decrease more than 10% but less than 20%

C Decrease from 0 to 10%

D No change in value

S Increase from 0 to 10%

F Increase more than 10% but less than 20%

G Increase 20% or more

1) How would you expect the average values of the RESIDENTIAL property within ONE block of the bookstore to be affected?

2) How would you expect the average values of the COMMERCIAL property within ONE block of the bookstore to be affected?

3) How would you expect the average values of RESIDENTIAL property located THREE blocks from the bookstore to be affected?

4) How would you expect the average values of COMMERCIAL property located THREE blocks from the bookstore to be affected?

5) Are you aware of the existence of adult entertainment businesses in Oklahoma City?

6) What is your opinion as to the effect of these businesses on surrounding properties?

7) Specifically, how do you think these businesses affect the surrounding property?

Are you a member of:

MAI

ASA

SREA

other

Your name or agency

Thank you for your cooperation. Please return this questionnaire in the postage paid envelope provided for your convenience.

METHODOLOGY

On February 7, 1986, 100 questionnaires were mailed. All real estate appraisers in Oklahoma City listed in the Yellow Pages were included in the survey. As of March 1, 1986, 34 (34%) of the questionnaires had been completed and returned. Real estate appraisers do not receive certification from the State of Oklahoma; however, 26 of the respondents (76%) belonged to a professional organization. The table below summarizes the objective part of the questionnaire. Subjective comments are discussed in a separate section of this report.

SCALE OUEST IONS

1 2 3 4

A 11 (32%) 7 (21%) 4 (12%) 4 (12%)

Decrease

20% or more

B 8 (24%) 9 (26%) 3 (9%) 3 **(9%)**

**Decrease**

10% - 20%

C 6 (18%) 10 (29%) 10 (29%) 7 (21%)

Decrease

0 - 10%

D 9 (26%) 8 (24%) 17 (50%) 20 (59%)

No change

in value

E,F, and G were positive

values--not checked by anyone

OKLAHOMA CITY REAL ESTATE APPRAISER SURVEY RESULTS

The 100% survey of real estate appraisers in Oklahoma City produced results that were consistent in virtually all respects with the result of the national survey of appraisers carried out by the city of Indianapolis.

Respondents overwhelmingly (74%) indicated that an adult bookstore would have a negative effect on residential property values in the hypothetical neighborhood described if they were within one block of the premises. 32%' felt that this depreciation would be in excess of 20%, wheras 42% foresaw a decrease in value of from 1% to 20%. (Comparative national figures are $^{78t}$k, 19%' and 59% respectively.)

Seventy-six percent saw a similar decrease in commercial property values within one block of the adult bookstore. As in the national survey, fewer (21%) felt that a devaluation of over 20% would occur. The majority, (55%) saw the depreciation as being in the 1% to 20% range. (Comparative national figures are 69%, 10% and 59% respectively.)

The negative impact fell off sharply when the distance was increased to three blocks. As in the national survey, there appears to be more of a residual effect on residential properties than on commercial properties.

50% of the appraisers felt that a negative impact on residential properties would still obtain at three blocks from the site. Only 12% felt that this impact would be in excess of 20%. The remaining 38% felt that depreciation would be somewhere in the 1% to 20% range. 50% saw no applicable effect at all at three blocks. (Comparative national figures are 39%, 3% and 61%.)

Commercial property was judged to be negatively impacted at three blocks by 41% of the survey. 59% saw no change in value as a result of the bookstore. (Comparative national figures are 23% and 76% respectively.)

In summary:

- The great majority of appraisers ( about 75%) who responded to this survey felt that there is a negative impact on residential and commercial property values within one block of an adult bookstore.

- This negative impact dissipates as the distance from the site increases, so that at three blocks,~half.of the appraisers felt that there is a negative impact on residential property and less than half felt that there is a negative impact on commercial property.

## RESULTS FROM SUBJECTIVE QUESTIONS

Oklahoma City real estate appraisers were also asked for their opinions as to the effect of adult entertainment businesses on surrounding properties. Most of the respondents discussed a variety of negative effects. Only five *respondents (14%)* said that adult entertainment business had very little effect on surrounding properties. Of these, three appraisers felt that these types of businesses located in commercial areas that were already blighted. All respondents indicated their awareness of the existence of adult entertainment businesses in Oklahoma City; many referred to the 10th and MacArthur location as a prime example of an undesirable cluster situation.

<u>Opinions are summarized below</u>:

Not good. Attracts undesirables, threat to residents feeling of safety & security.

- acts as a deterrent to home sales

Would you wart your home or business next door?

-Forces good businesses out

-Tends to have a snowball effect

-*An* immediate *transition* begins, with the better *quality businesses* moving out and a lower class business moving in (pawnshops, bingo parlors)

-Embarrassment to other businesses and clientele - late hours, parking-trash and debris - vandalism

-Children in the area in danger of adverse influence or by actual molestation by perverted people drawn to such establishments

Typical shoppers and residents go elsewhere to shop, and, if ~ able to live.

If there is a large concentration of this type of business, there can be a very large loss in property value.

-Tends to prevent economic improvement in the area, effects the community as to attracting other businesses

-Detrimental impact on rental rates

# *A Report On Zoning And 0ther Methods Of Regulating Adult Entertainment In Amarillo*

**September 12, 1977**

**PLANNING DEPARTMENT**

# CITY OF AMARILLO, TEXAS

A Report On Zoning And 0ther Methods Of Regulating

Adult Entertainment In Amarillo

CITY COMMISSION

Jerry H. Hodge

Mayor

Jerry Ammerman
Commissioner No. 1

Curtis A. Crofford
Commissioner No. 3

Houston Deford

Commissioner No. 2

J. Dean Christy

Commissioner No. 4

John S. Stiff

City Manager

PLANNING AND ZONING COMMISSION

W. E. (Bill) Juett

Chairman

U. C. Sterquell, Jr., Vice-Chairman

Herbert Johnson

September 12, 1977

## PREFACE

This report presents the findings of the Amarillo Planning Department regarding the adult entertainment industry within the confines of the Amarillo City Limits. These findings analyze the land use effects of adult entertainment businesses and alternatives for their regulation. Adult entertainment businesses are those that customarily are not open to the general public by the exclusion of minors by reason of age.

Presently, the only authority available to a city for regulating adult businesses is the city's power to zone and license. These methods of control have been sanction by the Young v American Mini Theaters, Inc. case.

The determination of what is or is not obscene is to be made by a jury on a case by case basis in accordance with the test described in the Marvin Miller v State of California decision.. The criminal offenses for dealing in obscenity, proscribed by the Texas Penal Code, are the exclusive

province of the State, and the city may not invade this area by seeking to define obscenity or provide rebuff for its sale, display or distribution.

## A REPORT ON ZONING AND OTHER METHODS

## OF REGULATING ADULT ENTERTAINMENT IN AMARILLO

### Introduction

This report on the current extent of pornography in Amarillo was initiated upon the request of the Amarillo Planning and Zoning Commission April 25, 1977. Accompanying the request was the desire for information concerning the possible zoning control of all businesses catering to adults only. For the purpose of this report, adult-only businesses have not been limited to those that display pornographic material, but include bars, lounges and any other business type which restricts entry, sale or viewing based upon a minimum age.

This study is an attempt to briefly explore the national problem of adult-only businesses with a major emphasis on those which deal in pornographic material. The Amarillo situation was analyzed in relation to the extent of the national growth of the adult-only industry and the extent and limitations to which the City can control, through land use mechanisms, the proliferation of the industry outlets. No city ordinance regulating any type of adult business is included within this report and none will be drafted until discussion has occurred on the various options available for the control of adult businesses.

In any consideration of whether or not to control and restrict adult-only outlets within the municipal jurisdiction, the following should be reviewed:

1. To prohibit these uses to locate anywhere in the municipality, three points must be considered:

A. The Courts have generally invalidated legislation which attempts to prohibit a particular use altogether from a municipality.

B. Prohibiting the location of any pornographic use in the city could be contested on the grounds that it provides an individual engaged in such practice no means of livelihood within the City.

C. Such legislation could also be contested on the grounds that it infringes upon the right of freedom of speech.

2. If these uses are to be allowed and restricted within the municipality, the City must decide where such uses are to be located.[1]

METHOD OF ANALYSIS

In the preparation of this report several data sources were employed. Current weekly national news magazines were searched for references to the problems of major urban areas relative to this topic. Several individual cities known to be exploring methods of controlling the growth of the adult-only industry were contacted and adopted City Ordinances were reviewed. The American Society of Planning Officials provided advance information from an unreleased publication on Adult Entertainment which has since been published (copy included for your review). Several recent Supreme Court decisions were reviewed in order to determine the general mood of the law as handed down.[2]

This information was synthesized into a form which details the national limitations placed upon a state and city in the land use control of adult-only businesses. The Texas obscenity law was then reviewed in order to determine the limitations of legislative regulation of adult-only businesses and the extent which Amarillo, as a city, may regulate the industry through land use and licensing mechanisms.

DEFINITIONS

Obscenity is defined by the Supreme Court in the following excerpts from Marvin Miller v State of California:

1. "Obscene material is not protected by the First Amendment, Roth v. United States, 354, U.S. 476, 77 S Ct. 1307, 1L. Ed. 2d 1498, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and taken as a whole, does not have serious literary, artistic, political, or scientific value."

2. "The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, Roth, Supra, at 489, 77 S. Ct. at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary.

3. "The jury may treasure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a 'national standard'."

As stated above the basic guideline for determining what is obscene is through an evaluation of the material utilizing the forum community standard. In Smith v United States, 97 S. Ct. 1756 (1977) the Court amplified its consideration of the community standard when it stated that community standards are required to be applied by the jury in accordance with its understanding of the tolerance of the average person in the community. The result being that the jury has the discretion to determine what appeals to the prurient interests and what is patently offensive in its community. "State law cannot define the contemporary community standards for appeal to the prurient Interest and patent offensiveness that under Miller v California are applied in determining whether or not material is obscene. Though state legislatures are not completely foreclosed from setting substantive limitations *for* obscenity cases, they cannot declare what community standards shall be . . . [Smith v United States (1759)]

The conduct regulated by the Texas Legislature is defined in the Texas Penal Code Subchapter 43B, "Obscenity". The following is that portion of chapter 43 which regulates the sale, distribution and display of obscene material:

43.21. Definitions

In this subchapter:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;

(B) depicts or describes. sexual conduct in a patently offensive way; and

(C) lacks serious literary, artistic, political, or scientific value.

2. "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing. photograph, motion picture, or other pictorial representation; a play, dance, or performance; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment or machine.

(3) "Prurient interest" means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) "Distribute" means to transfer possession, whether with or without consideration.

(5) "Commercially distribute" means to transfer possession for valuable consideration.

(6) "Sexual conduct" means:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person;

(B) any contact between the female sex organ and the male sex organ;

(C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or

(D) patently offensive representations of masturbation or excretory functions.[3]

43.22. Obscene Display of Distribution

a. A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution.

(b) An offense under this section is a Class C misdemeanor.

43.23. Commercial Obscenity

(a) A person commits an offense if, Knowing the content of the material:

(1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;

(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes It obscene; or

(3) he hires, employs, or otherwise uses a person under the age of 17 years to achieve any of the purposes set out in Subdivisions (1) and (2) of this subsection.

(b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.

(c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this section, In which event it is a Class A misdemeanor.

43.24. Sale, Distribution, or Display of Harmful Material to Minor

(a) For purposes of this section;-

(1) "Minor" means an individual younger than 17 years.

(2) "Harmful material" means material whose dominant theme taken as a whole:

(A) appeals to the prurient interest of a minor, in sex, nudity, or excretion;

(B) is patently offensive to prevailing standards In the adult community as a whole with respect to what Is suitable for minors; and

A. is utterly without redeeming social value for minors.
B.

a. A person commits an offense if, knowing that the material is harmful:

(1) and knowing the person is a minor. he sells, distributes, exhibits, or possesses for sale, distribution, or exhibition to a minor harmful material ;

(2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display; or

(3) he hires, employs, or uses a minor to do or accomplish or assist in doing or accomplishing any of the acts prohibited in Subsection (b)(l) of (b)(2) of this section.

(c) It is a defense to prosecution under this section that:

(1) the sale, distribution, or exhibition was by a person having scientific, educational, governmental, or other similar justification; or

(2) the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse.

> (d) An offense under this section is a Class A misdemeanor unless it is committed under Subsection (b) (3) of this section in which event it is a felony of the third degree.[4]

The preceding has outlined the substantive limitations of that which can be found obscene in the State of Texas. The enforcement of those sections of the State Penal Code applying to obscene material is left to the discretion of the District and County Attorneys.

The remainder of this report will concern the controls that the City may impose to regulate the adult-only industry through land use controls, licensing, and measures to assure that minors will not be allowed to purchase or view the display of pornographic material in commercial businesses.

THE NATIONAL PROBLEM/CITIES

Urban areas across the nation are beginning a crackdown on the growth of sex-oriented businesses. Recent public outcries and national exposes have been forcing new evaluations of existing pornography law. This renewed attack on pornography is partially founded upon the Supreme Court decision In Young v American Mini Theater. This decision, affirming the City of Detroit's police power ability to zone adult entertainment, redefined the standards the community can use to appraise that material which is found to be adult entertainment and protected by the 1st and 14th Amendments of the U. S. Constitution. The following excerpt from Young v American Mini Theaters makes clear the Supreme. Court view of adult entertainment and zoning:

> Though the First Amendment protects communication in the area of adult motion pictures from suppression, the State may legitimately use the content of such pictures as the basis for placing theaters exhibiting them in a different classification from other motion picture theaters for zoning purposes. The City's interest in the present and future character of its neighborhoods adequately support the limitation imposed . . . on the place where adult films may be exhibited.

As a result of Young v American Mini Theaters, several cities have initiated zoning ordinances similar to Detroit's to control the proliferation of sex industry outlets into incompatible areas of city development. Kansas City, Missouri and Atlanta, Georgia, are examples of cities recently implementing zoning ordinances to control the adult entertainment industry. These cities have accepted the fact that there is a large market for adult entertainment. By implementing and enforcing a zoning ordinance to control site location choices to those sites meeting certain minimum requirements, these cities have sanctioned the adult entertainment industry. However, this sanction does not entail a condonation of commercial sex activities outside the control of land use planning activities.

The problems with the proliferation of adult businesses in major urban areas are growing, not only in the volume of outlets[1] but also in new types of adult businesses. Cities that have attempted to use zoning ordinances to define explicitly each controlled adult entertainment

business have found that the ordinances are subject to constant update as the adult entertainment industry implements flew techniques for the dissemination of its product. The following list illustrates some of the kinds of pornographic adult businesses that could have a blighting effect upon a neighborhood if allowed to grow uncontrolled. The list also points to the problem of attempting to define each new adult business.

Pornographic Adult Businesses

Adult bookstores

Adult mini motion picture theater (peep shows)

Adult motion picture theaters

Artists body painting studios

Eating places with adult entertainment

Exotic photo studios

Lounges and bars, topless

Lounges and bars, bottomless

Massage parlor

Nude theater

Nude wrestling parlor

As cities strengthen laws dealing with certain listed businesses, new businesses providing the same or similar services have been invented by the industry. For example, in Birmingham, laws governing massage parlors were tightened forcing most to close.[5] As a result, shoeshine shops, where you can lie down while getting your shoes shined and providing the same service as the message parlor, were opened. The City was then forced to adopt another ordinance requiring that a person could not lie down to get a shoeshine. Similar situations occurred in Boston when massage parlors were under attack. A quick metamorphosis was made of adult entertainment businesses under the guise of sensitivity training parlors, nude wrestling studios and

exotic photography centers. These later generation businesses were clearly not massage parlors, even though similar services were offered, and were not subject to the massage parlor ordinances.

Two distinctly different zoning techniques have been used to regulate the adult entertainment industry. They are:

1. The Boston, Massachusetts approach. In 1974 Boston was the first city in the nation to put its official stamp on the adult entertainment zone. Boston created a special zoning category for adult bookstores, peep shows, x-rated movies and strip joints. This zone was a special overlay district applying to only seven acres of the City's space. The overlay zone had two main purposes: (A) The City wanted to concentrate similar adult entertainment uses into a single small area; and (B) the City wanted to prevent the spread of these uses to other areas of the City.

The district approach has certain advantages over a case by case zoning approach. Specific district boundaries are set and development standards are established. These two items when taken together reduce greatly the administrative cost when compared to a case by case conditional or specific use permit requirement. The limited confines of the district boundary reduces the potential for new development. The district approach also reduces the opportunity for arbitrary and subjective decisions.

The overlay district offers the potential to evaluate the total public service impact of adult uses. The concentration in a single area allows for the review of relative cost and revenues to the City. Police costs will certainly be higher, as will related traffic and parking costs. These costs though can be determined. Permits can be required and the fees for these can reflect the true costs to the community.

2. The Detroit, Michigan approach. In 1972 Detroit implemented an ordinance designed primarily to prevent the development of additional "skid-rows." It was found that concentrations of various straight and pornographic uses were generally determinates of the deterioration of surrounding areas.

Detroit has two objectives: (A) to separate typical "skid-row" uses from each other; and (B) to keep these same uses separate from residential areas. These objectives lead to a single policy of dispersing "skid-row" uses and spreading them throughout the commercial and industrial areas of the City.

After "skid-row" uses had been determined, defined and subjected to a

conditional permit process, they were allowed in only certain zones

of the City and then only in sites meeting certain requirements.

These two techniques and adaptations to then are the only methods currently being used to control the location of adult entertainment activities. The Supreme Court in Young v American Mini Theaters has upheld the approach that Detroit has implemented. No test has yet

been made of the Boston method of controlling the spread of adult businesses. Recently the Boston "Combat Zone" (the seven acre overlay district) has obtained some notoriety as being a failure, with social and administrative costs exceeding a tolerable level.

Both Detroit and Boston have chosen land use controls as their primary method of regulating adult businesses. Both use coincidentally a licensing regulation. Other cities such as Santa Maria, California have chosen licensing as their primary approach to regulating adult businesses. Licensing approaches have been adopted in order to maintain certain minimum standards at places of adult entertainment. The licensing mechanism is designed to regulate entertainment businesses which also provide food, alcoholic beverages or exhibition of the human body. Licensing outlines required performance standards and sets fees and required deposits as guarantees of compliance with the standard.

ADULT ENTERTAINMENT IN AMARILLO

Several businesses in Amarillo cater either wholly or partially to the adult-only market. The attached map, LOCATION OF ADULT ENTERTAINMENT IN AMARILLO, illustrates the general location of the majority of businesses whose activities include catering to the adult-only market. As the attached map indicates, adult businesses in Amarillo have generally tended to congregate into several areas in a strip fashion along major thoroughfares.

The Amarillo Police Department in a statistical analysis of street crimes

(rape, robbery, all assaults, theft from persons, auto burglary, driving under the influence, public intoxication, vandalism and illegal weapons) found that the incidence of street crimes was significantly greater around the concentrations of adult-only businesses than the overall City average. The Police Department went further in their analysis and noted that these street crimes were two and a half times the City average in the immediate vicinity of alcohol only adult businesses, and one and a half times the City average immediately surrounding businesses featuring alcohol and semi-nude entertainment. In reviewing these facts relative to crime in the vicinity of adult businesses, the reader should be aware that adult-only establishments, especially

alcohol only lounges, have tended to concentrate in several areas while lounges featuring semi-nude entertainment are fewer in number and have tended to somewhat isolate themselves from other adult-only establishments.

Outlets for adult-only material in the City include several book stores, drug stores, grocery stores, etc. with sections of books and magazines featuring nudity and non-explicit sexual activity. Pornographic publications featuring nudity with explicit sexual activity, are available within the City in only seven known locations, three being adult theaters with books, magazines, novelties and peep shows. These are dispersed lineally across the CBD and its fringe. There are also four book stores that devote space to publications featuring pornography with explicit sexual

activity. No attempt has been made to locate all activities featuring minimal amounts of pornographic publications.

As can be discerned from this overview of the extent of pornography distribution within the City, our current problem is not great. However, the following paraphrased statement concerning Mason City, Iowa, illustrates the potential for growth of the adult entertainment industry.

> Between 1963 and 1964 go-go dancers gradually began to appear in the lounges and bars of the town. By 1965 the dancers were topless. In 1973 the City received an application for its first adult movie house license. The license was refused (probably by an arbitrary and subjective decision). The applicant filed a judicial appeal and won the case forcing the City to grant the license. In 1973 an adult book store opened, complete with sex novelties and movies. Also in 1573 a popular lounge hired totally nude dancers. Four competitors soon followed suit. Finally the City gained its first massage parlor.

There is no reason to assume that Amarillo will be exempt from a growth of adult oriented businesses similar to Mason City. The lack of any valid City mechanism to control and regulate the anticipated growth could lead to (a) concentrations of adult entertainment businesses creating a crime incidence condition equal to or greater than the current situation around concentrations of alcohol only businesses, and (b) a proliferation of adult entertainment businesses in and around residential areas and other family or juvenile oriented activities.

## POSSIBLE CONTROL MECHANISMS OF ADULT BUSINESSES IN AMARILLO

Adult businesses in Amarillo are comprised of taverns, lounges, lounges with semi-nude entertainment, adult bookstores and adult theaters. Various state and local laws currently regulate to certain extents each of these uses. The Texas Liquor Control Act regulates all businesses selling alcoholic beverages after local option-approval, through a licensing procedure. These same businesses must also be licensed by the City and must conform to zoning and occupancy requirements. Those businesses that feature semi-nude entertainment are also controlled by Federal Code Section 21.07, 21.08, and 43.23 (Public Lewdness, Indecent Exposure, and Commercial Obscenity) and City Ordinance 13.29 (Operation Regulations; grounds for revocation, violations of Dance Establishments). Purveyors of adult printed and celluloid material are controlled only by Penal Code Sections 43.22, 42.23, and 43.24 and general zoning and occupancy requirements.

While the above state and local ordinances work to regulate portions of the adult entertainment industry, they are at best a piecemeal approach. For example, the enforcement of chapters 21 and 43B of the Penal Code through the appropriate court is generally a slow and tedious process requiring manpower that is not available for this type of low priority victimless crime. The

maintenance of the minimum requirements of the Texas Liquor Control Act and the various local laws regulating the sale of alcoholic beverages are only a means to maintain certain standards of operation in taverns, lounges, etc. The general zoning regulations which currently restrict adult businesses are not designed for the particular land use impacts resulting from the adult businesses. These impacts range from late night hours of operation and resulting noise, traffic, lighting, etc. to increases in crime rates immediately surrounding the businesses.

Bypassing the intrinsic limitations of enforcement of the Penal Code, an approach to a more definite control of these businesses is through a strengthening of zoning regulations specifically defined to moderate the land use impact of adult-only businesses. Coincidentally with the improved zoning regulations, a license and permit mechanism can be implemented. This mechanism can set and require compliance with minimum standards of operation for various adult businesses and recover actual or expected expenses incurred in their enforcement through annual permit fees. These fees can reimburse the City for the added costs of police patrols, improved streets, additional street lighting to reduce accident and crime potential, routine City Department inspection, etc.

These measures would generally be applied to all adult-only businesses. No infringement upon their constitutional rights would result from compliance with a zoning and licensing mechanism designed to minimize the land use and social impacts of adult-only businesses.

Zoning regulations specifically designed to restrict adult-only businesses can serve the following purposes:

1. Assure a land use compatibility between the adult use and the surrounding land use.

1. Require that certain minimum density standards for adult uses are maintained.

3. Require the amortized termination of those adult uses not currently meeting either or both of the preceding zoning purposes.

Licensing adult-only businesses can serve the following purposes:

1. Maintain a record of business, location, owner, etc.

2. Assure that certain performance requirements are met, such as hours of operation, maintenance of employment standards and compliance with all laws governing material sold or displayed by the business.

3. Provide a method by which the City can recoup any expenditure for public services required above the city average exclusive of the licensed business type.

Performance standards can include a provision for administrative revocation of an adult business license for any noncompliance with a performance standard. This revocation of license would not necessarily be supported by any conviction or state criminal charge against the license holder. The basis for the revocation would be for violation of the performance standards as defined explicitly in the City Code's standards for operations of an adult business. Performance standards would of course be required to vary in content relative to controlled adult business type.

Adult business licenses should not attempt to regulate the land use effect of the use on the neighborhood or community, but should be utilized to assure performance at a certain standard, to maintain an accurate-record of business locatlons, and to provide fees to the City for services above the average. By maintaining a clear distinction between the requirements of a license and the zoning ordinance the entire control mechanism is strengthened.

The preceding portion of this section has dealt with the regulation of businesses that totally restrict entry, sale, and viewing of products to adults only. Methods to control the ease of view of generally distributed pornographic material are numerous and not detailed explicitly in this report. Briefly though, methods to control the display of this material range from requiring the display to be in separate rooms with an enforceable and enforced restricted admittance, to simply covering the entire publication with an opaque slip cover with the publication's name printed on the cover. The control of the display and sale of pornographic material through a City Ordinance licensing mechanism would work to protect minors from harmful maternal (Section 43.24) and adults who would be offended by certain displays of pornographic material (Section 43.22) generally available for the public's view.

## SUMMARY AND FINDING

The analysis of the impacts of adult-only businesses upon surrounding land uses indicates that these businesses do have effects that can be distinguished from other uses allowed in like zoning districts. The following identifies two causal factors isolated in this preliminary analysis:

1. The Amarillo Police Department's statistical survey of street crime in the vicinity of adult-only business indicates that crime rates are

considerably above the City's average immediately surrounding the adult-only businesses analyzed.

2. Concentrations of these adult-only activities have detrimental effects upon surrounding residential and commercial activities. These effects are caused by (a) the noise, lighting and traffic generated by the pedestrian and vehicular traffic frequenting these businesses whose primary hours of operation are from late evening to late night, (b) the increased opportunity for "street crimes" in areas with high pedestrian traffic, and (c) the tendency to avoid areas where adult businesses (especially pornographic) are established. This avoidance and other factors can lead to the deterioration of surrounding commercial and residential activities.

Other cities have noted these effects of adult-only businesses and have attempted remedies to the problem. Boston, Massachusetts has concentrated all adult uses into a single area of the City. Detroit, Michigan has dispersed adult uses throughout the city to sites that meet certain minimum land use requirements. Both of these cities have adopted zoning ordinances that restrict location choices of adult book stores, theaters, cabarets, etc. Their ordinances are limited to those activities that definitely do not fall under penal code control. The City of Los Angeles study on adult entertainment includes a consideration for the zoning control of other adult oriented activities including massage parlors, nude modeling studios, adult motels, arcades, etc. Los Angeles has disregarded the question of legitimacy and has suggested zoning those adult businesses as recognized existing land uses.

Detroit has implemented an ordinance which requires that adult entertainment businesses not be located within 5O0 feet of residentially zoned areas, or within 1000 feet of another regulated use. In Amarillo, adult uses are currently allowed in general retail and all less restrictive zoning districts. If Amarillo adopted an ordinance with space requirements between regulated uses and residential zones similar to that of Detroit, the number of potential sites for adult businesses would be severely limited. This method, limiting severely the potential site choices of adult businesses, would probably not be upheld by the Courts. The limitation of site choices would be caused by the narrow commercial strip developments less than 500 feet wide along most Amarillo’s major thoroughfares. Also, this approach would probably tend to concentrate adult activities into the central business district and a few industrial areas.

## RECOMMENDATIONS FOR THE CONTROL OF ADULT-ONLY BUSINESSES IN AMARILLO

If the Planning and Zoning Commission and City Commission should find from the data presented In this report that there exists sufficient need to control adult-only businesses and

businesses which display generally circulated pornographic material, the Planning Department would recommend the following:

A. Any zoning ordinance amendments proposed to regulate adult businesses should not attempt to define individual activities but should instead regulate the site location choices of all businesses that restrict sale, display or entry based upon a minimum age, and not consider the legitimacy of the use.

B. The potential site location choices for adult-only uses should be dispersed rather than concentrated. This distance should be measured radially from property line to property line and should be at least 1,000 feet. Requirements designed to maintain the integrity of residential zones and other areas where the there is considerable traffic in juvenile or family oriented activities should be adequate for the purpose but should not be overly restrictive.

C. Should the City develop amendments to the Code of Ordinances designed to control the site location choices of adult entertainment businesses, it may be desirable to specify an amortized termination schedule for any existing adult business which does not meet the minimum site location standards as specified in the Ordinance.

D. Concurrent with any zoning ordinance revisions designed to control adult uses, a permit and license mechanism should also be developed. The minimum operational standards specified by the license will vary according to the type of business to be regulated.

E. Any zoning ordinance amendments concerned with adult businesses should provide provisions to regulate signs and similar forms of advertising.

F. The City Commission should encourage a vigorous enforcement of the State Penal Code to remove illegitimate uses. Especially important is that portion of the Penal Code which protects minors from all pornographic material. The City should impose specific amendments to the Code of Ordinances requiring businesses publicly displaying generally circulated pornographic material to prohibit minors, by an enforced physical barrier, from viewing or purchasing pornographic material.

If the City Commission, following a recommendation from the Planning and Zoning Commission, finds the necessity to control adult-only businesses and the public display of generally circulated pornographic material all amendments to the Code of Ordinances should be prepared as a total package and submitted to the Planning and Zoning Commission for preliminary review, before action by the City Commission. The Planning and Zoning Commission review should have the Intention of assuring the purpose and continuity of each amendment to the overall goal of regulating these adult businesses and adult material displays.

[1]Zoning for the Pornographic Arts, City Development Department, August, 1976, Kansas City, Missouri

[2]The cases reviewed in depth were:

A. Young v American Mini Theaters, Inc., 96 S. Ct. 2440 (1976). This was the Supreme Court review of the City of Detroit zoning ordinance which regulated (a) the proximity of adult uses to residential zones, (b) the proximity of adult uses to other areas where heavy traffic or concentrations of minors were found and (C) the density of adult businesses. The Court held that a city has the authority to control the location and density of adult entertainment businesses based on its police power right and duty to protect the health, safety and welfare of its citizenry.

B. Miller v California, 93 S. Ct. 2607 (1973). This decision laid down the most recent standard for determining what is obscene. This decision is the basis for the Texas Penal Code Chapter 43, Public Indecency.

C. Smith v United States, 97 S. Ct. 1756 (1977), Paris Adult Theatre I v Slaton, 93 5. Ct. 2629 (1973), and Roth v United States, 77, 5. Ct. 1304 (1957). These earlier decisions were reviewed in order to determine the history of restrictions upon 1st Amendment guarantees. This review revealed that in effect the Court is ruling on the controversial problem of obscenity and state community standards determining prurient appeal and patent offensiveness on a case by case basis.

[3]Amended by Act 1975, 64th Leg., p 372, Ch. 163, 1, eff. September 1, 1975.

[4]Acts 1973, 63rd Leg. p 863, Ch. 399, 1, eff. January 1, 1974.

[5]U.S. News & World Report, September 13, 1976, p. 76.

[6]Time, April 5, 1976.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No.: 6:02-cv-1469-Orl-31 KRS

DAYTONA GRAND, INC. d/b/a
LOLLIPOP'S GENTLEMEN'S CLUB,
a Florida corporation,
and MILES WEISS,

Plaintiffs,

v.

CITY OF DAYTONA BEACH, FLORIDA,
a municipal corporation,

Defendant.

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# DEFENDANT CITY OF DAYTONA BEACH'S CLOSING ARGUMENT and APPENDIX

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We do not believe that plaintiffs' evidence, consisting solely of statistical analysis of police dispatch records, "casts direct doubt" on the rationales or evidentiary support for the challenged ordinances. Plaintiffs' focus too narrowly on law enforcement activity recorded in police dispatch records, fail to "cast direct doubt" on the City's supporting evidence outside the dispatch records, and fail to even address much less "cast direct doubt" on other substantial interests affecting the welfare and economic health of the City and its citizens. Even if the court finds that plaintiffs' evidence meets the "direct doubt" threshold of *Alameda/ Peek-a-Boo*, considering the entire record as it now exists "credible evidence" supports a "reasonable" legislative conclusion that the ordinances can combat negative secondary effects of adult entertainment in proximity to alcohol in Daytona Beach; therefore, the City's legislative judgment must be upheld.

Each ordinance was supported by pre-enactment evidence, and the legislative records are before the court. That satisfied, there are two avenues by which to "cast direct doubt": (1) by showing that the facts in the legislative records do not reasonably support the rationales for the ordinances; or (2) by introducing evidence showing that the City's rationales are based on factual findings so clearly incorrect that belief in them is unreasonable. The first avenue is a path of logic; the latter is a matter of factual proof; and plaintiffs bear the burden of proof. If the court finds plaintiffs succeeded in casting "direct doubt," the City's additional trial evidence must be considered to determine whether it renews "support for a theory that justifies" the ordinances.

**CITY'S EVIDENCE**

**Ordinance No. 81-334** prohibits certain sexual behavior and touching in establishments where alcohol is served or consumed, and exposure of the genitals, buttocks, and female breasts. (City's Ex.1). The purpose and intent is expressed in § 2: "to prohibit nudity, gross sexuality, and the simulation and depiction thereof in establishments dealing in alcoholic beverages."

Also in § 2 of the ordinance, the City acknowledged receipt of evidence showing, and found that, the prohibited acts of nudity and sexual conduct coupled with alcohol in public places:

> SECTION 2. *** [1] encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, [2] *** begets undesirable behavior, [3] that sexual lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public ***.

Supporting evidence is found in *California v. LaRue*, cited in the preamble; and testimony and documents detailing the City's own experience with a proliferation of topless bars operating in the community. The City's evidence was considered at three public meetings. (Aug. 26, Sept. 30, Oct. 21, 1981).[1] The August meeting included a bus tour of the sexually oriented businesses operating in the City. (Min., LR Tab 3/C). The Police Chief discussed the documents prepared by his department (Overview & List of SOBs, LR Tab 4/D), and answered questions. He identified prostitution in and around the businesses as a problem which was difficult for police to handle effectively for numerous reasons including techniques used by prostitutes to avoid arrest; high turnover of prostitutes; inability to charge a business owner even where prostitution occurs on the premises; and difficulties prosecuting charges. (Overview ¶¶A, D; List ¶¶7, 8). The Chief identified the area around the Shingle Shack (topless bar) as "a haven for prostitutes who are very aware of our difficulties in making arrests," and whose ranks swell during Race Weeks. (*Id.*, List ¶8). He noted that they sometimes take customers to motels beyond the city limit; and that in this area "five homicides directly related to prostitution and drugs [occurred] in the past three years," as well as "numerous rapes and robberies." (*Id.)*. At the Shingle Shack "[s]everal arrests have been made of

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[1] This ordinance was considered concurrently with an adult use zoning ordinance which is not at issue here and we discuss only those facts pertinent to alcohol establishments.

the dancers for lewd and lascivious conduct," and arrests of "customers who get carried away during performances" (*Id.* at ¶7); at Pandora's Box (topless bar) there were arrests for prostitution "inside as well as outside" and robberies and assaults occurred "at the business." (*Id.* ¶9). At Masonova Features ("live nude models" and a beverage license) the Chief noted prostitution, lewd and lascivious arrests, and a prolific rapist frequented the business. (*Id.* ¶10). At six beachside topless bars patrons "frequently become incited to engage in lewdness." (*Id.* ¶¶ 13-18). Memos by the City Attorney and Police Chief were presented at the September 30 meeting. (LR Tab 6/F, 8/H). The Chief's memo is a "partial list of situations, offenses and incidents" related to the topless bars which "can be substantiated by police reports and testimony of various officers" including:

1. Topless dancing encourages customers to solicit dancers for prostitution. In some cases dancers will arrange to meet prospective customers after their performance. ***A large number of prostitution arrests have involved girls who are employed or who have been employed as topless dancers.

2. Topless dancing has a tendency to incite customers to participate in immoral conduct especially after they have had a few drinks. Arrests *** have been made where customers participated in lewdness with dancers *** dancers have engaged in lewdness and other unlawful acts ***.

3. Some places of business using topless dancers have developed techniques which encourage prostitution *** designed to make enforcement of prostitution laws difficult or impossible. They include the use of "police proof rooms", intercom systems, peep holes, etc.

4. *** dancers have been accosted and/or raped after getting off work.

5. Topless establishments have a tendency to attract prostitutes as evidenced by the number of arrests in the area of several such businesses. It is common knowledge among prostitutes that these places generate more business.[2]

6. In past years we have had seven homicides directly related to prostitution within the areas surrounding these establishments. Some of the cases involved victims and suspects who were known to frequent topless establishments.

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[2] Dr. Linz suggests this relationship is bi-directional. (1/19 Linz 71, lines 1-14).

7. There have been a number of robberies and assaults of clientele who frequent these establishments. These are usually committed by the prostitute or their associates who frequent the area.

8. We presently have three reports on missing topless dancers who were last seen in the area of their place of employment.

Also entered were computer printouts: police dispatch records from around the Shingle Shack and other adult businesses around Ridgewood/Madison, the Playmate Club block, and the topless bar block on Broadway; and one labeled "Prostitutes." (Min., LR Tab 7/G; printouts Tabs 9-12/I-L). The City implemented a computer aided dispatch (CAD) system in 1980. (2/23 Szabo 100). The area printouts show dispatches around the Playmate and Broadway areas for 1/81-7/81 and around the Shingle Shack for 11/80-7/81. The "Prostitutes" printout shows arrest information and location for 83 prostitution arrests in Daytona Beach. (See Appendix; Overview ¶A, "Our records show a total of 83 prostitution arrests for this [1981] year"). There were 26 arrests on the mainland, all but a few in the streets around the Shingle Shack (1981 street map, City's Ex. 15); five were at Connecticut /Ridgewood, on the south side of the Shingle Shack, and directly across the street. (See Appendix; 2/22 Prioletti 85). At the final public hearing, speakers included (LR Tab 20/T):

> Leon Van Wert, an attorney who attended liquor license revocation hearings, spoke about drugs and prostitution occurring in topless bars throughout the state. He personally "observed obvious acts of solicitation going on at many of these places."
>
> Helen Flippo, owner of a family restaurant B&B Fisheries across the street from the Shark and next door to Broadway Sam's, described excessive behavior in the area requiring her to hire a security guard. She said both "had been bars before they became topless and they were not a problem then." Now she has break-ins at her business; a dancer propositioned her busboy; a nearly naked dancer stood in front of the bar at the dinner hour; violence between motorcycle gangs in the bars spilled onto the street and her property in full view of customers; a dancer at Sam's was selling dope from her car on the street in front of her dining room and was arrested.

This record was held by the Florida Supreme Court to be "replete with the legislative findings of the city commission and supporting reports and documents provided by the police, indicat-

ing that nude dancing in Daytona Beach contributes to criminal activities." *Del Percio*, 476 So. 2d 197, 204 (Fla. 1985); *see also Function Junction*, 705 F.Supp. 544, 546-548 (M.D. Fla. 1987).

**Ordinance No. 02-496.** In December 2001 the City Code was being revised and the Commission was notified that it should consider replacing the out-of-date public nudity regulations. Also at that time, enforcement of the adult zoning ordinance was enjoined and two bars had divided their premises to allow nude entertainment without alcohol in one area while continuing to serve alcohol in the remainder of the premises. The City Attorney recommended consideration of a general nudity regulation "[i]n light of our community's experiences with nudity occurring in public during special events and the current exploitation of the 'loophole' in our nudity in bars regulation by [businesses] segregating nudity and alcohol within a single structure***." (LR Tab 3).

Ord. No. 02-496 was considered on July 17, Aug. 7, and Oct. 2, 2002. (LR Tabs 6, 7, 17). The Police Chief recommended adoption with a memorandum stating in part (LR Tab 4):

> During special event periods which have a strong "street party" element, nudity has been a recurrent problem. Although both males and females have engaged in such exposure, the most common occurrences of public nudity during special events is in the form of women exposing their breasts and buttocks, such as:
> - The upper body is exposed with only "body paint" covering the breasts
> - "Chaps" which are cutout to expose the buttocks ***
> - During the student spring breaks, particularly this year, young women were frequently encouraged to and did bare their breasts in exchange for beads
>
> In addition to concerns engendered by public nudity, nudity on the streets and sidewalks is a particular problem during these periods due to issues of crowd control and traffic movement.

The Chief also noted bars "evading the application" of the alcohol/nudity prohibition and stated:

> Based on observations by my department, it appears that the incidence of lewd and lascivious activity prohibited by state law[3] has increased in businesses where nude

[3] *Hoskins v. DBR*, 592 So.2d 1145 (2 DCA 1992) *rev. den.*, 601 So.2d 552 (Fla. 1992) (lap dancing is lewdness); *State v. Waller*, 621 So.2d 499 (2 DCA 1993) (jury could find lap dancing is lewdness); *State v. Conforti*, 688 So.2d 350 (4 DCA 1977) *rev. den.* 697 So.2d 509

> entertainment is offered, as well as in alcoholic beverage establishments which violate §10-6.

The ordinance was enacted as a general nudity regulation applicable in all public places, including adult theaters, with constitutionally required exceptions. After referring to nude entertainment in the businesses circumventing § 10-6, City Code, the rationale and findings include:

> WHEREAS, lewd and lascivious activity prohibited by state law has been observed on numerous occasions within the businesses presenting nude entertainment; and
>
> WHEREAS, the propensity for lewd and lascivious behavior within entertainment establishments, whether or not alcohol is being served, appears to increase significantly when coupled with nudity; and
>
> WHEREAS, in addition to commercial nudity *** increasing problems in recent years of nudity in City streets, parks, and other public places; and
>
> WHEREAS, the City is experiencing many problems which some have attributed in whole or in part to lack of control during the special event periods of Bike Week, Biketoberfest, Spring Break, and Black College Reunion, and the City Commission is committed to addressing these problems, and has enacted and is considering enactment of various ordinances aimed at curtailing activities which exacerbate the adverse effects caused by special events; and
>
> WHEREAS, public nudity and near-nudity during Bike Week, Biketoberfest, Spring Break and Black College Reunion has been a recurrent problem; and
>
> WHEREAS, public exposure of breasts was a pervasive problem during the Spring Break period this year, including exposure engaged in and observed by the many minors visiting the City during that period;
>
> ***
>
> SECTION 5. [Nudity] in public places *** generally increases incidents of lewd and lascivious behavior, prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women, and facilitates other activities which break down family structures and values.
>
> ***
>
> SECTION 7. The City of Daytona Beach is known as a tourist destination and its economy is largely dependent upon tourism, but the City is experiencing economic problems due to decline in year-round family tourism in recent decades and costs associated with special event tourism.

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(Fla. 1997) (lap dancing is lewdness); *Dreamland Ballroom v. City of Ft. Laud.*, 789 So.2d 1099 (4 DCA 2001) (§796.07 validly applied to owner of strip club); "lewd" or "lascivious" is an intentional act of sexual indulgence or public indecency when such act causes offense to one or more persons viewing it or otherwise intrudes upon the rights of others. *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991) *see also* 2005 Fl. SB 730, amending §796.07.

> SECTION 8. The City of Daytona Beach is struggling to improve its economic situation and that of its citizens and businesses by returning to an emphasis on family-oriented tourism.
>
> SECTION 9. Regulation of public nudity will protect and preserve the public health, safety, and welfare of the people of The City of Daytona Beach ***.
>
> SECTION 10. Nonregulation *** would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of The City of Daytona Beach and the State of Florida the availability of and opportunity for nudity in public places ***[and] encourage the influx of persons seeking to observe and/or participate in such nudity, and to participate in the disorderly, harmful, and illegal conduct that is associated therewith, thereby damaging the economy and increasing injuries and damages to the people of the City who will be the victims of such increased disorderly, harmful, and unlawful conduct.

Local news articles describe the 2002 public nudity during collegiate events and its effect on the community. (LR Tabs 11-13). A 49 year old tourist sharing the beach with collegians termed it "disgusting." Concern was expressed that "the atmosphere is ripe for an incident like the New York City 'wilding' of 2000 during which women's clothes were torn off their bodies." (Tab 11). Two sisters visiting from Pennsylvania found the experience "shocking"; they "saw guys exposing themselves" and drug use on the streets. (Tab 12). The County Council Chair witnessed underage girls drinking and flashing their breasts, and the Police Chief noted that these events "chase away family tourism." (Tab 13). Narrative reports[4] by various detectives and special unit officers describing the behavior occurring in the bars offering female entertainers, both bars that continued to serve alcohol through-out and those that segregated a portion for nudity without alcohol:

> **8-5-02**: Three undercover detectives visited the Pink Pony /Red-Eyed Jacks, a bar offering alcohol with partial nudity on one side and nudity without alcohol on the other. In the alcohol area dancers were wearing G-strings and pasties. In the nude area a dancer "removed her panties exposing her genitalia *** and several times lied on her back, spread her legs and performed a simulated sex act, to wit: masturbation." The detectives returned to the alcohol area and ordered drinks. They talked with a dancer wearing pasties: "Detective Oakley inquired about the VIP

[4] The reports were for information purposes only. By informal agreement with plaintiffs in litigation, no ordinances were being enforced after summer 2001.

rooms. The female stated that the VIP rooms [sic] very full nude and full contact." When asked what that meant she said "as long as you keep your fingers out of my holes there won't be a problem, that's what I tell everyone."

**8-5-02**: Three undercover detectives visited Molly Brown's, a ground floor bar with alcohol and partial nudity, and Molly Brown's II, nudity without alcohol on the upper floor. In the alcohol area a dancer was observed wearing "bikini top and shorts. There were not any lewd acts observed." Upstairs in the no-alcohol area a naked female dancer "played" with her breasts, inserted her "nipples into her mouth," and "pressed her female breasts against this detective's face *** simulated masturbation." One naked female "placed herself on top of another dancer and simulated sex acts *** also simulated masturbation."

**8-6-02**: The detectives returned to Molly Brown's/MBII. They observed no violations on the lower floor. On the upper floor nude dancers "would rub" their breasts in the faces of male patrons "after receiving a tip." A "cocktail waitress had the dancer lie back on the counter. The waitress then kissed the vagina area of the female dancer then simulated intercourse."

**3-8-02**: Non-field unit officers visited Lollipops, with alcohol served in all areas. "Dancers were bare breasted [with] *** some sort of 'g-string' bottoms." They "observed bare breasted dancers performing lap dances involving simulated intercourse by the female dancer placing her buttocks in the lap of the patron and began to manipulate her hips back and forth and up and down *** rub their bare breasts in the faces of the patrons and allow the patrons to lick and suck the breasts." A dancer approached one detective and stood between his legs. He told her "no I don't want a dance," but she "proceeded to attempt to place her bare breasts in my face *** dropped to her knees and placed her mouth directly on my crotch and bit down on my pants." The same detective observed a "'shooter girl' climb onto the lap of a female Detective. The waitress proceeded to hold her arms in the air and began to 'hump' the lap of the female detective *** this same waitress/dancer, pull[ed] up the shirt of another female Detective." One dancer "was auctioning posters of herself and*** would occasionally place the poster down the front of her 'g-string' simulating masturbation." Another detective reported: "30-40 female dancers were walking around with their breast fully exposed *** wearing 'g-string' type panties *** 'table dances' consisted of blatant acts of simulated sex acts, to include oral copulation and masturbation." During a table dance, a dancer "knelt down between the patron's legs and placed her face on the patron's groin area simulating oral sex. On the stage, dancers straddled patrons that were sitting on the side of the stage and spread their legs apart touching their crotches as to simulate masturbation."

**3-6-02**: At Molly Brown's (alcohol served), detectives observed: a dancer "giving a lap dance to another female and male patron*** simulating oral sex with the male *** [both] were touching the dancer's breasts and buttocks. The female patron at one point was kissing on the breasts of the dancer. Female dancers simulating sex

acts *** permitting patrons to touch their breasts and buttocks *** All female dancers were wearing g-string underwear."

**3-6-02**: At Lollipops (alcohol served), "entertainers were wearing 'thong' type bottoms" and were bare breasted or "wearing tape manipulated *** to simulate the nipple. Entertainers also simulated sex acts on stage, and conducted full contact 'lap' dances. Some of these dances included naked female breasts making contact with male customers' faces."

**3-5-02**: At Lollipops (alcohol served), "there was total exposure of female breasts *** [and] what could only be described as full contact between dancers and patrons. Private dances were even more graphic."

**2-13-02**: At Lollipops (alcohol served), detectives observed: "Several dancers completely topless, several dancers did wear tape *** manipulated to simulate a nipple. *** also wearing G-string underwear." During table dances "dancers were touching and rubbing on these patron's groin area."

**2-1-02**: At Lollipops (alcohol served), two detectives observed dancers topless or with "tape manipulated to simulate a nipple" and two dancers "simulating sex acts in front of customers."

**1-18-02**: At Molly Brown's (alcohol served), "all dancers" had flesh colored pasties. Two "engaged in simulated oral sex with one another at the same time."

**3-9-01**: At Pink Pony (alcohol served), a dancer in G-string and pasties was observed in a VIP booth "simulating sexual conduct by rubbing her genital region against the customer's genital region." A similarly clad dancer "exposed her genital region and massaged this region *** [and] simulated sex acts with a beer bottle by deep throating said item."

**12-5-00**: The Chief of Police received a letter from Henry Harrison of Asheville, North Carolina. Mr. Harrison stated he had visited Lollipops and paid for a VIP dance. The dancer got "totally nude" then "started opening my fly and removing my pants *** and she said she wanted to give me a blow job and have sex."

Also in the record are pictures of bottom coverings, permitted attire, Minutes, and materials submitted by the bars' attorneys. (LR Tab 15-18). Some speakers at the hearing disputed the wisdom of the ordinance, but significantly not one disputed the factual accuracy of the reported behavior at the establishments detailed above or on the streets.

**Ordinance No. 03-375** was enacted after *Peek-a-Boo*.[5] It amended the public nudity regulation to grant an exception allowing legally operating adult theaters to offer "pasties and G-string" entertainment provided the location is not close to an alcoholic beverage establishment. (City's Ex. 3). The purpose of the amendment was "to maintain a separation between adult theaters and alcoholic beverage establishments." (§ 62-184(b)(3)). As explained in the preamble:

> WHEREAS, the City believes that adverse impacts caused by adult theaters, whether or not alcohol is being served, increases significantly when the expressive activity is conducted by persons who are completely or virtually nude, that the adverse impacts support the application of the regulation within adult theaters as previously adopted, and that the regulation as previously adopted and applied to adult theaters does not significantly restrict first amendment protected expression, however, in light of the uncertain state of the law and the significant costs of litigation, at this time the City is desirous of limiting its public nudity regulations as applied to adult theaters to the parameters expressly approved in *Peek-a-Boo Lounge* provided such theaters are separate from alcohol.

The ordinance referred to previous evidence and findings, court decisions, and additional evidence and findings supporting the need for a separation between alcohol and nudity and sexual conduct:

> SECTION 3. The City has previously determined that nudity within alcoholic beverage establishments causes adverse secondary effects in the City, and the City's prohibition against nudity in such establishments has been upheld including specific findings that the City has a substantial government interest in preventing the secondary effects caused by such uses. [citing *Del Percio*, *Geaneas v. Willets*, and *Function Junction*, describing and approving the legislative record].
>
> SECTION 4. The City Commission has reviewed the legislative record compiled in support of the City's regulations providing zoning for adult businesses, prohibiting nudity in alcoholic beverage establishments, and prohibiting nudity in public places. [Ord. Nos. 81-334 and 02-496].
>
> SECTION 5. The City Commission has been advised of and received excerpts from the testimony transcribed in *Function Junction v. City of Daytona Beach*, describing the characteristics of the City and the adverse impacts experienced in the City from adult businesses, including the testimony of an assistant State Attorney [David Smith] describing criminal activity associated with alcoholic beverage

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[5] *Peek-a-Boo*, 337 F.3d 1251 (11th Cir. 2003), suggested that requiring dancers in adult businesses to wear anything more than pasties and G-string might not pass "as applied" constitutional analysis, but remanded that issue for further argument and fact finding.

establishments which featured nude or "topless" entertainment.

SECTION 6. The City Commission has been advised of and received a transcript of the testimony given by Dr. William H. George, Ph.D., in *McKee v. City of Casselberry*, *** and articles published by Dr. George concerning the effects of viewing explicit erotica in combination with consumption of alcohol.

David Smith's testimony in the 1987 trial of Ord. No. 81-334 is at LR Tab 31 (hereafter transcript page). Prosecuting since 1977 primarily in Daytona Beach, Smith confirmed much of Chief Willets information presented in 1981. (106). Smith prosecuted misdemeanors in Daytona Beach for a year, felonies covering the City's entire beachside "all the way to Ponce Inlet" for three years[6] (106-07, 126-27); "vice***adult entertainment of the book-stores and prostitution***on the mainland in Daytona Beach" and "RICO investigations of the adult entertainment in the whole entire county which boiled down to Daytona Beach." (107, 112, 126, 135). After misdemeanors, Smith "kept abreast of prostitution problems in Daytona *** beginning *** from '81 up to around '84, '85" (126), and it was getting worse. (127). Smith knew of "only three areas that involved any prostitution." (109). Masonova Features had "three or four prostitutes that were working out of the second floor in connection with the business," and "a couple of brothels on the side," and he filed RICO charges on it.[7] (112-13). "Practically any time of the day you could drive by and see prostitutes on the streets" around the Shingle Shack. "The topless bar area on the beach side would be one of the others***from*** Lovely Linda's*** to Playmate Club/Sugar Shack." (109-10). Prostitution is difficult to prosecute and most acts do not result in arrest. (117). Arrests would not necessarily be made on or around the site of the clubs because it was common for prostitutes to use

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[6] Cases were assigned to prosecutors based on where the crime occurred. (*See* 126).

[7] Ironically, Masonova was noted by plaintiffs' experts for having little "crime" in the study area based on their CAD analysis – of course, detective unit or St. Attorney investigations are not in CAD, which simply records the dispatch of regular patrol officers to a location.

a "motel or down on the beach *** North Ridgewood [prostitutes]***would go to some small motels*** just perform the act right there in the car in a parking lot or on a back street" (110), and also frequently used a secluded area by the City's Yacht Club – the area was right across the street from Smith's office and he had "never seen a prostitute there that hadn't been picked up somewhere else.*** The pickups are made in the areas that I've already described." (120-22). Smith learned "of the drugs involved with these bars" handling beachside felonies, mainland adult entertainment, and beachside "street level drug activity." (111). "Street level dealers would congregate in these topless bars, make deals therein *** they were hangouts for the street level drug dealers [and] Beat dope dealers." (111). "There are several [mainstream] bars or places that sell liquor in the area that didn't have these congregations." (111-12). Clientele attracted by topless bars were "involved in the use of drugs, more so than other businesses." (115). "[I]t was generally my experience that the sales were made mostly by the boyfriends and hangers on to the dancers." (116). In sum, it was Smith's opinion based on years of experience prosecuting vice, including prostitution, drugs, and related RICO actions specifically in the City that there was "most definite-ly" more prostitution and drug activity related to the topless bars in the City than mainstream bars (116-17); and his testimony was previously accepted by this court. 705 F. Supp. at 548.

Gerald Langston, Planning Director, also testified in 1987. 705 F. Supp. at 547-48 (LR Tab 31). Langston described decaying conditions and high crime in the City's blighted core areas where the topless bars were located. (64-67, 75-76). The City was labeled "City of Sleaze" in national media. (68; 2/22 Prioletti 48). The City needed new development, particularly new hotels on the beachside, and one of the main impediments was the deplorable conditions there. (64-67). Using the tools in chapter 163, Fla. Stat., the City began a major redevelopment program, spending tax money to improve infrastructure and to assist private developers. (68-69). The topless bars were

a disincentive to private investment. (78-79, 82, 99; 2/22 Prioletti 68-73, 74). Ordinances changing permitted uses, requiring spacing between bars, and mandatory maintenance of exteriors were enacted, including the adult zoning and alcohol/nudity ordinances. (69-70; 2/22 Prioletti 68-69).

The 2002 testimony of Dr. William George, Ph.D., in *McKee v. Casselberry*, and supporting papers published in peer-reviewed journals were entered on the record. (LR Tabs 35-42). George is a psychologist and university professor who for over twenty years has conducted extensive research through "controlled laboratory experiments on the consequences of alcohol consumption and nudity;" he has been awarded four major federal grants in addition to state grants in this field after rigorous peer-review; and 30-35 of his studies have been published. (676-77, 681, 697, 700).

> [Lab experiments] demonstrate causality in a true way that most field research cannot *** because in the lab you can tightly and rigorously control all the variables" *** [Lab experiments] allow for what we in research methodology refer to as internal validity. That is being able to show that these relationships, in this case alcohol and nudity and the adverse consequences, that these are real. These are not or these cannot be explained away by extraneous forces but they're real.

(687-88). George studies effects caused by actual alcohol consumption, belief that one has consumed alcohol, and belief that another person has consumed alcohol, and erotica. (686). A major variable in his studies is "belief in alcohol's power to disinhibit." (715). He and others working in this field have established that alcohol consumption with eroticized nudity can lead to behaviors consistent with the secondary effects recognized by the courts. (691). George steps through seven research papers, each building on the others. (727). The first demonstrated that "exposure to erotic material makes you drink more, can make you drink more." (716). Queried as to application of that finding "to a licensed beverage establishment that combines nudity and alcohol," George responded:

> *** I can speak to two aspects of your question. One aspect is does it generalize to the real world, and I certainly think we do. I mean, I think all of science would be in trouble if the work we did in the labs didn't translate to the real world.
>
> And the second aspect that I could speak to is about the adverse consequences.

> I believe that it's a bigger adverse consequence that's a synergy that can balloon from walking through these studies, but we're not there yet.
> ***[O]n this one study, the contribution to the synergy is merely the fact that being sexually aroused by erotic material makes you drink more and get more intoxicated.

(716, 717-18). The next study found that men who thought they were drinking, whether or not they were,[8] watched more erotica and more violent erotica, and "the drinking effect was much stronger with the high deviant materials than with the low deviant materials." (724). This established a "bi-directional effect ***If you get people drinking, they want more erotica." A 1988 study[9] measuring how we view a person perceived to be drinking determined that women perceived as drinking were viewed as more sexually available (729-30). In a later study the belief variable strengthened this finding.(734). George considered whether "beliefs and expectations ***about alcohol and sex do they fit that biological reality or do they have a certain magical, inflationary quality that just comes from more is better?" and found it was the latter. (736-37). He asked whether these perceptions "translate into behavior" (739) and how is that explained. (740-41: "Until now you've demonstrated an empirical effect, alcohol and nudity can and erotic nudity can cause these things [secondary effects], but you haven't explained it.") He found a behavior effect – "you show that person more porn because you think that they are disinhibited" (745-46), and linked this behavior effect to belief in alcohol's power. (748-50). The final paper reviewed is "a summary and synopsis of the findings from my labs and from other labs about alcohol and erotica and sexual behavior" (751):

> [W]e now know empirically that alcohol in combination with erotica can have these

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[8] In his criticisms, Pl's Ex. 1 at 173-75, 176, Linz fails to recognize the study's four permutations: people who were/not drinking and thought they were/not drinking alcohol (723). Linz's criticism of much of George's work, *e.g.* Pl's Ex. 1 at 169-70, ignores the belief variable. (George: "It's not the alcohol, per se *** it's my belief that alcohol can do that." (743).

[9] Linz's references, *e.g.* Pl's Ex. 1 at 180, to cautions that "a better understanding" is needed before "generalizations" can be made is taken from this early study, not later ones.

> effects that could be considered analogous to effects in the real world, and those effects would include being interested in more erotica exposure, drinking more causes sexual aggressiveness, being interested in not just sexual arousal, but being interested in taboo sexual arousal and activity.
>
> ***There are two theories [explaining this]. One is called the alcohol expectancy theory, and the other is called the alcohol myopia theory.***the key behind both theories is that they offer a logical and compelling explanation for why it is that alcohol ingestion would result in what for the purposes of this case would be considered adverse secondary effects.

(752-53). The idea of the expectancy theory is that "alcohol provides the excuse to deviate" (discussed 753-55). The alcohol myopia theory factors in biology, the cognitive impairment effect of alcohol (756); it is cognitive "myopia" in the sense that "you can't retain appreciation for all the reasons why you should or should not do something." (757). "[D]runk people are more inclined to engage in excessive behavior *** be it sexual behavior, violent behavior *** They're less able to reign in their behavior, and they're too focused on the green lights and the go signals." (760). Returning to the synergy created by the combination of alcohol and erotica (762):

> [W]hat you get in the synergy is you get the erotica exposure catalyzing more alcohol consumption. You get the alcohol consumption catalyzing more erotica exposure, and you get the myopia and expectancy theory then expanding that, so that the likelihood that you're going to get what we would characterize in the lab as excessive outcomes becomes greater, but what we would characterize in the real world as adverse secondary consequences that are analogous to the ones in the lab."

In Dr. George's opinion, the findings discussed translate into adverse secondary effects from combining alcohol and nudity, and those effects can be felt not just inside the bar but can carry into the wider community, depending on the "crime opportunity" available. (809-10, 821-23).

In a 1999 article from *New Statesman* magazine at LR Tab 43, the author graphically relates his experiences with private or table dances at a no-contact nude bar:

> [T]he acts performed by the dancers are so intimate and explicit that they constitute a halfway house to paying for sex. This is not just striptease: It is quasi-sex. *** It had the effect of persuading me that full, paid-for sex, something I had thought my inhibitions and ethics would never permit, was a logical, acceptable next step."

The author confesses that he paid for sex with a prostitute after visiting the nude bar.

The record also includes: prior judicial decisions, including *California v. LaRue* describing the gross sexual conduct occurring in California bars; LR Ord. Nos. 81-334, 02-496 (incorporated by reference); legal memo discussing *Peek-a-Boo* and supporting evidence; Minutes; documents submitted by opponents. (LR 44-48, Vol II 50-52). Two attorneys spoke in opposition and submitted letters, copies of articles criticizing the methodology of studies from other jurisdictions, and copies of studies from other jurisdictions which purported to show no correlation between adult businesses and adverse effects. None of the opposition studies was of Daytona Beach.

**CITY'S ADDITIONAL EVIDENCE IN SUPPORT OF ORDINANCES**

Detective Oakley supplemented the police reports in the LR and the 1987 testimony of Prosecutor David Smith. (2/22 152-177; 2/23 2-46; City Ex. 29). Oakley visited each of the clubs "25 to 50 times" and found similar conduct, providing graphic descriptions. In the VIP area at Lollipops a nearly naked dancer simply laid on top of him without moving for a full $20 song (168-69) talking about her boyfriend and buying drugs. (170, 4; City's Ex. 29). There were drug buys at Lollipops (21, 43; City's Ex. 20); oral sex between dancers in the Pink Pony VIP (10-11); Oakley was quoted a price of $30 for oral sex at the Shark (17); and his experience is that drug activity and dealers are more prevalent at adult clubs than mainstream bars. (24-27).

A citizen, Joe Craig, gave police a sworn statement that he personally was offered sex at Red-Eyed Jack's numerous times, including "oral sex, hand job, and as I perceived vaginal sex. They even had condoms with them. I believe it is an ongoing enterprise." (City's Ex. 28).

Shawnna Redmond visited Lollipops with friends a few months after it opened (2/23 47-69; City's Ex. 21). She observed sex acts in the VIP area and what appeared to be drugs, then was roughed up by bouncers and thrown out when they discovered her. She solicited help from the

police, but they assessed her condition as drunk and 'trespassed' her from the club at the bouncers' request. She filed a complaint against the police officer, battery charges, and a civil suit. Michael Richards also filed a citizen complaint after he was beaten by Lollipops bouncers. (City's Ex. 27, App.). Richards disputed a VIP bill of $360 (18 songs @ $20). When police arrived he was intoxicated and appeared disoriented; bouncers claimed Richards was the aggressor and he was trespassed. An internal review found that no independent witnesses were interviewed. Bouncers choked Emmanuel O'Neale, threatened to call police but then knocked O'Neale's cell phone to the ground when he tried to call, and took all the money out of his pockets. (City's Ex. 26, App.). There are many more such incidents recorded at Lollipops. (City's Ex. 30; see App.). The records show they are difficult to investigate effectively, typically boiling down to a patron's word against that of several employees. The incidents generally involve circumstances unique to the "strip club" operation; many erupt over disputed VIP bills, and some customers wake up on the ground outside the back door or in the hospital. They are not isolated incidents, show commonalities, their severity is startling, and it is reasonable to believe there are many more unreported.[10] (3/15 Beres 63, 69).

On 6/11/02 a man was found unconscious outside Red-Eyed Jack's and died in the hospital shortly after. An initial witness statement by an employee alleged that the man had been refused entry to the club because he was too drunk, that he then fell and hit his head leaving so the employee called police, and the police arrived promptly. But investigation revealed that the man's ATM card was used inside the club earlier in the evening, indicating that he was in fact a customer. This case remains an open homicide investigation. (City's Ex. 31; 3/15 Beres 75-80).

Rick Prioletti supplemented Langston's 1987 testimony.(2/22 34-151). He pointed out that

[10] Plaintiffs suggest the reason: because dancers are "independent contractors" dance bill disputes might be referred to civil court if not resolved by bouncers. (3/15 Beres 91-92).

street prostitution in the City is concentrated on the beachside tourist and Ridgewood Avenue corridors where the adult bars are located, and that there does not appear to be any prostitution in other areas of the City. (87-94; City's Ex. 16-18). Prioletti discussed the economic history of the City, its tourism heyday and decline, and lack of a diversified economy leading to reluctant reliance on special event tourism. He described the unique challenges of accommodating beachside tourists and residents, ongoing redevelopment efforts, and the public funds committed. (City's Ex. 8-12). The City does not want a future dependent on special events for its survival; it is continually striving to erase the image it has been saddled with, the problems associated with events, and to remake itself as a family-friendly destination and attract new business and industry. (Ord. No. 02-496, Preamble, §§7,8,10). Prioletti, Lt. Beres, and Lt. Szabo also provided further information about the specific areas and businesses studied by plaintiffs' experts, relative to 1981 and now.

**PLAINTIFFS' EVIDENCE**

Plaintiffs' experts gathered the City's records of police calls for service (computer aided dispatch or CAD) for 1979-81 and 1999-2002, performed statistical analysis of the records, and determined there were not a meaningful statistically significant higher number of calls for service at the 1981 topless bars, the 2002 "adult cabarets," or the areas immediately adjacent to them.[11]

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[11] Actually, they said the records didn't show a higher "crime rate," but since they didn't study crime records, this clearly misrepresents the findings. In their words: for 1981 they found the adult business roadway sections "[o]verall *** show a somewhat higher rate of crime, but the difference is not dramatic" (Pl's Ex. 1 at 28); three of the six "do show significantly higher rates of crime." (*Id.* at 29-30). For 2002 after controlling for various factors believed to be associated with crime (e.g., retail alcohol sales outlets which Linz erroneously identifies as bars), they found "statistically significant" but not "meaningful" correlation between the adult bar census blocks and "crimes against persons" (79); "technically statistically significant" but "trivial" correlation with "other less serious offenses (79-80); "statistically significant" correlation with drug offenses, explaining 5% of variability (80); "statistically significant" but "meaningless" correlation with "total crime" (81); "statistically significant" correlation with prostitution explaining 2% of variability (85).

## LEGAL ANALYSIS AND ARGUMENT

The ordinances are reviewed under *O'Brien's* intermediate level of scrutiny. This court previously found that the first, third, and fourth *O'Brien* prongs are satisfied. The only remaining issue is whether the ordinances further a substantial government interest of the City.

In *California v. La Rue*, 409 U.S. 109 (1972), the Supreme Court upheld an ordinance identical to the City's 1981 enactment, finding that evidence of gross sexual conduct in bars, and prostitution and other crimes occurring around the bars, was sufficient to justify the regulation.[12] In *Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the city's interest in applying a general nudity regulation to an adult bar was challenged and the court stated:

> Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by amicus curiae does not cast any legitimate doubt on the Erie city council's judgment about Erie. [*citing* Br. 1st Am. Lawyers Assn. 16-23].

529 U.S. at 298 ("study relied on by amicus" refers to Dr. Linz's paper "Debunking the Legal Myth of Negative Secondary Effects"). In *City of Los Angeles v. Alameda Books,* 122 S.Ct 1728 (2002), the Court granted certiorari "to clarify the standard for determining whether an ordinance serves a substantial government interest." The Court expanded upon the *Erie* passage, saying:

> [W]e specifically refused to set such a high bar *** a municipality may rely on any

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[12] The *LaRue* Court relied on the added weight of the 21st amendment. In 1996 the Court disavowed the 21st amendment analysis, but specifically reaffirmed *LaRue*'s outcome. *44 Liquormart v. RI*, 517 U.S. 484, 515 (1996) ("the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment*** police powers provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion"); *followed Sammy's Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir. 1998); *Flanigan's Enters. v. Fulton County*, 242 F.3d 976, 985 (11th Cir. 2001).

> evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. [citations omitted] This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. (*citing e.g., Erie*).

122 S.Ct. at 1736. In *Peek-a-Boo Lounge v. Manatee County* the11th Circuit attempted to fill in the mechanics of this procedure for challenging the government interest. The appellate panel found that the plaintiffs had in fact successfully "cast direct doubt" on the government's expressed interest by introducing studies of local conditions when the county's sole evidence had been foreign studies and judicial opinions, and sought to assist the trial court on remand with the following instructions:

> At trial, in keeping with *Alameda Books*' burden-shifting analysis, the District Court must determine whether the County's additional evidence "renew[s] support for a theory that justifies its ordinance." 122 S. Ct. at 1736. Stated otherwise, in light of our finding that the Adult Lounges have managed to cast direct doubt on the County's rationale for adopting Ordinance 99-18, the District Court must decide by a preponderance of the available evidence (including whatever additional evidence the County places in the record) whether there remains credible evidence upon which the County could reasonably rely in concluding that the ordinance would combat the secondary effects of adult entertainment establishments in Manatee County. The burden lies with the County in this regard. However, the District Court should be careful not to substitute its own judgment for that of the County. The County's legislative judgment should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the County reasonably relies.

337 F.3d 1251, 1273 (11th Cir. 2003). In interpreting this somewhat confusing passage, it helps to remember the facts and procedural stance: adult bars had been operating in the county for years; the county adopted new regulations relying exclusively on foreign studies in the legislative process with no reference to existing local bars; on summary judgement motions the bars submitted *local*

*studies* to the court which addressed the county's expressed legislative concerns but the county submitted *only* the existing legislative record with *only foreign studies*; and the appeal court found that the bars successfully "cast direct doubt." On remand, although it was the county's burden – or opportunity – to come forward with some additional evidence or support, upon receiving supplementary evidence the trial court was instructed to apply the two lowest standards of proof: preponderance of the evidence while granting deference to the legislative judgment.

Ultimately, this is what we glean from *Peek-a-Boo*: (1) Under *O'Brien* government must support its legislation by pre-enactment evidence; (2) pre-enactment evidence is open to challenge in the courtroom; (3) if evidence submitted to the court successfully refutes all pre-enactment evidence, the government is entitled to introduce new evidence, including evidence which was not considered at the time of enactment; and (4) if any single piece of credible evidence upon which government could reasonably rely in concluding that the ordinances would combat secondary effects remains at the conclusion of trial, it is sufficient to sustain the legislation.

We already know from a host of cases applying *O'Brien* that empirical evidence is not necessary and that the government's evidentiary burden is not high, *e.g.*:

> As we have said, so long as the regulation is unrelated to the suppression of expression, "the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. at 406. *See, e.g., US v. O'Brien, supra*, at 377; *U S v. Albertini*, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985) (finding sufficient the Government's assertion that those who had previously been barred from entering the military installation pose a threat to the security of that installation); *Clark v. Community for Creative Non-Violence*, 468 U.S. at 299 (finding sufficient the Government's assertion that camping overnight in the park poses a threat to park property).

*Erie v. Pap's A.M.*, 529 U.S. at 299, *also* 298-300; *Alameda*, 122 S.Ct. at 1736-37, and 1743 (J. Kennedy, concurring: "very little evidence is required *** if [the city's] inferences appear reasonable, we should not say there is no basis for its conclusion"); *see also Turner Broad. Sys.*

*v. FCC*, 520 U.S. 180, 193, 195-96, 199, (1997) (deference owed legislature); *World Wide Video v. Spokane*, 368 F.3d 1186, 1196 (9th Cir. 2004) (evidence of pornographic litter was not effectively controverted by plaintiffs' expert; elimination of pornographic litter, by itself, is a substantial governmental interest; "citizen testimony concerning pornographic litter and public lewdness, standing alone, was sufficient to satisfy the "very little" evidence standard of *Alameda* [citations ommitted]; *cf. Stringfellow's of N.Y., Ltd. v. City of New York*, 694 N.E.2d 407, 417, 91 N.Y. 2d 382, 400, 671 N.Y.S.2d 406 (N.Y. 1998) ("Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects")); *Grand Faloon v. Wicker*, 670 F.2d 943 (11th Cir. 1982) (testimony of Police Chief sufficient to sustain ordinance); *G.M. Enters. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003)(city's judgement reasonable dispute some conflicting evidence); *Nat'l Amusem'ts v. Town of Dedham*, 43 F.3d 731, 742 (1st Cir. 1995), *cert. den.* 515 U.S. 1103 (1995); *N.W. Enters. v. Houston*, 352 F.3d 162, 180 (5th Cir. 2003) ("The point of deference is this: legislators cannot act, and cannot be required to act, only on judicial standards of proof"); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005) (rejecting Dr. Linz's opinion "that 'systematically collecting police call-for-service information' and adhering to the Appellants' suggested methodological standards were 'the only reliable information' that could have supported the City's concern"); *Annex Books, Inc. v. Indianapolis*, 333 F. Supp. 2d 773, 781 (D. Ind. 2004)(rejecting Linz's study methodology in favor of actual police experience).

The City's substantial interests and evidence supporting a reasonable belief that the ordinances will further that interest are articulated in the record reviewed *supra*. Ord. No. 81-334 was enacted "to prohibit nudity, gross sexuality, and the simulation and depiction thereof in establishments dealing in alcoholic beverages." (§ 2). The 2002 regulation, as applied to adult theaters, was

intended to close the loophole discovered by two bars offering nude entertainment in areas adjacent to liquor. The 2003 amendment was intended to maintain the effect of the original 1981 ordinance: it adjusted application of the nudity regulation to adult theaters in light of *Peek-a-Boo* insuring an opportunity for "pasties and G-string" erotic dance in permitted adult theaters under the zoning ordinance, *see Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1307-8 (11th Cir. 2003), while still maintaining a separation from alcohol. In sum, the ordinances act in concert and the intent of all three as applied to adult theaters is as originally stated – to prevent gross sexual conduct and nudity from occurring in conjunction with alcohol.

Why does the legislative body want to prohibit gross sexuality and nudity in proximity to alcoholic beverage establishments? Because the City actually experienced an influx of strip bars in the 70's when its economic outlook was dim and developed areas were deteriorating, and those businesses exacerbated the challenges already facing the City. In 1981 the City didn't rely on police dispatch records to determine whether there was a problem – they were one item in the record but the City also looked at prostitution arrest locations, the Police Chief listed specific concerns including murders and missing persons connected with the trade, lewd and lascivious behavior inside, customers assaulted and robbed, dancers assaulted or raped, prostitution inside and out, and the ineffectiveness of current law enforcement tools in curbing these problems. A citizen described the impact on her family restaurant when two neighboring bars went topless, including exposure to extreme violence and drugs. While the "police reports and testimony" of officers from 1981which the Chief referred to as substantiating the incidents in his memo are not available 25 years later, plaintiffs have presented nothing to refute the Chief's credibility. Police dispatch records are not on point. Unreported incidents, activity by detectives, special units, State Attorney investigators, none of that is recorded in CAD, and CAD designations often do not accurately reflect real crime.

(2/23 Szabo 101-108: the City's CAD is a measure of patrol activity and response times, but not of crime). We do have 1987 testimony from the prosecutor handling vice crimes; he testified from personal knowledge of prostitution and drug activity associated with the bars, his RICO cases including one of the businesses operating brothels (a record not in CAD). And finally, the City's concerns about its economic future and measures necessary to improve prospects were addressed by Urban Planners in 1987 testimony and before this court.[13] In 2002/3 the concern was not excessive calls for service (if *that* were the concern, plaintiffs might be on to something); no, concerns were lewd behavior inside the clubs; nudity, lewdness, and disruptive behavior on the City's streets; economic harm from the City's reputation as a town where anything goes; criminal behavior attracted by the clubs; and others expressed in the LR. There is no doubt as to the lewd behavior in the clubs; the CAD studies do not "cast direct doubt" on the credibility of the police reports (undercover activity is not in CAD). Dr. George provides a scientific explanation for behavior spiraling out of control[14] consistent with the effects observed by police, and supports the legislative judgment that alcohol and nudity should be separated. In addition, more serious crime concerns are evident depending on the "crime opportunity" in the environment they create: e.g., assaults and robberies

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[13] Numerous cases have recognized a city's substantial interest in its economy and aesthetics. *See e.g., New Orleans v. Dukes*, 427 U.S. 297, 299, 303; *Fla. Pub. Telcoms. Ass'n v. Miami Beach*, 321 F.3d 1046, 1055 (11th Cir. 2003); *One World Family Now v. Miami Beach*, 175 F.3d 1282, 1288 (11th Cir. 1999). Public, as opposed to private, morality also is an appropriate concern. *Lofton v. DCF*, 358 F.3d 804, 819 (11th Cir. 2004) ("our own recent precedent has unequivocally affirmed the furtherance of public morality as a legitimate state interest").

[14] If, indeed, any proof beyond common knowledge and sense is necessary. *See Sammy's*, 140 F.3d at 997: "The Supreme Court has itself noted that "common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca*, 452 U.S. at 718 *** requirement that the dancers partially cover their breasts or cease to serve alcohol is certainly the least restriction possible which would still further the city's interest in controlling the combustible mixture of alcohol and nudity."

by bouncers at Lollipops intent on collecting dance fees; a death at Red-Eyed Jack's doorstep.

**Exemption.** There is no exemption from the 1981 ordinance, but plaintiffs claim a blanket exemption from the 2002 nudity regulation under §62-184(a)-(b). The code structure and trial evidence negate this claim: (1) § 184(b) is the specific exemption applicable to adult theaters and this criteria must be met in order to claim exemption; (2) zoned sites are available for adult theaters using the exemption in (b), so such activity can constitutionally be prohibited in plaintiffs' zoning district under (a), *see e.g. Wise Enters.*, 217 F.3d 1360 (11th Cir. 2000) (both zoning and alcohol restrictions); (3) even if an (a) exemption were available to an adult theater, Lollipops manager testified that dancers take their clothes off for money making it inapplicable[15] ; and (4) "blanket" exemptions for a business are inappropriate under any circumstances, *e.g.* the 'dancer' lying on top of Detective Oakley was not engaged in protected expression where nudity was necessary to convey her message. *See, e.g.*, *R.A.S. Enter't v. Cleveland*, 130 Ohio App. 3d 125, 129 (Ct. App. 1998) (declaratory relief as to legality of future live nude dances not available because the nature of a live performance means there is no way of knowing what form dances would take in the future).

The City's ordinances should be upheld. The 1981 ordinance is virtually identical to that upheld in *La Rue*, 409 U.S. 109. Applied to adult theaters, the City's more recent enactments are less restrictive[16] and regulate only nudity not sexual conduct. Government has "ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion," 517 U.S. 484, 515, the Fla. Supreme Court held the evidence substantial, and plaintiffs' CAD studies do not refute it.

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[15] [D]ancers "get tipped gratuity or they charge for a table dance. It wouldn't make sense to take your clothes off for free when they're there to make the money. Q. So they get paid when they take their clothes off for the table dances? A. Correct. Q. That's how they make their money? A. Yes, through tips, through gratuities, yes." (1/20 Bishop 73).

[16] The court ruled the 500' separation from alcohol meets the fourth *O'Brien* prong.

# CITY OF DAYTONA BEACH CLOSING ARGUMENT

# APPENDIX

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1981 Prostitution Arrests

City's Ex. 1, Tab12/L

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Abstracts of Handwritten Police Department Records: Incident Reports and Witness Statements

City's Exhibit 26 Emmanuel O'Neale

City's Exhibit 27 Michael Richards

City's Exhibit 30 A & B, 643 No. Grandview Ave.
Oct. 2001 – Dec. 2004

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**CITY'S EX. 1 TAB 12/L**

**57 BEACHSIDE PROSTITUTION ARREST LOCATIONS IN DAYTONA BEACH**
**(for street locations see City Street Map, City's Ex. 15)**

| ADDRESS | Number of Arrests |
|---|---|
| 2700 N ATLANTIC | 1 |
| 1100 N ATLANTIC | 1 |
| HARVEY APPROACH | 1 |
| 700 N Atlantic | 2 |
| GLENVIEW & N WILD OLIVE | 1 |
| 600 BLK N WILD OLIVE | 1 |
| SEABREEZE & N ATLANTIC/600 N ATLANTIC | 2 |
| 00 BLK N GRANDVIEW | 1 |
| OAKRIDGE/OAKRIDGE & GRANDVIEW | 2 |
| 400/1400 BLK N OCEAN BEACH | 1 |
| 400 N ATLANTIC | 10 |
| ORA & N GRANDVIEW | 1 |
| ORA & N OCEAN/ORA APPROACH (BEACH) | 4 |
| EARL & HALIFAX | 1 |
| EARL & OCEAN | 3 |
| EARL & ATLANTIC | 1 |
| 248 N ATLANTIC | 1 |
| AUDITORIUM & ATLANTIC | 3 |
| COATES & AUDITORIUM | 1 |
| COATES ST PARKING LOT | 2 |
| 00 BLK N COATES | 1 |
| MAIN & ATLANTIC | 1 |
| 103 N OCEAN | 1 |
| 100 BLK N OCEAN | 3 |
| 41 N OCEAN | 1 |
| 101 S OCEAN 1 | 1 |
| THUNDERBIRD HOTEL | 3 |
| BROADWAY APPROACH | 1 |
| BROADWAY & PENINSULA | 1 |
| WEST END OF HEWEN PL | 2 |
| RUGER PL (By Silver Bch) | 2 |
| 229A CARDINAL ORMOND BEACH (rental unit in Elinor Village) | 4 |

**CITY'S EX. 1, TAB 12/L**
**(for street locations see City Street Map, City's Ex. 15)**

**26 MAINLAND PROSTITUTION ARREST LOCATIONS IN DAYTONA BEACH**

| | |
|---|---|
| BELLEVUE & RIDGEWOOD | 1 |
| 571 1/2 SECOND AVE | 1 |
| HAZEL & RAILWAY | 1 |
| BAY & N RIDGEWOOD | 1 |
| 118 RIDGEWOOD | 1 |
| 268 N RIDGEWOOD | 1 |
| MULLALLY & RIDGEWOOD/ST. PAUL'S PRK LOT | 3 |
| FAIRVIEW & N RIDGEWOOD | 1 |
| ARLINGTON & N RIDGEWOOD | 1 |
| TAYLOR & RIDGEWOOD | 2 |
| NORTH STR & N RIDGEWOOD | 2 |
| 466 RIDGEWOOD | 1 |
| 619 N RIDGEWOOD | 1 |
| CONNECTICUTT & RIDGEWOOD | 5 |
| 308 MADISON | 1 |
| KINGSTON & N RIDGEWOOD | 1 |
| 990 ORANGE (POLICE DEPT) | 2 |

**ABSTRACT: CITY'S EXHIBIT 26**

**Date: 6-24-04**
**Victim: Emmanuel O'Neale**

Lollipops' employees Jerry McMichael and Jay Bassett were charged with Robbery.

According to the Arrest Reports: An employee told O'Neale a private dance was $10. O'Neale "went to the area for a private dance and paid the ten dollars and went to the back area for his private dance." Upon leaving the dancer said "you owe me $60." There was a verbal altercation, then Bassett grabbed O'Neale "by his neck and pushed him against the wall" and choked him. McMichael "reached into V-1's [O'Neale] pockets to get the money.... [Bassett] asked..."Do you have it."' O'Neale complained of neck pain and was looked at by paramedics.

O'Neale provided a sworn statement: When he entered, O'Neale asked at the front door desk "how much for a lap dance, he said 10$ (not 10 for the floor and 20 for the back)." O'Neale "got a stripper and pay the guy $10, I go inside to the back." After finishing with the dancer, O'Neale tried to leave the back area and "the lady then says I owe her 60$." O'Neale said he didn't have it and explained that he had asked "at the front desk purposely so I would know how much I could spend." The bouncer intervened and discussed it with the doorman. O'Neale kept saying he didn't have it and the doorman said "bullshit I seen money in your pocket. At that time they told me something like butterfly your pocket. I said again I didn't have it. The guy who choked me said would you like me to call the cops and make it into something its not. I said I'll call the cops, took my phone out the guy who took my money grabbed the phone and it fell to the floor." One of the bouncers "grabbed my neck and put me against the wall banging the back of my head..... The other guy ...reached in my pocket and took all the money from my left pocket." O'Neale thinks he had at least $80 in the pocket. He picked up his phone and called the police while walking out. O'Neale also states, "During the assault I was being choked as if he were going to kill me. I was in fear for my life because of the force of his grip .... I was scared three big guys surrounding me was very intimidating..."

**ABSTRACT: CITY'S EXHIBIT 27**

**Date: 3-16-03**
**Victim: Michael Richards**

Michael Richards received a Trespass Warning in this incident. He filed a complaint with the Police Department regarding the handling of the incident, and one of the responding officers was counseled for failing to obtain information from witnesses who were not involved in the incident.

According to the Incident Report: Two officers were flagged down outside Lollipops regarding a physical altercation. The Richards told the officers they had been punched by a bouncer in Lollipops "for no reason." The reporting officer states that he investigated by speaking with three employees in Lollipops (two bouncers and a dancer). He determined that Richards had "charged up $360" for dances in the VIP room and "refused to pay." Two bouncers and the manager "went to speak" with Richards about the bill. Richards son "came up and then shoved Z-3 [bouncer Gabe Blanchard] back." Richards then started fighting and the bouncers "grabbed" him and they fell to the floor, but Richards broke away and "ran through the club toward the bar where he attacked a customer." The bouncers then "grabbed" Richards again and held him till police arrived. The employees attempted to locate the customer who was alleged to have been attacked by Richards "but had negative results." Richards "had minor injuries to his face and fingers and was treated" by paramedics.

Joseph Roces, Lollipops' employee, provided a written statement: "An intoxicated male did not pay for any of the VIP dances which totaled $460.00." The male's son "pushed ... security" and security "pushed" back, "father started to fight security then father grabed [sic] customer and fought the customer we grabbed him and settled him till police got there."

Lisa Calapouski, Lollipops' dancer, provided a written statement: She came out of VIP with Richards. Roces told Richards he owed $360 ("18 songs .... $20 per song"). Richards "got mad .... started yelling at me saying he wouldn't pay that because it wasn't worth it. Michael starts to tell Joey [Roces] to call the cops because he wasn't paying." They argued, then "Joey [Roces] and I both told Michael [Richards] that since his sons sent him back there they should pay. Richards went to talk to his sons and "Joey and some other bouncers and managers went with him..... After he talked to his sons Michael [Richards] got mad and started running towards the front he took off his shirt and started pushing the bouncers out of his way. He started to hit a bouncer."

Gabe Blanchard, Lollipops' employee, provided a written statement: "A patron owed $460." One of them "shoved" Blanchard, the other "came at me in a fighting stance. I was able to block a punch and grab his shirt we fell." Richards "ran and attacked a patron at the bar they started to fight."

According to the Internal Investigation report: Richards complained that the officers did not properly investigate by not "contacting independent witnesses, taking statements from him and his son and in not arresting those that Mr. Richards claimed battered him."

Officer Williams testified that he was flagged down in front of Lollipops, went in and "observed Mr. Richards inside the club on his knees with his shirt off and appearing 'disoriented and confused.' Richards advised ... that he was assaulted by one of the employees of the club..... Williams advises that Mr. Richards did identify an individual who he claimed assaulted him, however, statements provided by other club employees were consistent with one another's and inconsistent with Mr. Richards' account..... Richards was 'disruptive and loud' and appeared to be intoxicated. Conversely, none of the club employees appeared to be intoxicated."

Officer Guglielmo was with Williams. He recalled observing "Richards inside the club kneeling down in the center of the club and refusing to leave at the employee's request." Richards left at the officers' request. Richards was "bleeding from the lip... appeared impaired and ... his impairment affected his ability to comprehend questions and statements made to him."

The internal affairs investigator found that Officer Williams "limited his investigation to involved parties, namely, Mr. Richards and his son and club employees," and recommended that the officer be counseled "regarding the necessity to contact uninvolved parties who may have witnessed an incident in an effort to get impartial testimony."

**ABSTRACT: CITY'S EXHIBIT 30**
**RMS (Record Maintenance System) report and related records:**
**"Assault & Battery" at 643 No. Grandview Ave. (Lollipops Gentlemen's Club)**
**Time Period: Opening of business Oct 2001 through December 2004**

**Date: 11-13-04**
**Victim: Robert Jackson**

According to the Incident Report: Jackson was talking with a bouncer. Another man walked up, argued with Jackson, walked away, then walked back and hit Jackson. Jackson identified the assailant as a bouncer, but the Club said he wasn't; the assailant left the premises before police arrived. The police officer and Jackson both viewed video of the incident recorded by the club security camera. The officer states that Jackson appeared intoxicated.

**Date: 10-28-04**
**Victim: Jean Day**

According to the Incident Report: The officer was flagged down at the intersection of Glenview and Grandview Avenue regarding a disturbance. The officer found Jean Day in the parking lot at that location, unconscious and bleeding from the mouth. She was transported to the hospital. The officer took Day's boyfriend, Sweatt, inside the club but they could not locate the assailant.

Walaa Soliman, an employee of the Pizza restaurant across the street provided a sworn statement: Soliman observed Day being hit in the face by a large man and knocked to the ground, and he observed the same assailant hit Day's boyfriend when he tried to help her. Solimon further stated, " I can identify the person who did it."

Day's boyfriend, John Sweatt, gave a sworn statement: Day was working as a dancer at Lollipops and "had too much to drink." Sweatt reported this to a doorman and requested that Day be asked to leave with him. The doorman called the manager over. The manager said he would "take her in the back to sleep it off." Sweatt said he wanted to take Day home, but the manager "said he would kick my [Sweat's] ass if I [Sweatt] didn't leave his club." Sweat left the club and tried to call Day repeatedly, but got no answer. Approximately 1 $^{1}/_{2}$ hours later Day called Sweatt to pick her up and told him she had been "beat up in the dressing room and the manager through [sic] her stuff out of the club suitcase, clothes, phone and took her money 100/more dollars..". Sweat found Day outside the club "yelling at a bouncer ... 6' 2 to 4" tall 250 pounds" who "walked up and punched her in the face and knocked her down." The same assailant punched Sweatt when he tried to help Day then the assailant went inside Lollipops. Sweatt said he could "identify said individual and want to press charges."

**Date: 9-12-04**
**Victim: Walter Carr**

According to the Incident Report: Carr reported this incident on September 14, 2004, two days after it occurred, by coming to the front desk at the Police Department. The officer who took Carr's report observed the injuries and took a photo. Carr could not identify the assailants.

Carr provided a sworn statement: Carr went to Lollipops about 11:30 the night of September 11, 2004. He "had a thousand dollars cash" and a credit card, and was "highly intoxicated." He doesn't remember why, but he does remember "being pulled out by three or four bouncers and being severely beaten while I was on the ground." He came to on the ground outside the back door of Lolllipops sometime in the early morning of September 12. His Rolex wristwatch was smashed (showing time of 3:10), his cash was gone from his wallet, and he had an "unsigned credit card receipt." A later check with his credit card company showed that three separate charges had been made on the night of September 11 and early morning of September 12. When he came to Carr saw an employee leaving the club by the back door. Carr asked the employee for help but "he refused." Carr's face was swollen, one eye was swollen shut, and he had bruised ribs and chest.

**Date: 8-29-04**
**Victim/Defendant: James Therrien**

According to the Arrest Report: Therrien, a patron at Lollipops, was charged with Aggravated Battery for "striking V-1 [bouncer Brent Rose] with a beer bottle to the head causing a small laceration."

Therrien was arrested on the scene and the two bouncers involved provided sworn statements. Therrien later came to the Police Station and filed his sworn written statement.

Brent Rose, Lollipops' employee, provided a sworn statement: Rose was breaking up a fight between other people when Therrien, who "wasn't even involved in original fight approached and hit me with a bottle."

James Alexander, Lollipops' employee, provided a sworn statement: Alexander asked a customer to leave after the customer was "rude to a young ladie (Entertainer) [sic] about not wanting a lap dance." The customer's son "pushed" Alexander and the father "tried to jump over the son and hit me so a fight started and I was trying to defend myself." Two more bouncers assisted and they "escorted the father and son outside." As they returned to the area where the fight had started Therrien, who wasn't involved in the previous fight, "hit my doorman (bouncer) Brent in the front of the face cutting him open and knocking him down." They took Therrien "out the backdoor. He had a motorcycle and tried to leave when the police arrived and arrested took him away."

Fred [ ? ] provided a sworn statement: "I witnessed the man in custody throw a beer bottle at a bouncer."

Therrien provided a sworn statement: Therrien "was standing by the main stage when the staff grabbed the man next to me. They were beating him while he was unconios [sic]. I told them stop it [was] way out of line," the bouncers "grabed me, through me to the ground, and kick and punched me out cold." [sic] Therrien also alleged that money, his cell phone, and jewelry was stolen from his person during the incident.

Front Desk officer who took Therrien's report: This officer noted discrepancies between Therrien's initial oral statements to him about the money and property stolen and Therrien's handwritten statement. The officer also noted that Therrien did not wish to press charges, "but wanted documentation of ... his 'side' of the story."

**Date: 6-25-04**
**Defendant: Steven Tovar**

Tovar, a patron of Lollipops, was charged with Disorderly Conduct and Battery on a Law Enforcement Officer.

According to the Arrest Report: Tovar was yelling and screaming outside Lollipops when police arrived. Tovar stated he called the police "about my friend getting slapped in the face by a dancer" Tovar calmed down and the Officer "completed [his] investigation" then "asked Tovar 'Why he did not pay the dancer for the dances that he received from her.'" Tovar started yelling again and the Officer was unable to calm him. Ultimately, Tovar pushed the Officer and made an aggressive movement toward him, resulting in Tovar's arrest..

**Date: 3-6-04**
**Victim: Tanya Barreto**

Tanya Barreto flagged down two officers in the 600 block of North Glenview at 3:20 a.m.. Page 1 of the Incident Report identifies her as a "temporary dancer" at Lollipops, with her place of residence in Lake Worth, Fla. One officer filed an Incident Report; there are no other statements.

According to the Incident Report: Barreto reported to the officers that she had been thrown out of Lollipops by 5 or 6 bouncers, and that "while doing this they hit, kicked, and punched her several times." She had some visible signs of injury. She said she was thrown out after a "verbal fight" with some other dancers in the dressing room, and admitted that she threw "two beers." Lollipops manager, Christopher Vorhees, advised the investigating officer that Barreto had been "escorted out" after the verbal altercation in the dressing room, then she reentered "and started to throw beer bottles at the dancers." Vorhees advised that there was video of the incident, and he could supply a copy later in the day. Later, the video was picked up and the reporting officer viewed it. The video showed Barreto entering and throwing "four glass beer bottles at unknown subjects." Four bouncers then held her arms and legs, lifted her, and carried her outside.

**Date: 2-24-04**
**Victim: Oberist Lee Saunders**

Lollipops employee Christopher Vorhees was charged with Battery in this incident.

According to the Arrest Affidavit: Vorhees first approached Saunders about a $10 bar tab which Saunders disputed but agreed to pay. Then Vorhees tried to collect "an additional $100 for a lap dance [Saunders] received earlier in the night." When he refused to pay Saunders was "struck several times" by Vorhees "and others." Saunders had minor cuts on his throat and abrasions to his lower lip. Photos were taken of the victim's injuries.

Saunders provided a sworn statement: A dancer took him to the "VIP Room." She danced 3 times and he paid her. Then [illegible] said he "owed $100." When he "argued .. the bouncers of Lollipop [sic] pushed me in the storage room & held me down and kicked and punched me in the face then threw me out the back door. I got severely beat up ... busted lips and cuts on my face and bruised ribs."

Sam Baker, Saunder's friend, provided a sworn statement: This statement is somewhat unintelligible, but Baker states that his friend was kicked "in the face."

Vorhees, Lollipops' employee, provided a sworn statement: Saunders owed money "for a bar tab .... he finally paid... then was "told to leave." Saunders refused to leave, "took a swing" at another employee, and two bouncers carried him out the door "kicking and fighting." Vorhees states that Saunder's "friend said he does this all the time."

Danny Basset, Lollipops' employee, provided a sworn statement: Bassett says Saunders tried to assault him, "took a swing, ripped my shirt," then the bouncers escorted Saunders out. Bassett was at his "desk" where is "a money holder."

Cory Minton, witness, provided a sworn written statement: Minton saw the altercation which he says started at "the VIP dance room." He saw the bouncers talking to a very intoxicated patron, telling him he would have to leave. The patron started fighting and continued fighting while the bouncers carried him out.

**Date: 11-28-03**
**Victim: Brian Pingor/Dickerson**

This is an Incident Report only, no witness statements. The patrons were tourists.

According to the Incident Report; Two officers were dispatched to Lollipop's "in reference to a person being held against their will." When the officers arrived, Lollipop's manager, Sean Bishop, advised them that a patron had owed money to a dancer and "had no money on him," but the patron had already left. While the officer was talking to Bishop, Pingor came in and wanted to talk to the officer. Pingor said he and a friend (later identified as Dickerson) owed money to a dancer and two bouncers, Gabriel Blanchard and Jarrod Alexander, were "questioning" Dickerson about it. Pingor tried to defend his friend. The bouncers asked Pingor to leave. Pingor refused and the bouncers called Sean Bishop and Christopher Vorhees on the radio. Bishop and Vorhees then escorted Pingor out, and one of them "threw him to the ground." Dickerson didn't pay all the money, and he was "escorted" out a little later. The business allowed the officer to view a video of the incident, but the officer did not observe a battery on the video. Pingor claimed that the battery occurred out of view of the video when they threw him down outside.

**Date: 11-22-03**
**Victim: William Dunn**

Lollipops' employee Gabriel Blanchard was charged with Battery in this incident.

According to the Arrest Affidavit: Blanchard punched Dunn in the head and Dunn fell to the ground. Dunn told the police officer that "when he attempted to call police, Def [Blanchard] took his cell phone and threw it to the floor. It was never retrieved." Dunn suffered a laceration over his eye which was treated at the hospital. The officers were unable to locate this incident on the business's security tape. Blanchard told one officer that Dunn "took a swing at me [Blanchard] and I hit him," but the arresting officer noted that he did not hear that statement.

"Narrative Continuation:" Dunn was intoxicated at the scene. He was unable to identify the assailant. Dunn went to the hospital and the officer spoke to him there a couple of hours later. At the hospital, Dunn told the officer that his friend owed $480 for lap dances, and there was a disagreement about the bill and who was responsible for paying it. The officer also spoke to Lollipops' employee Jarrod Alexander. Alexander told the officer that one of his dancers, Janet Bassett, saw Dunn "reaching behind his back for something, and she reacted to it." Alexander told the officer he would "review the tapes in the VIP section." The manager was given blank witness statements for the business's employees to fill out. An officer returned to the business the next day to witness the employees' signatures and pick up the statements.

Dunn provided a sworn statement: "Gabriel attacked me and threw me to the floor." He also states that the staff "stole" his phone and told him they would give it back if he paid, and his credit card and $250 cash were missing.

Heather Loupe, Dunn's friend, provided a sworn statement: "When I entered the vicinity I witnessed ..... [Alexander].... push William Dunn to the ground with extreme force injuring his head." She tried to retrieve Dunn's cell phone from the bouncers but was told it would be returned "when they received the amount of money owed to them."

Jennifer Geiger, Lollipops' dancer, provided a sworn statement: She and another dancer took Dunn's friend to the VIP room. Dunn said that he would pay his friend's bill when they were done ($20 per song for each dancer, plus $10 for the VIP entrance fee). Dunn tried to interrupt them during the 11th song and again during the 12th song, but was denied admittance to the VIP area. They quit then and asked Dunn to pay the $480 due. He was drunk and tried to walk away.

Jay Bassett, Lollipops' employee, provided a sworn statement: Bassett was working the VIP desk. He "knew the guy Dr. Dunn ... since he frequents our club." Dunn was intoxicated but first assured Bassett "it's all good." But then Dunn and his friend argued over the bill and Dunn told his friend to pay it himself. "Extra security" was called at that point, and "Dr. Dunn and his friend became abusive in language .. as if to antagonize security." Dunn then reached "to the back of his jacket inside" and told his friend "to 'Grabb it.'" [sic]. An entertainer, "Dani said she saw a strap across his back and feared Dr. Dunn had a weapon" so she "put him in an arm bar" against the wall. "Security then searched him for weapons and escorted Dr. Dunn to VIP to isolate him until police arrived."

Jarrod Alexander, Lollipops' employee, provided a sworn statement: "A customer came out of the VIP Room .... swearing at the entertainers who danced for him and the doorman." Alexander tried to calm the situation. The customer and his friend argued over who would pay the bill. "Both men began to get irritated and very hostile when I told them that the police were coming and someone had to pick up the bill." Then one of the customers "started to move in a hostile manner and went to reach into his right rear pocket to pull some type of object out...." and a dancer, Danni, "forced him against the wall." Alexander then allowed the customer's girlfriend [Loupe] to speak to him in the VIP room about paying the bill, but the customer "became outraged" and Alexander and another employee, Gabe [Blanchard], "ran back there.... Once Gabe told the man to calm down the police were on their way" he started to fight.

Janet Bassett, Lollipops' employee, provided a sworn statement: She observed Dunn and his friend "dressed in Black Tuxedos causing a loud disturbance." They refused to pay their bill for dances, used profanity, and "told the security 'what are you gonna do beat us up, please do so we can sue your asses.'" They were intoxicated. Then one of the men "stepped behind one of the security guys and told his friend 'Go under my jacket' as he said this he lifted his coattails and the

other white male went to reach under the back of his coat." Bassett feared they had a weapon so she "grabbed the white male who was lifting his jacket and put him in an arm bar... and proceeded to pat him down for a weapon" [Bassett testified at trial that she was formerly employed in law enforcement.]

Gabriel Blanchard, Lollipops' employee [arrested], provided a sworn statement: Blanchard was paged to the VIP area and told that Dunn and his friend refused to pay their $480 bill. Dunn told Blanchard "Not to 'Fucken' touch him." Blanchard told Dunn to "calm down that the police were on the way." Dunn "clenched his fist took a forceful stance" and fought with him.

**Date: 9-1-03**
**Incident Report**

According to the Incident Report: Officers were flagged down by a Lollipops' employee at 3:30 in the morning. The employee pointed out a man, later identified as Anthony Gates, standing on the corner who had been thrown out of Lollipops earlier and "threatened to shoot them." Upon seeing the employee again, Gates had walked toward the employee and reached behind his back. The officers secured Gates in their vehicle then obtained the following information from participants in the incident:

Sean Coggins, Lollipops' employee [he also provided a sworn statement]: He was walking three dancers to their cars when Gates approached, started yelling about money, then grabbed Cortese, one of the dancers, by the throat. Coggins shoved Gates away. Gates threatened to shoot Coggins and left the area. Cortese also left the area at that time.

Brian Gillespie [he also provided a sworn statement]: From across the street Gillespie saw Gates grab Cortese, saw Coggins break it up, and saw Gates "act like he had a gun" then leave the area. Gillespie saw Gates return to the area and he warned Lollipops staff.

Anthony Gates, customer of Lollipops: He went to Lollipops earlier in the evening to see Cortese, his "'kind of' girlfriend. He had put his money, $180, on the table. When Cortese's dance ended, she grabbed all of his money and ran into the locker room." When Gates approached Cortese while she was leaving in an attempt to get his money back, Coggins grabbed him by the throat. Gates then got in a cab, went around the block, and returned to try to see Cortese again. Gates told police he wanted to file a theft charge against Cortese.

The officers "trespassed" Gates from Lollipop's. They never located Cortese.

**Date: 6-1-03**
**Arrestee: John Luke**

John Luke, boyfriend of a dancer at Lollipop's was arrested for Aggravated Battery and Resisting Without Violence.

According to the Arrest Report: The arresting officer observed Luke punch Cameron Bender, a bouncer at Lollipops, in the head with a pair of brass knuckles in his hand. Luke then refused to follow the officer's commands and resisted being handcuffed. Bender was observed to have a laceration above his left eye.

Alberta Pangourni, Lollipops' dancer, provided a sworn statement: Luke is her boyfriend. Luke "ask why the[y] had to keep us lock in and Joey got in his face acting like he was going to jump on him ...This whole thing happened because he [Luke] was trying to protect himself."

Joseph Roces, Lollipops' employee, provided a sworn statement: There was a confrontation with a dancer's boyfriend [Luke] outside the club. Luke had brass knuckles and a knife, and he hit Bender in the face.

Cameron Bender, Lollipops' employee, provided a sworn statement: A "guy & girl start fight" outside the club. The doorman approached the girl, at which point the guy [Luke] pulled out "what look like a knife." Bender then grabbed Luke's hand and Luke hit him in the head.

**Date: 3-22-03**
**Victim: Michael Brignola**

Brignola came to the front desk of the Police Department on 3/28/03 to report a battery that occurred at Lollipop's on 3-22-03.

Brignola provided a sworn statement: "There was a discrepancy with my bill so I would not sign the credit card slip." He states that a male employee of Lollipops then aggressively told him to sign it a few times, which he refused to do. The employee then told him to leave, and Brignola refused. Then two bouncers "draged [sic] me into a room that was well lit away from everyone while one bouncer kicked me in the face three times. While I was held down. When I came to I called 911 and a black bouncer gave me my credit card as if nothing had happened. I had 5 stitches under my right eye and missed three days of work."

Brignola wanted to press charges but was not able to identify the bouncers. The officer who took the report checked with dispatch, and determined that there was a service call that night indicating that "Brignola was trespassed from Lollipops" but no other information.

**Date: 3-12-03**
**Incident Report/Jennifer Wharton**

Wharton came to the front desk of the Police Department on 3/13/03 to report a battery the previous night at Lollipops. Wharton was working as a dancer when she argued with another dancer "but would not say what about." The other dancer, whom she identified as Laurie Beth Walters using a stage name "Celeste", grabbed her and punched her twice in the face. Lollipop's staff broke up the fight and sent Wharton home. Wharton advised that she wanted to press charges against Walters.

**Date: 3-9-03**
**Victim: Daniel Davis**

According to the Incident Report: An officer responded to Lollipops after a call by Davis. Davis, a customer, said that a dancer started a fight with him over a personal matter, punched him a few times in the face, and he wanted to press charges against her. Lollipops' manager sent the dancer home before the officer's arrival, and told the officer that he could not provide identification information for the dancer because "employee files were locked in the owner's safe."

Davis provided a sworn statement: He was a customer in Lollipops. One of the dancers, Jeannie Powell, punched him three times in the face. He did not retaliate because "then I would have been in trouble." Instead, Davis called the police. Davis wanted to press charges. He states that "the manager bought me a drink and said they were sorry that she did this and they sent her home and said that they would take care of it."

**Date: 3-6-03**
**Victim: Timothy Norling**

Lollipops' employee Mark Szarejko was charged with Aggravated Battery in this incident.

According to the Arrest Affidavit: The officer responded to Lollipops and found Norling bleeding from a head laceration. Norling was too intoxicated to provide any information. Norling's two friends advised that they had been customers in Lollipops when a Lollipops' employee later identified as Szarejko confronted Norling about "a debt owed to a dancer." They argued, then Szarejko struck Norling in the head with a beer bottle. However, "several bystanders advised" the officer that Norling was struck "by an unknown black male subject not by" Szarejko.

Nick Elrod provided a sworn statement: He was with Norling. He saw a man wearing "a red tank top" hit Norling with an empty glass bottle "over a dispute." After Norling was hit "one of the bouncers at Lollipops told me to stand back while my friend was laying on the ground bleeding. He acted like nothing happened."

Christopher James Werr provided a sworn statement: Werr was with Norling. He observed Norling in an argument with "a bouncer and a kid in a red tank top." He saw the person in the red tank top hit Norling with a bottle. He states "the bouncer would not let me near him [Norling]. A minute later they kicked us all out they would not give us any help."

**Date: 1-29-03**
**Victim: Gary Boatwright**

The information is provided in an Incident Report with no sworn witness statements.

According to the Incident Report: A police officer responded to a disturbance call at Lollipops. Gary Boatwright and Jack Graham met the officer "at the north side entrance." Graham and Boatwright were both "highly intoxicated and Boatwright was additionally disoriented." Graham advised the officer that they had been in Lollipops and got into an argument "over Boatwright's failure to pay for a 'lap dance.'" Boatwright was pushed by "an unknown person" and injured his head on the concrete floor. The bouncers then removed Boatwright and Graham from the club. Boatwright and Graham told the officer they did not wish to pursue charges. The officer "interviewed several bouncers, who stated they never observed anyone push Boatwright."

**Date: 10-19-02**
**Victim: Henry Lima**

According to the Incident Report: Lima contacted a police officer outside of Lollipops. He told the officer that "the club bouncers beat him up and knocked out three of his teeth, though [he] did not know why." The officer then talked to Blanchard, a Lollipops' employee. According to Blanchard, a bartender gave Lima three drinks and Lima refused to pay. Blanchard intervened, at which point Lima told Blanchard that "the club manager had given" him the drinks. Blanchard asked Lima to point out the manager, and Lima "and several of his friends led [Blanchard] to the rear of the club." Lima and his friends then "began speaking to each other in spanish," then Blanchard was hit twice at which point he started fighting back until the fight ended. Then someone threw a chair at him, possibly breaking his nose. "Lollipop's staff advised that the video system was not taping during the incident." Lollipops staff requested that Lima and his friends "be trespassed only." Blanchard was not arrested due to lack of evidence. Two customers witnessed the incident.

Blanchard provided a sworn statement: A bartender told him Lima had not paid for his drinks. Blanchard followed him to the back where Lima refused to pay. "I said it was time to go then his friends surrounded me, something hit me..." and the fight started.

Lima provided a sworn statement: A fight started and he went to see what was going on. A bouncer hit him in the face. He was kicked and punched, knocking out teeth.

Michael Hedrick, from South Carolina, provided a sworn statement: He was standing beside Lima. He noticed that Lima was "looking nervous" and commented on it to his friend. "Less than a minute later I turned around and saw ponytail [Lima] on the ground being kicked by a bouncer with a big build and a red hat. I told him to settle down; he said I work here." Lima got up and the bouncer told him to leave. Lima's friends came over and the bouncer told them all to leave. As Lima "turned away, a friend of his .... screamed at the bouncer... and turned to walk away. The bouncer ... punched him in the back of the head." Then Lima threw a chair "across the room."

Jason Carroll, from Georgia, provided a sworn statement: He saw Lima throw the chair. Before Lima threw the chair, Carroll saw "the bouncers were taking him [Lima] down." Lima was walking away when the "bouncers started taking another man down." That's when Lima threw the chair and it hit one of the bouncers.

**Date: 9-18-02**
**Victim: William Wooten**

According to the Incident Report: Wooten came to the front desk at the Police Department on 9-26-02. He stated that he had been beaten and robbed at Lollipops on 9-18-02. Wooten had gone to Lollipops, played pool, then talked to one of the dancers. Wooten wasn't "aware of any problems that may have occurred; But was apparently the subject of a trespassing call made to the DBPD at approx [sic] 7:32 pm that date.. That point the victim apparently had been beaten unconscious and was taken to Halifax Hospital by EVAC." Wooten regained consciousness in the hospital the next day. He had a concussion, broken nose, multiple abrasions and bruises, and was missing $200. Wooten had no recollection of the beating.

Wooten provided a sworn statement: After playing pool, he sat at the bar talking to a dancer. Late the next afternoon he woke up in the hospital. "Upon 'victim' [Wooten] questioning what happened ... Apparently what happened was Dancer's 'boyfriend' owner of club didn't like me talking to girl then I was drugged or hit real hard to the point of unconsciousness. Hit with bar stool on face and arms. Bar stool marks on arms. Beat up assaulted in club dragged outside and left there unconscious until ambulance picked me up at approx 19:32.... $200 has been taken apparently after I had been beating up." [sic]

**Date: 7-15-02**
**Victim: Rocky Scivano**

Scivano was involved in a physical altercation with Sean Coggins while Coggins was working the VIP desk at Lollipop's. The only statement is that of Coggins, stating that Scivano started yelling and pushing at him and "we started swinging at each other." A followup by the police officer indicates that Scivano was not interested in pursing the matter.

**Date: 6-30-02**
**Victim: Hunter Alford**

Lollipops' bouncer Renato Alfredo Ramirez was charged with Felony Battery.

According to the Arrest Report: Ramirez asked a customer to leave at closing time and a verbal altercation started. Witnesses stated that Ramirez pushed the customer to the ground and the customer resisted; Ramirez then stuck the customer multiple times, dragged him to the front door, slammed him into the door a few times even though the customer was no longer resisting. then threw him outside apparently unconscious.

Hunter Alford provided a sworn statement: He was leaving Lollipop's around 2:30 am and "exchanged words" with "Freddie R." He tried to walk away when Freddie "blind sided me with a punch. He then locked my arms behind my head and slammed my face into the steel exit door. I blacked out after the strike."

Jason Hanna, a customer, provided a sworn statement: Hanna saw a bouncer "come up to a guy and punch him in face." The victim resisted and the bouncer "punched him again" and got him in a "full nelson move." The bouncer dragged the victim to front door and "slammed [him] into front door 2-3 times with head. Victim was bleeding badly from face and head." The bouncer then "bragged about beating .. to fellow workers." He never saw a bottle.

Adam Haller provided a sworn statement: Alford had his hands up and the bouncer pushed him to the ground, put him in a "full nelson and slammed to the door 2-3 times." Hanna never saw a bottle.

Janet Bassett, Lollipops' employee, provided a sworn statement: Bassett saw "Freddie asking a white male to leave several times. The male refused, and she heard him "tell the security 'Fuck you' and ... swing a beer bottle at security guard's face. The security guard then pushed the w/m through the front door of the bar. It appears that the w/m hit his face on the door as he was exiting."

April Vicente, customer, provided a sworn statement: "I saw the guy that works there slam some guy up against the door about 4 or 5 times and throw him on the ground. I think the guy who works there name was 'fredie' [sic] the guy that worked there knoked [sic] him out cold, it was messed up the guy could not even stand up for him self."

Mandy Pease, customer, provided a sworn statement: Pease was waiting for her boyfriend at the front door when she saw "the bouncer slam a guys head into the door about 5 times and then slammed him to the concrete. It seemed the guy was out cold about the second slam to the door."

**Date: 6-25-02**
**Victim: Jason Wood**

Jason Wood provided a sworn statement: "Two Doormen of LollyPops [sic] struck me several times. For no reason I was beat by these men at the Front door then in the street. I called the police and officer Bryan came to my home and spoke with me." Wood provided a brief description of the men and wrote "Officer Bryan stated he knew one of the men then proceeded to the club."

Officer Bryan completed an Incident Report: He went to Wood's home at approximately 12:30 am. Wood was "highly intoxicated" and stated that the staff of Lollipops had battered him around midnight. Bryan went to Lollipop's location and spoke to a parking lot attendant working across the street. The parking lot attendant said that he saw the incident and that Lollipops staff was not involved. He said Wood was outside the club, "became belligerent with pedestrians in the area," and one of the pedestrians punched him, then another bystander broke it up.

**Date: 6-11-02**
**Victim: Elizabeth Stearns**

Elizabeth Stearns provided a sworn statement: Stearns was a dancer at Lollipops. She was talking to another dancer "'Veronica' by the VIP desk. She punched me twice in the face. Then kneed me in the stomach." Stearns went to the manager but he refused to help and told her to leave. Stearns "got dressed, called the police and went to leave." She walked by Veronica, who again kicked her in the stomach "with her heel which is spiked."

John Morey, customer, provided a sworn statement: Morey witnessed Veronica punching the other dancer in the stomach, and heard Veronica say "something to the effect of 'if she talks shit, I'll hit her.'"

**Date: 7-22-01**
**Date: Charles Tackett**

Sworn Witness Statement by Charles Tackett: Tackett was in front of Lollipops when two men "said something to one of the waitresses outside and she tried to slap him. They tried to slap her" and Tackett intervened and told them to leave. They left, then came back 10 minutes later and "one of the men reached in his pocket and pulled out what appeared to be a 25 semi automatic held it up to me. I grabbed his wrist, bent it back towards him and told him it was not worth it." The men left.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on May 16, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Benjamin & Aaronson, P.A., One Financial Plaza, Suite 1615, Fort Lauderdale, FL 33394; danaaron@bellsouth.net

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**ADULT USE STUDY**

# Newport News

# Department of Planning and Development

# March 1996

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# I. INTRODUCTION

Merchants Associations and the residents in the City of Newport News that have adult uses near them have expressed concerns over the lack of controls over these uses.

This report identifies the need for an ordinance that would regulate Adult Uses in Newport News. Research in other cities on the impact of adult uses found that crime rates were higher and property values lower near adult uses. This report summarizes the findings of that research.

This report also identifies the adult uses in the Newport News. The report gives the police calls for service for incidents that would concern adjoining areas. It also provides opinions from the Board of Directors and Governmental Affairs Committee of the Virginia Peninsula Association of Realtors about the impact of adult uses on the value of nearby properties.

The report concludes with a proposed ordinance, Exhibits D-1 and D-2 in the Appendix, to control adult uses in the City.

***Background***

Cities which passed ordinances to regulate adult uses have been challenged in court over the violation of First Amendment and 14th Amendment rights. Courts have often struck down ordinances for various reasons:

1. The ordinances were motivated because of a distaste for the speech itself, and not on the desire to eliminate adverse effects.

2. The ordinances were not based on factual information that proved the existence of negative impacts on surrounding areas.

3. The ordinances severely restricted First Amendment Rights.

4. The ordinances placed arbitrary restrictions on legitimate businesses.

5. The licensing processes were confusing, and exorbitant license fees were punitive and bore little relation to the actual cost of the process or the public cost of the use.

Cities that have been successful in defending adult regulations used their police powers under zoning to develop performance oriented standards. Most cities are using variations of the Detroit, Michigan ordinance, that encourages dispersion of adult uses. A few use the Boston, Massachusetts model, (e.g. Seattle and Renton, Washington), which concentrates adult uses in certain areas.

The United States Supreme Court has upheld both types of zoning ordinances, (i.e. those ordinances that either disperse or concentrate adult uses). The Court is more likely to strike down an ordinance when…"cities attempt to regulate because they object to the sexually explicit messages conveyed by adult business. Courts will also void regulations that seek to exclude all adult uses through an outright ban, excessive locational requirements, or undue discretion placed in the hands of officials who review applications for special use permits or business licenses."

***Detroit, Michigan***

The Detroit Ordinance was challenged and upheld by the Supreme Court in 1976. In Young v. American Mini Theaters, 427 U.S. 50 (1976), 28 ZD 329, the Supreme Court held that "even though the First Amendment protects communication in this area (sexually explicit activities) from total suppression, we hold the State may legitimately use the content of these materials as a basis for placing them in a different classification from other movie theaters."

The Detroit approach disperses adult uses. It separates adult use establishments from one another, keeps them separate from residential areas, and limits them to commercial and industrial zones. No adult uses are permitted within 500 feet of a residentially zoned area, or within 1,000 feet of any two other adult uses.

***Boston, Massachusetts***

The Boston approach, which concentrates adult uses, reflected an existing situation where adult uses were already clustered near each other in the city. The city created an "Adult Entertainment Zone," and provided urban renewal funding to upgrade the area. The objective was to concentrate the uses to a single, small area of the city, and prevent their spread to other parts of the city, especially residential areas. This technique to concentrate adult uses in a small part of the city was upheld by the Supreme Court in City of Renton v. Playtime Theaters, Inc., 475 U.S.41 (1986), 38 ZD 310.

***Proposed Newport News Ordinance***

In Newport News, the adult uses are dispersed along major highway corridors in the City with clusters downtown, in the Hilton area and near Ft. Eustis. Adult uses usually are located in commercial zones: C2 Retail Commercial, C2-A General Commercial and RBD Regional Business District.

The proposed ordinance in the Appendix has been drafted to regulate adult uses through a conditional use permit process. New adult uses will need a conditional use permit to limit adverse impacts on surrounding areas. The ordinance encourages dispersal of adult uses, except for downtown where concentrations would be permitted. Outside of downtown, the ordinance separates adult uses from each other and from residential areas, churches, libraries, parks, playgrounds and schools. The separation requirements are similar to the controls proposed and recommended by the City Planning Commission in the draft zoning ordinance.

The ordinance has the following features:

- It defines adult entertainment establishments, adult uses, adult video stores, adult motion picture theaters, and night clubs.

- Locations for adult uses would be limited to the C2 Retail Commercial, C2-A General Commercial, and RBD Regional Business District zones.

- Conditional use permits would be required for adult uses.

- In the C2 and C2-A zoning districts, no adult use would be permitted closer than 500 feet--which is the width of a typical city block--to:

    a. Any school, church, park, playground, or library property;

    b. Any other adult entertainment establishment;

    c. Any residentially zoned property which fronts on the same street or which contains any school, church, park, playground or library. Otherwise,

the minimum distance from such structures to a residential zone shall be 200 feet.

## II. ADULT USE FACILITIES IN NEWPORT NEWS

### *Number and Type*

Based on the definitions in the proposed ordinance, there are 31 adult use establishments in Newport News. They include: 14 adult entertainment establishments (Go-Go Bars); eight adult book, merchandise or video stores; and, nine night clubs. These adult uses were identified by the Police Department, the Commissioner of Revenue, and the Department of Planning and Development. Their identification as adult uses confirmed in writing by most business owners.

Table 1 lists the adult uses in Newport News and indicates the zoning districts in which they are located.

### *Existing Zoning of Adult Uses*

The City has no special controls over adult uses in the existing zoning ordinance when they are in the C2-A General Commercial, M1 Light Industrial, or RBD Regional Business District zones. In the C2 Retail Commercial zone, night clubs and adult entertainment establishments require a special exception, recommended by the City Planning Commission and approved by the Board of Zoning Appeals, because they are considered enclosed recreational uses which require C2-A General Commercial Zoning. The zoning ordinance has no additional controls over adult book stores and adult video stores which are permitted without restrictions in C2 Retail Commercial zone.

Of the 31 adult uses in the City, 17 are located in the C2-A General Commercial zone, five are in the RBD Regional Business District zone, seven are in the C2 Retail Commercial zone, and two are in the M1 Light Industrial zone.

***Location of Adult Uses***

The locations of adult uses in the City are shown on Map 1. For the most part, they are dispersed along Warwick Boulevard and Jefferson Avenue.

However, there are clusters of adult uses in the City. Five adult uses--four adult entertainment establishments and one adult book store--are located in the RBD Regional Business District in downtown Newport News. There is a concentration of five adult uses--two adult entertainment establishments, one adult video store, one adult merchandise store, and one night club--in the vicinity of Hilton Village on Warwick Boulevard between Main Street and Mercury Boulevard in the C2-A General Commercial strip. Two adult entertainment establishments and one night club occur in the Lee Hall area on Warwick Boulevard across from Ft. Eustis.

**TABLE 1**

**ADULT USES IN NEWPORT NEWS, NOVEMBER 1995**

ADULT ENTERTAINMENT ESTABLISHMENTS

| | BUSINESS NAMES | ADDRESS | ZONING |
|---|---|---|---|
| 1. | JB's Gallery of Girls | 5825 Jefferson Ave. | C2A |
| 2. | RD's Gallery of Girls | 14872 Warwick Blvd. | C2A |
| 3. | RB's Gentlemen Club (Debs Dollhouse) | 9956 Warwick Blvd. | C2A |
| 4. | The New Bluebeard/JB's Gallery of Girls #7 | 606 Dresden Dr. | C2A |
| 5. | The Flame II | 9921 Jefferson Ave. | C2A |
| 6. | Bluebeard Go-Go II | 15674 Warwick Blvd. | C2A |

| | | | |
|---|---|---|---|
| 7. | The Katt | 7824 Warwick Blvd. | C2A |
| 8. | Buck's Brand Steak and Seafood House | 16906 Warwick Blvd. | C2A |
| 9. | Solid Gold Restaurant | 3416 Washington Ave. | RBD |
| 10. | Bijou Cafe | 11312 Jefferson Ave. | C2A |
| 13. | Marylee Restaurant | 100 33rd Street | RBD |
| 14. | The Junction Restaurant | 16916 Warwick Blvd. | C2 |
| 15. | Moonlight Restaurant | 3504 Washington Ave. | RBD |
| 16. | JCR Social Club | 3410 Washington Ave. | RBD |

NUMBER OF BUSINESSES: 14

## ADULT BOOK STORE, MERCHANDISE, VIDEO STORE

| BUSINESS NAMES | | ADDRESS | ZONING |
|---|---|---|---|
| 20. | Arcade | 3404 Washington Ave. | RBD |
| 21. | Mr. D's | 9902-A Warwick Blvd. | C2A |
| 22. | The Video Store | 9903-B Jefferson Ave. | C2A |
| 23. | The Video Store II | 11299 Jefferson Ave. | C2A |
| 24. | Video XXXtra | 811 Old Oyster Point Rd. | C2 |
| 25. | Video X-Cel | 9509 Warwick Blvd. | C2A |
| 26. | Newport Video | 13772 Warwick Blvd. | C2 |
| 27. | Video Quarter | 15320-E Warwick Blvd. | C2 |

NUMBER OF BUSINESSES: 8

## NIGHT CLUBS

| | BUSINESS NAMES | ADDRESS | ZONING |
|---|---|---|---|
| 17. | DD Corral | 16912 Warwick Blvd. | C2 |
| 19. | Fox Den Lounge | 6045 Jefferson Ave. | C2A |
| 28. | Callabash | 11234 Jefferson Ave. | C2A |
| 29. | Chi-Chi's | 12755 Jefferson Ave. | C2 |
| 30. | Cozzy's Comedy Club | 9700 Warwick Blvd. | C2A |
| 31. | Heartbreak Alley | 100 West Newmarket Square | C2A |
| 32. | Manhattan's | 601 Thimble Shoals Blvd. | M1 |
| 33. | Mitty's | 1000 Omni Blvd. | M1 |
| 34. | Wipeout Eddy's | 11712-L & K Jefferson Ave. | C2 |

NUMBER OF BUSINESSES: 9

TOTAL 31

Exhibit A shows the locations of the adult uses in greater detail, the surrounding zoning, and a perimeter 500 feet from each adult use. Photographs of the adult uses in the City are in Exhibit C.

## III. PUBLIC SAFETY IMPACTS

Studies of adult uses in other cities have found that crime rates were higher for areas near adult uses.

**Indianapolis, Indiana**

The 1984 Indianapolis Study Adult Entertainment Businesses in Indianapolis: An Analysis looked at the period of 1978 through 1982. The study found that the average annual rate for major crimes in areas with adult uses was 23 percent higher than the corresponding rate for control areas. The average annual rate for sex related crimes was 77 percent higher in the study area than the control area.

***Los Angeles, California***

The 1977 report Study of the Effects of Adult Entertainment Establishments in the City of Los Angeles monitored major crimes, which increased 7.6 percent in the Hollywood Area between 1969 and 1975. This was double the citywide rate of 4.2 percent. Street robberies and purse snatching increased by 94 percent and 51 percent, compared to the citywide average of 26 percent and 37 percent. Minor crimes increased 46 percent in the Hollywood area, but only 3 percent citywide. Prostitution arrests in Hollywood increased 372 percent while the city showed a 25 percent increase.

***Austin, Texas***

The Austin, Texas report found that in study areas containing adult uses, sex related crimes were two to five times the citywide average, and 66 percent higher in study areas than control areas. In the four study areas, sex related crimes ranged from 4.97 to 13.56 per 1,000 population, compared to the citywide rate of 2.81 per 1,000. The major crime rate was also higher. Major crimes ranged from 128.59 to 552.54 per 1,000 compared to the citywide rate of 83.14 per 1,000.

***Other Cities***

Studies for Amarillo, Texas; Beaumont, Texas; Los Angeles County, California;

and Phoenix, Arizona indicated that the crime rates were higher near adult businesses.

***Newport News, Virginia***

Of the more than 100 dispatch codes for the different types of police calls for service, the Police Department identified 32 dispatch codes for incidents that would impact an adjoining business or residential area. The Police Department researched police calls for service by address for the 31 adult uses between January 1, 1994 and October 31, 1995. The police calls for service were cross checked to insure the calls were assigned to the correct address, and involved an incident at the address.

Table 2 summarizes the police calls for service for adult uses in the City. The 31 adult uses had 425 police calls for service between January 1, 1994 and October 31, 1995. Adult entertainment establishments had the most police calls--over 65 percent of the calls for service--and averaged 23 calls per business. Adult book stores, merchandise and video stores had the lowest number of calls--4 percent of the calls for service--and averaged two calls per business. Night clubs had 30 percent of the calls and averaged fourteen calls per business. By comparison, a selected list of restaurants with ABC licenses averaged eleven police calls for service during the same period.

*TABLE 2*

**ADULT USES IN NEWPORT NEWS, POLICE CALLS FOR SERVICE**

**(JANUARY 1, 1994 – 0CTOBER 31, 1995)**

| TYPE OF BUSINESS | POLICE CALLS FOR SERVICE 1/94 – 10/95 | % OF TOTAL | AVERAGE CALLS |
|---|---|---|---|
| Adult Entertainment Establishments | 280 | 65.88% | 23 |
| Adult Book Store, Merchandise, Video Store | 17 | 4.00% | 2 |
| Night Clubs | 128 | 30.12% | 14 |

| | | | |
|---|---|---|---|
| TOTAL | 425 | 100.00% | 13 |

Exhibit B in the Appendix gives more information about the types of police calls.

The most frequent incidents resulting in police calls were: disorderly conduct (151), fighting (60), intoxicated person (39), Assaults (25) and destroying property (18).

Table 3 compares police calls for service by pairing selected adult entertainment establishments or night clubs with nearby restaurants with ABC licenses that are not adult uses.

By comparing adult uses with nearby restaurants that are not adult uses, it can be determined if adult uses have higher rates of police calls. For example, downtown adult entertainment establishment #1 had 116.7 police calls per 100 occupancy compared to non-adult use restaurant #1, which is located across the street and had 50 police calls per 100 occupancy. Adult entertainment establishment #2 in downtown had 94 police calls for service per 100 occupancy compared to nearby non-adult use restaurant #2 that had 27.5 police calls for service per 100 occupancy. Night club #3 in midtown had 10.8 police calls for service per 100 occupancy compared to non-adult use restaurant #3 in the same business area which had 5.6 police calls per 100 occupancy. Night club #4 in Denbigh had 3.4 police calls per 100 occupancy compared to nearby non-adult use restaurant #4 which had 1.9 police calls per 100 occupancy. Therefore, when pairing businesses in nearby locations, it appears that adult uses will have more police calls for service than a non-adult use restaurant with an ABC license.

*TABLE 3*

**PAIRED COMPARISON OF SELECTED ADULT ENTERTAINMENT ESTABLISHMENTS, NIGHT CLUBS, AND NON ADULT USE**

**RESTAURANT WITH ABC LICENSES**

| PAIRING | POLICE CALLS FOR SERVICE 1/94 – 10/95 | OCCUPANCY | POLICE CALLS PER 100 OCCUPANCY |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Downtown | | | |
| Adult Entertainment Establishment #1 | | | |
| | 35 | 30 | 116.7 |
| Restaurant #1 | 15 | 30 | 50 |
| DIFFERENCE | +20 | | +66.7 |
| | | | |
| Downtown | | | |
| Adult Entertainment Establishment #2 | | | |
| | 47 | 50 | 94 |
| Restaurant #2 | 22 | 80 | 27.5 |
| DIFFERENCE | +25 | | +66.5 |
| | | | |
| Midtown | | | |
| Night Club #3 | 27 | 250 | 10.8 |
| Restaurant #3 | 10 | 180 | 5.6 |
| DIFFERENCE | +17 | | +5.2 |

| | | | |
|---|---|---|---|
| Denbigh | | | |
| Night Club #4 | 12 | 350 | 3.4 |
| Restaurant #4 | 4 | 216 | 1.9 |
| DIFFERENCE | +8 | | +2.5 |

***Study Areas/Control Areas***

The effect of concentrations of adult uses were checked by comparing study areas with control areas.

Study Area 1, which has four adult uses in police reporting areas 13 and 14 was compared with a control area 1 nearby. Study Area 1 had 81 percent more police calls for service and 61 percent more crimes than the control area. When the calls for service were adjusted for population differences, the police calls for service were 57 percent higher and the crimes were 40 percent higher.

Study Area 2A is police reporting area 3, and Study Area 2B is police reporting area 4 in downtown Newport News. These were compared with Control Area 2A, which is police reporting area 2 in the vicinity of City Hall, the City Jail, Juvenile Detention Center, Police South Patrol Headquarters and the Courthouse. The population of Control Area 2A was adjusted to remove inmate population in the City Jail and Juvenile Detention. Police calls for service were adjusted to eliminate requests to pick up detention orders or warrants, transfer juveniles to less secure facilities, and crimes reported at the Police Station that occurred outside of the reporting area. Study Area 2A has 42 percent more police calls for service and 7 percent more crime than the Control Area. Study Area 2B

has 17 percent more police calls for service and crime than the Control Area. Also, the rate of police calls for service and Crime per 1,000 people is much higher in the Study Areas than the Control Area.

Study Areas 2A and 2B were compared with Control Area 2B--police reporting area 6--as a separate check. Control area 2B has more population, higher unemployment, higher poverty, and lower median family income than Study Areas 2A and 2B. In this comparison, the Control Area had 18 percent and 33 percent more police calls for service and 21 percent and 16 percent more crimes. But when adjusted for population, both Study Areas had 37 percent and 143 percent higher rates of police calls for service and 32 percent and 213 percent higher crime rates.

## STUDY AREA 1

## SOCIO-ECONOMIC DATA

| AREA 1 | | 1990 POPULATION | | 1990 HOUSING UNITS | | | | |
|---|---|---|---|---|---|---|---|---|
| AREA | LAND (ACRES) | PERSONS | PERSONS/ ACRE | HOUSING UNITS | UNITS/ ACRE | 1990 UNEMPLOY-MENT RATE* | 1989 MEDIAN HOUSEHOLD INCOME* | 1990 % BELOW POVERTY LEVEL* |
| Control Area 1 | 205 | 1,357 | 6.6 | 632 | 3.1 | 2.4% | $35,760 | 4.4% |
| Study Area 1 | 209 | 1,561 | 7.5 | 775 | 3.7 | 2.1% | $34,998 | 3.1% |

*Computed

Source: 1990 Census Summary Tape File 3A/P70, P80A, P117

## STUDY AREA 1

## SOCIO-ECONOMIC DATA

## (JANUARY 1, 1994 – OCTOBER 31, 1995)

| AREA 1 | POLICE CALLS FOR SERVICE | CALLS FOR SERVICE PER 1,000 | PART I & II CRIMES | PART I & II CRIMES PER 1,000 |
|---|---|---|---|---|
| Control Area 1 | 465 | 343 | 230 | 169 |
| Study Area 1 | 842 | 539 | 370 | 237 |
| Study Area 1 +% Above Control/-% Below Control | +81% | +57% | +61% | +40% |

Source: Newport News Police Department Crime Analysis Unit

## CONTROL AREA 2A/STUDY AREA 2

## SOCIO-ECONOMIC DATA

| AREA 2 | | 1990 POPULATION | | 1990 HOUSING UNITS | | | | |
|---|---|---|---|---|---|---|---|---|
| AREA | LAND (ACRES) | PERSONS | PERSONS/ ACRE | HOUSING UNITS | UNITS/ ACRE | 1990 UNEMPLOY-MENT RATE* | 1989 MEDIAN HOUSEHOLD INCOME* | 1990 % BELOW POVERTY LEVEL* |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Control Area 2A | 98 | ** 646 | 6.6 | 456 | 4.7 | 5.5% | $23,465 | 12.1% |
| Study Area 2A | 85 | 332 | 3.9 | 111 | 1.3 | 3.6% | $15,056 | 28.5% |
| Study Area 2B | 78 | 154 | 2.0 | 116 | 1.5 | 3.0% | $12,522 | 33.4% |

*Computed

**Does not include population in: City Jail (236) & Juvenile Detention (46)

Source: 1990 Census Summary Tape File 3A/P70, P80A, P117

## STUDY AREA 2

## POLICE CALLS FOR SERVICE AND PART I & II CRIMES

## (JANUARY 1, 1994 – OCTOBER 31, 1995)

| AREA 2 | POLICE CALLS FOR SERVICE | CALLS FOR SERVICE PER 1,000 | PART I & II CRIMES | PART I & II CRIMES PER 1,000 |
|---|---|---|---|---|
| Control Area 2A | 622 | 963 | 373 | 577 |
| Study Area 2A | 886 | 2,669 | 398 | 1,199 |
| Study Area 2B | 725 | 4,708 | 438 | 2,844 |
| | | | | |

| | | | | |
|---|---|---|---|---|
| Study Area 2A<br>+% Above Control/-% Below Control | +42% | +177% | +7% | +108% |
| Study Area 2B<br>+% Above Control/-% Below Control | +17% | +489% | +17% | +393% |

Source: Newport News Police Department Crime Analysis Unit

## CONTROL AREA 2B/STUDY AREA 2

## SOCIO-ECONOMIC DATA

| AREA 2 | | 1990 POPULATION | | 1990 HOUSING UNITS | | | | |
|---|---|---|---|---|---|---|---|---|
| AREA | LAND (ACRES) | PERSONS | PERSONS/ ACRE | HOUSING UNITS | UNITS/ ACRE | 1990 UNEMPLOY-MENT RATE* | 1989 MEDIAN HOUSEHOLD INCOME* | 1990 % BELOW POVERTY LEVEL* |
| Control Area 2B | 104 | 557 | 5.4 | 265 | 2.5 | 15.6% | $ 8,198 | 49.7% |
| Study Area 2A | 85 | 332 | 3.9 | 111 | 1.3 | 3.6% | $15,056 | 28.5% |
| Study Area 2B | 78 | 154 | 2.0 | 116 | 1.5 | 3.0% | $12,522 | 33.4% |

*Computed

Source: 1990 Census Summary Tape File 3A/P70, P80A, P117

## STUDY AREA 2

## POLICE CALLS FOR SERVICE AND PART I & II CRIMES

## (JANUARY 1, 1994 – OCTOBER 31, 1995)

| AREA 2 | POLICE CALLS FOR SERVICE | CALLS FOR SERVICE PER 1,000 | PART I & II CRIMES | PART I & II CRIMES PER 1,000 |
|---|---|---|---|---|
| Control Area 2B | 1,078 | 1,935 | 506 | 908 |
| Study Area 2A | 886 | 2,669 | 398 | 1,199 |
| Study Area 2B | 725 | 4,708 | 438 | 2,844 |
| Study Area 2A +% Above Control/-% Below Control | -18% | +37% | -21% | +32% |
| Study Area 2A +% Above Control/-% Below Control | -33% | +143% | -16% | +213% |

Source: Newport News Police Department Crime Analysis Unit

# IV. IMPACTS ON NEARBY PROPERTIES

Studies in other cities indicate that adult uses have a negative effect on property values nearby. There also is evidence from the Austin, Texas study that mortgage lenders consider adult uses in a neighborhood to be evidence that an area is in decline, thus making financing more difficult.

### *Indianapolis, Indiana*

The Indianapolis study concluded that residential properties in study areas appreciated in value at one-half the rate of control areas. Appraisers felt that there is a negative impact on residential and commercial property within one block of an adult bookstore. The negative impact decreased with distance from the bookstore. The negative impact was greater for residential properties than commercial properties.

### *Los Angeles, California*

The Los Angeles report surveyed 400 real estate professionals with 20 percent responding. Eighty-eight percent felt that the concentration of adult businesses would decrease the market value of business property located in the vicinity. Sixty-eight percent felt the concentration would decrease the rental value of business property. Fifty-nine percent felt the concentration would decrease the rentability/salability of business property nearby. Seventy-three percent felt the concentration would decrease the annual income of businesses located in the vicinity. Ninety percent felt the concentration of adult uses would decrease the market value of private residences within 1,000 feet, 86 percent felt the concentration would decrease the rental value of residential property, and 90 percent felt the concentration would decrease the rentability/salability of residential property within 1,000 feet.

### *St. Paul, Minnesota*

The study Effects on Surrounding Area of Adult Entertainment Businesses indicated there was a correlation between deteriorating housing values, crime rates and the location of adult businesses. It also concluded that there was a stronger correlation with neighborhood deterioration after the establishment of an adult business than before.

***Austin, Texas***

A survey of real estate appraisers and lenders in Austin, Texas found that 88 percent of the respondents believed an adult bookstore would decrease residential property values within one block. They noted adult businesses nearby made homes less attractive to families, which reduces demand and property values.

***Newport News, Virginia***

The Hilton Village Merchants Association, the Gateway Area Merchants, and the Citizens for the Hilton Area Revitalization have stated their desire for the City to regulate adult uses. These citizens fear that additional adult uses in Hilton Village and Rivermont will contribute to the deterioration of the area. They have advocated strengthening the City's control over adult uses.

Realtors knowledgeable of local market conditions have indicated that having adult uses nearby can reduce the number of people interested in occupying a property by 20 to 30 percent, and will hurt property values and the resale of property in adjacent residential neighborhoods.

Members of the Virginia Peninsula Association of Realtors' Board of Directors and the VPAR Governmental Affairs Committee were surveyed on the impact adult uses have on property values. Of 38 questionnaires sent out, 14 (37 percent) responded. The responses are summarized in Table 4.

A very high percentage of Realtors, 13 of 14 responding (93 percent), thought that having adult uses within one block of residential properties would most likely decrease residential property values.

Five Realtors (36 percent) thought commercial property values within one block of adult uses would decrease. Another five (36 percent) thought there would be no change. One (7 percent) thought commercial property values would increase. Two (14 percent) were undecided--indicating commercial property values could either decrease, stay the same, or increase--and one (7 percent) did not respond because she was not a commercial broker.

Those who thought commercial property values would decline cited concerns for personal safety, increased crime, noise, strangers in the neighborhood, and parking problems. One wrote that few residents or businesses would choose to be near any of the adult uses. Another indicated adult uses drove away family oriented businesses.

Those who thought commercial property values would not change within one block of an adult use wrote that property values may decrease depending on the appearance of the store front, the type of adult use, or if there were concentrations in a small area. One wrote that the public perceived that these uses attracted undesirable people.

Of the undecided responses, the Realtors indicated the effect on commercial property values depended on the type of adult use.

There were other comments that the impact on property values is lessened when the adult use is two or three blocks away, and that adult uses generally locate in declining areas needing revitalization.

**Table 4**

**Impact of Adult Uses on Property Values within one Block**

| | Decrease | No Change | Increase | Undecided | No Response |
|---|---|---|---|---|---|
| Impact on Residential Property Value | 13 (93%) | 1 (7%) | 0 (0%) | 0 (0%) | 0 (0%) |
| Impact on Commercial Property Value | 5 (36%) | 5 (36%) | 1 (7%) | 2 (14%) | 1 (7%) |

## V. CONCLUSION

Studies in other cities indicate that having adult uses nearby leads to increased crime and declining property values. In Newport News, the police calls for service indicate adult uses experience crime problems that impact on nearby neighborhoods or businesses. Pairing comparisons of selected adult uses with restaurants that have ABC licenses but are not adult uses, indicate the adult uses have more police calls for service. Control area comparisons suggest that police calls for service and crimes are higher in areas with concentrations of adult uses. A survey of Realtors indicates that adult uses will lessen nearby residential property values, and may lessen nearby commercial property values depending on the type of adult use and the amount of concentration. These studies indicate that the regulation of adult uses is warranted.

To better regulate adult uses, most cities use the Detroit, Michigan ordinance as a model. The Detroit ordinance encourages spatial separation of adult uses, and separation of these uses from residential areas. The amount of separation is 500 to 1,000 feet which is the equivalent of one to two city blocks.

The proposed Newport News ordinance defines adult uses and would limit their location to the C2 Retail Commercial, C2-A General Commercial, and RBD Regional Business District zones. Conditional use permits would be required for new adult uses. In the C2 Retail Commercial zones and C2-A Commercial zones, new adult uses must maintain a separation of 500 feet from other adult uses, churches, schools, parks, libraries and playgrounds. The ordinance recommends that the separation from residentially zoned property fronting on the same street be 500 feet; otherwise, the separation shall be 200 feet. Separation would not be required downtown in the RBD Regional Business District zone.

## EXHIBITS

A. Maps of Adult Uses

B. Dispatch Codes and Police Calls for Service

C. Photographs of Adult Uses

0. Proposed Adult Use Ordinance

D-1 Article II. Definitions

D-2 Article IV. Section 422. Adult Uses

EXHIBIT B

# DISPATCH CODES AND POLICE CALLS FOR SERVICE

## January 1, 1994 - October 31, 1995

| CODES | NO. OF CALLS | CODES | NO. OF CALLS |
|---|---|---|---|
| ABCV - Alcohol Violation | 2 | PARK - Parking Violation | 12 |
| ASDW - Assault, Deadly Weapon | 1 | PBAS - Public Assistance | 8 |
| ASLT - Assault | 25 | RAPE-Rape | 0 |
| CODE - City Code Violation | 1 | ROBB. - Robbery, Business | 1 |
| DEPR - Destroying Property | 18 | ROBI - Robbery Individual | 1 |
| DISO - Disorderly Conduct | 151 | SHOT - Shooting | 4 |
| DMAS - Domestic Assault | 5 | STAL - Stalking | 1 |
| DMST - Domestic Problem | 11 | STLV - Stolen Vehicle | 4 |
| DUIA - Driving Under the Influence | 5 | SUSP - Suspicious Person | 16 |
| FOW – Fight/Riot | 60 | SUSV - Suspicious Vehicle | 8 |
| GUNS - Gunshot Report | 1 | SXOF - Sex Offense | 1 |
| HOMI – Homicide | 0 | TAMP - Tampering W/Auto | 1 |
| IGUN - Individual W/Gun | 15 | TRAF - Traffic Problem | 0 |
| INTX - Intoxicated Person | 39 | TRES - Trespassing | 7 |
| JUVN - Juvenile Problems | 1 | UNSP - Unspecified | 9 |
| NUIS – Nuisance | 12 | VDCA - Violation of Drug Control Act | 5 |

EXHIBIT C

1. JB's Gallery of Girls, 5825 Jefferson Avenue

2. RD'S Gallery of Girls, 14872 Warwick Boulevard

3. RB's Gentlemen Club (Deb's Dollhouse), 9956 Warwick Boulevard

4. The New Bluebeard/JB's Gallery of Girls #7, 606 Dresden Drive

5. The Flame ll, 9921 Jefferson Avenue

6. Bluebeard Go-Go II, 15674 Warwick Boulevard

7. The Katt, 7824 Warwick Boulevard

8. Bucks Brand Steak and Seafood House, 16906 Warwick Boulevard

9. Solid Gold Restaurant

10. Bijou Cafe, 11312 Jefferson Avenue

13. Marylee Restaurant, 100 33rd Street

14. The Junction Restaurant, 16916 Warwick Boulevard

15. Moonlight Restaurant, 3504 Washington Avenue

16. JCR Social Club, 3410 Washington Avenue

17. DD Corral, 16912 Warwick Boulevard

19. Fox Den Lounge, 6045 Jefferson Avenue

20. The Arcade, 3404 Washington Avenue

21. Mr. D's, 9902A Warwick Boulevard

22. The Video Store, 9903B Jefferson Avenue

23. The Video Store II, 11299 Jefferson Avenue

24. Video XXXtra, 811 Old Oyster Point Road

25. Video X-Cel, 9509 Warwick Boulevard

26. Newport Video, 13772 Warwick Boulevard

27. Video Quarters, 15320E Warwick Boulevard

28. Callabash, 11234 Jefferson Avenue

29. Chi-Chi's, 12755 Jefferson Avenue

30. Cozzy's Comedy Club, 9700 Warwick Boulevard

31. Heartbreak Alley, 100 West Newmarket Square

32. Manhattan's, 601 Thimble Shoals Boulevard

33. Mitty's, 1000 Omni Boulevard

34. Wipeout Eddie's, 11712 L & K Jefferson Avenue

EXHIBIT D-1

ORDINANCE NO. _____

AN ORDINANCE TO AMEND AND REORDAIN APPENDIX A, ZONING ORDINANCE, OF THE CODE OF THE CITY OF NEWPORT NEWS, VIRGINIA; ARTICLE II, DEFINITIONS, SECTION 201, DEFINITION OF CERTAIN WORDS AND TERMS.

BE IT ORDAINED by the Council of the City of Newport News, Virginia:

That Appendix A, Zoning Ordinance, of the Code of the City of Newport News, Virginia, Article II, Definitions, Section 201, Definition of Certain Words and Terms, be, and the same hereby is, amended and reordained to provide as follows:

APPENDIX A

ZONING ORDINANCE

ARTICLE II.

DEFINITIONS

**Section 201. Definition of certain words and terms.**

A. For the purpose of this ordinance, certain words and terms are herewith defined as follows:

1. *Accessory building or use*. A building or use subordinate to the main building or use on the same lot and serving a purpose customarily and naturally incidental to the main building or use.

2. *Acreage*. Any parcel of land described by metes and bounds and not shown on a plat of a recorded subdivision legally admitted to record.

3. *Adult book store*. Any commercial establishment having its stock and trade in books, films, video cassettes, (whether for viewing off premises or on premises), magazines and other periodicals, or sex aids or paraphernalia of which more than 25 percent are distinguished or characterized by their emphasis on or having as its dominant theme or purpose, matters depicting, describing or relating to sexual activities.

4. *Adult entertainment establishment*. Any establishment where live performance, display or dance of any type, which has a significant or substantial portion of such activity or, when considered as a whole, has as its dominant theme, or purpose, any

actual or simulated performance of sexual activity, removal of articles of clothing or appearing unclothed.

5. *Adult motion picture theater*. An establishment, which excludes minors by reason of age, and which is regularly used for presenting material distinguished or characterized by or, when considered as a whole having as its dominant theme or purpose, emphasis on matters depicting, describing or relating to sexual activities for observation by a patron therein.

6. *Adult uses*. Any adult book store, adult entertainment establishment, adult motion picture theater or nightclub.

7~~3~~. *Alley*. A permanent service way providing a secondary means of access to abutting properties.

8~~4~~. *Alterations*. Changes, improvements, and replacement of parts, in buildings or structures not affecting the supporting members of such buildings or structures.

9~~5~~. *Apartment house*. See "Dwelling—multiple."

10~~6~~. *Basement*. A story having not more than one-half (1/2) of its height below the level of a street grade or ground nearest the building. A basement shall not be counted as a story for the purpose of height regulation.

11~~7~~. *Block*. The area fronting on the same side of a public street or road situated between two (2) street intersections, except that where the distance between such street intersections is greater than one thousand two hundred (1,200) feet, the area fronting on the same side of a public street or road not more than six hundred (600) feet on either side of the parcel, lot or tract of land being considered as a building site shall be considered to be a block for the purpose of this ordinance; provided further, that in case of a dead-end or cul-de-sac street, the intersection of the circular right-of-way with the extension of the street, the centerline shall be considered the terminus of the block.

12~~8~~. *Boardinghouse*. Any dwelling, other than a hotel, where meals, or lodging and meals, for compensation, are provided for five (5) or more persons.

13~~9~~. *Boat basin*. A place for launching, docking or storage of small pleasure boats.

14~~10~~. *Building*. Any structure for the shelter, support or enclosure or persons, animals, chattels, or property of any kind.

15~~11~~. *Buildable width or buildable depth*. The width or depth respectively of that part of the lot not included within the front, side or rear yard.

16~~12~~. *Cellar*. A story having more than one-half (1/2) of its height below the level of a street grade or ground nearest the building. A cellar shall not be included in computing the height or number of stories of buildings referred to in any section of this ordinance.

16~~12~~.1 *Commercial vehicles, large*. A self-propelled or towed vehicle with a gross vehicle weight exceeding ten thousand (10,000) pounds and having one or more of the following characteristics:

a. Licensed for hire;

b. Lettering exceeding three (3) inches in height;

c. Tire rims larger than sixteen (16) inches;

d. Tandem axles;

e. Dual wheels;

f. Height greater than eight (8) feet;

g. Length greater than twenty-four (24) feet;

h. Lighting designed for emergency vehicles;

i. Air brakes;

j. Permanently affixed mechanical or construction equipment;

k. Designed to be used for or to be used to transport commercial, farm or construction equipment.

The gross vehicle weight that is reflected on state vehicle registration documents shall be prima facie evidence of a vehicles gross weight.

16~~12~~.2. *Commercial vehicles, small*. A self-propelled or towed vehicle with a gross vehicle weight of ten thousand (10,000) pounds or less and having one or more of the following characteristics:

a. Licensed for hire;

b. External racks or other devices used to hang ladders, pipes or other equipment or materials;

c. Lettering exceeding three (3) inches in height;

d. Lighting designed for emergency vehicles;

e. Logos or three-dimensional sculptures, letters or numbers representing anything other than the manufacturer or model of vehicle.

For purposes of this definition, any wrecker or tow truck with a gross vehicle weight of sixteen thousand five hundred (16,500) pounds or less shall be considered a small commercial vehicle, provided that the wrecker or tow truck owner is on the list of approved wrecker or tow truck operators maintained for use in emergency situations by the Newport News Police Department or the Virginia State Police.

The gross vehicle weight that is reflected on state vehicle registration documents shall be prima facie evidence of a vehicles gross weight.

17~~13~~. *Court, enclosed*. An open, unoccupied space surrounded on all sides by walls or by walls and an interior lot line.

18~~14~~. *Court, open*. An open, unoccupied space surrounded by walls except that one side opens onto a street, alley or yard.

19~~15~~. *Clinic*. An establishment where persons who are not lodged overnight are admitted for examination and treatment by a group of physicians or similar professionals practicing together.

20~~16~~. *Clubs*. A building or portion thereof or premises owned or operated by a corporation, association, person or persons for social, educational or recreational purposes, but not primarily for profit or to render a service which is customarily carried on as a business.

21~~17~~. *District, zoning*. Any section of the City of Newport News, Virginia, for which regulations governing the use of buildings and land, the height of buildings, the size of yards and the intensity of use are uniform.

21~~17~~.1. *Developed site*. An area of improved property that independently meets all requirements of the site plan ordinance.

22~~18~~. *Dwelling*. Any building or portion thereof, designed or used exclusively for residential purposes.

22~~18~~.1. *Dwelling--high rise*. A multi-story dwelling building in which elevator service is provided for access to all floors.

23~~19~~. *Dwelling--one family*. A dwelling building designed for or occupied exclusively by one family.

24~~20~~. *Dwelling--two family*. A dwelling building providing housekeeping units for not more than two (2) families with no interconnection between the two (2) units except that it may have a single entrance; all other exterior characteristics shall be that of a one-family dwelling. Two (2) single housekeeping units connected by a breezeway or corridor shall be classified as a two-family dwelling.

25~~21~~. *Dwelling--multiple*. A dwelling building or portion thereof which is occupied by or designed for occupancy by three (3) or more families occupying housekeeping units.

26~~22~~. *Dwelling unit*. See: "Housekeeping unit."

27~~23~~. *Family*. An individual or married couple and the children thereof with not more than two (2) other persons related directly to the individual or married couple by blood or marriage; or a group of not more than five (5) unrelated (excluding servants) persons, living together as a single housekeeping unit in a dwelling unit.

28~~24~~. *Farm*. A tract of land used for the production of crops or for the raising of animals.

29~~25~~. *Floor area ratio*. The combined area exclusive of any space within the building used for parking or for recreational use defined in this ordinance, of all floors of all buildings on a premises expressed as a percent of the total lot area of the premises or in lieu of total lot area, the adjusted lot area as defined in this ordinance.

30~~26~~. *Frontage*. All the property on one side of a street between two (2) crossing or terminating intersecting streets measured along the line of the street, or if the street is dead-ended then all of the property abutting one side between an intersecting street and the dead-end of the street. For lots fronting on the turnaround portion of a cul-de-sac, the frontage shall be that portion of the lot abutting upon the turnaround as measured along the circumference of the circular right-of-way.

31~~27~~. *Garage, accessory*. An accessory building designed or used only for the storage of self-propelled vehicles owned and used by the occupants of the building to which it is accessory.

3228. *Garage, repair*. Any premises, except those described as an accessory storage garage, used for the storage of self-propelled vehicles or where any such vehicles are equipped for operation, repaired, or kept for remuneration, hire or sale.

33~~29~~. *Garage, storage*. Any premises, except for those described as an accessory or repair garage, used exclusively for the storage or parking of self-propelled vehicles.

34~~30~~. *Grade*. The highest level of finished ground surface adjacent to the exterior walls of a building which faces a street.

3430.1. *Gross leasable area*. All floor area within a building or mall intended for lease, rent or use by tenants. Space in malls used exclusively for public ingress/egress shall not be included therein.

3531. *Height of building*. The vertical distance measured from the established grade to the highest point of the roof surface for flat roofs; to the deck line of mansard roofs; and to the average height between eaves and ridge for gable, hip and gambrel roofs.

3632. *Home for the aged, nursing home, convalescent home and rest home*. A home for the aged or infirm in which one or more persons not of the immediate family are received, kept or provided with food, shelter and care for compensation; but not including hospitals, clinics or similar institutions devoted primarily to the diagnosis and treatment of the sick or injured.

3733. *Home occupation*. Any occupation or activity which is clearly incidental to the use of the premises for dwelling purposes that constitutes entirely or partly the livelihood of a member of a family residing on the premises.

3834. *Hotel*. Any building occupied as the abiding place of persons, who are lodged with or without meals, in which, as a rule, the rooms are occupied singly for hire, and in which there are more than ten ( 10) sleeping rooms, and from which ingress and egress are made through an inside lobby or office supervised by a person in charge at all hours.

3935. *Housekeeping unit*. A room or combination of rooms containing living, sleeping and kitchen facilities for one family.

4036. *Kennel*. Any premises, land or building, enclosed or unenclosed, wherein or whereon more than three (3) dogs, three (3) cats or other similar domesticated animals are housed or kept. When such animals are not raised or bred for sale, then in determining the number for the purposes of this ordinance, animals under the age of four (4) months shall not be considered.

41~~37~~. *Lodginghouse*. A dwelling other than a hotel where lodging for compensation is provided for five (5) or more persons.

42~~38~~. *Institution*. A nonprofit corporation or a nonprofit establishment for public use.

43~~39~~. *Junkyard*. Any lot used for the storage, keeping or abandonment of junk, including scrap metals or other scrap materials, or for the dismantling, demolition or abandonment of automobiles or other vehicles or machinery or parts thereof. "Junkyard" shall include automobile graveyard, as defined in the state laws.

44~~40~~. *Loading space*. A space within the main building or on the premises providing for the standing, loading or unloading of trucks.

45~~41~~. *Lot*. Any tract of land described by metes and bounds in a recorded deed or on a subdivision plat of record which possesses or is in the process of being assigned a number for tax assessment identification purposes.

46~~42~~. *Lot area, adjusted*. The total lot area plus any creditable additional area as prescribed in Article XXII which is used for offstreet parking, recreational or other open purposes.

4743. *Lot area, open*. Any portion of a lot or same premises not covered by a building or structure and which is open, usable and accessible to all persons who occupy dwelling units on the same premises.

48~~44~~. *Lot area, total*. The gross area of a lot or premises computed from the exterior horizontal lot dimensions.

4945. *Lot, corner*. A lot abutting upon two (2) or more streets at their intersection, the shortest side fronting upon a street shall be considered the front of the lot, and the longest side fronting upon a street shall be considered the side of the lot.

5046. *Lot, double frontage*. An interior lot having frontage on two (2) streets.

5147. *Lot, interior*. A lot other than a corner lot.

5248. *Lot lines*. Lines bounding a lot, as defined herein.

5349. *Lot of record*. A lot which has been recorded in the office of the clerk of the appropriate court prior to the passage of this ordinance.

5450. *Lot width*. The horizontal distance between the side lot lines at the minimum building setback line established by front yard requirements of this ordinance and/or by a recorded subdivision plat.

5450.1. *Mall*. An enclosed common pedestrian area serving more than one tenant located within a covered mall building.

5450.2. *Mall building, enclosed*. A single building or series of connected buildings having a total gross floor area in excess of four hundred thousand (400,000) square feet, enclosing a number of tenants and occupancies such as retail stores, drinking and dining establishments, entertainment and amusement facilities, offices and other similar uses wherein all tenants have a main entrance into one or more common enclosed malls.

5551. *Manufacture and/or manufacturing*. The processing and/or converting of raw, unfinished or finished materials, or products, or any or either of them, into an article or

articles or substance of different character, of for use for a different purpose; industries furnishing labor in the case of manufacturing or the refinishing of manufactured articles.

56~~52~~. *Marina*. A place for the launching, docking, storage, repair and sale of fuel and accessory equipment for small boats.

57~~53~~. *Motel*. A building or group of buildings containing sleeping accommodations for ten (10) or more persons not members of a resident family and used for temporary occupancy of transients and containing cooking facilities in not more than fifty (50) percent of the individual units, and from which egress and ingress is made to rooms from individual outside entrances.

57.1~~75~~. *Extended stay motel*. A building or group of buildings containing sleeping accommodations for ten (10) or more persons not members of a resident family and used for temporary occupancy of transients and containing cooking facilities in more than fifty (50) percent of the individual units, and from which egress and ingress is made to rooms from individual outside entrances. For the purpose of construction, the lot area and dimensional regulations of the R2-C multiple family dwelling district shall apply.

58. *Nightclub*. An establishment, excluding motion picture theaters, which provides entertainment (including but not limited to live bands, floor shows, comedians, solo artists, and/or a dance floor for patrons), more than two (2) times per month, stays open after 11:00 p.m., and has a capacity exceeding 100 patrons.

59~~54~~. *Nonconforming use*. Any lawful use, in existence at the time of the adoption of this ordinance and not prohibited by the zoning ordinances of the former cities of Newport News and Warwick, notwithstanding that such use does not conform with the regulations of the zoning district in which it is situated.

60~~55~~. *Offstreet parking area*. Space provided for vehicular parking outside the dedicated street right-of-way having a dimension of not less than nine (9) feet in width and twenty (20) feet in depth for each vehicle space, exclusive of any necessary area for ingress and egress.

6156. *Outlots*. Lots that do not meet the requirements of this ordinance as to minimum width and depth.

6257. *Pen*. A small enclosure used for the concentrated confinement and housing of animals or poultry; as a pig pen, a place for feeding and fattening animals; a coop, an enclosure within an enclosure. A pen is not to be construed to be a pasture or range.

6358. *Premises*. A parcel of land together with any building or structures occupying it.

6358.1. *Shopping center*. A developed site designed and developed as an entity and containing a variety of uses primarily oriented to retail and service commercial.

6358.2. *Recreational vehicle*. A self-propelled or towed vehicle, designed or constructed so as to transport people or property in connection with recreation and/or which may be used as a temporary dwelling. Such vehicles include, but are not limited to, travel trailers, utility trailers, pickup campers or coaches, motor homes, tent trailers, boats and boat trailers, amphibious houseboats, or similar recreational vehicles.

6459. [Reserved.]

6560. *Stable, private*. A stable with a capacity for not more than four (4) horses or mules.

6661. *Service station (gasoline station)*. Any building, structure or land used for the dispensing, sale or offering for sale at retail of any automobile fuels, oils or accessories including lubrication or servicing of automobiles and replacement or installation or minor parts and accessories, but not including major repair work such a motor overhaul, body repair or spray painting

67~~62~~. *Story*. That portion of a building included between the surface of any floor and the surface of the floor next above it, or if there be no floor above it, then the space between such floor and the ceiling next above it.

68~~63~~. *Story--half*. A story immediately under a sloping roof, which has the point of intersection of the top line of the rafters and the face of the outside walls not to exceed three (3) feet above the top floor level, the floor area of which does not exceed two-thirds of the floor area immediately below it, and which does not contain an independent apartment.

69~~64~~. *Street*. The principal means of access to abutting properties whether called place, avenue, boulevard, drive, lane, road, but not including alley.

70~~65~~. *Street line*. A dividing line between a lot, tract or parcel of land and a contiguous street.

71~~66~~. *Structural alteration*. A change in any of the supporting members of a building. (See also "alterations.")

72~~67~~. *Structure*. Any construction or any production or piece of work artificially built or composed of parts joined together. The word "structure" specifically includes signs and billboards, but not paving such as driveways, walkways, patios, etc.

73~~68~~. *Tourist home*. A dwelling in which overnight accommodations are provided or offered for compensation for one or more transient persons.

74~~69~~. *Trailer (mobile home)*. Any structure designed or constructed so as to permit occupancy as a temporary or permanent living or sleeping facility which is, has been or reasonably may be equipped with wheels or other devices for transporting the structure from place to place.

75~~70~~. *Trailer park (mobile home park)*. An area designed, constructed, equipped, operated and maintained for the purpose of providing spaces for trailers or mobile homes intended to be used as temporary or permanent living facilities.

76~~71~~. *Yard*. An open space between a building or use and the adjoining lot lines, unoccupied or unobstructed by any portion of a structure or use from the ground upward, except as otherwise provided herein. In measuring a yard for the purpose of determining the width of a side yard, or the depth of a rear yard, the minimum horizontal distance between the lot line and the building or yard shall be applied.

77~~72~~. *Yard, front*. Open land area extending across the full width of a lot and lying between the front lot line and the principal building(s) or use(s).

78~~73~~. *Yard, rear*. Open land area extending across the full width of the lot and lying between the rear lot line and the principal building(s) or use(s).

79~~74~~. *Yard, side*. Open land area between the side lot line and the principal building(s) or use(s), and extended from the front yard to the rear yard.

79~~74~~A. *Yard, required*. The open land area between the minimum setback lines required in a zoning district, and the lot lines.

EXHIBIT D-2

ORDINANCE NO. _____

AN ORDINANCE TO AMEND AND REORDAIN APPENDIX A, ZONING ORDINANCE, OF THE CODE OF THE CITY OF NEWPORT NEWS, VIRGINIA, ARTICLE IV, GENERAL REGULATIONS APPLICABLE WITHOUT REFERENCE TO ZONING DISTRICTS, BY ADDING THERETO A NEW SECTION, DESIGNATED SECTION 422, ADULT USES.

BE IT ORDAINED by the Council of the City of Newport News, Virginia:

That Appendix A, Zoning Ordinance, of the Code of the City of Newport News, Virginia, Article IV, General Regulations Applicable Without Reference to Zoning Districts, be, and the same hereby is, amended and reordained by adding thereto a new Section, designated Section 422, Adult Uses, to provide as follows:

APPENDIX A

ZONING ORDINANCE

ARTICLE IV.

GENERAL REGULATIONS APPLICABLE WITHOUT

REFERENCE TO ZONING DISTRICTS

**Section 422. Adult uses.**

A. Within the City, it is acknowledged that there are some uses, often referred to as adult uses, which because of their nature can have a negative impact on nearby property, particularly when several of them are concentrated under certain circumstances or located in direct proximity to a residential neighborhood, thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing the concentration or location of these uses in a manner that would create such adverse effects. The definition of adult uses is found in Section 201 of this Appendix.

B. No adult use shall be permitted except in RBD, C-2 and C-2A Districts. A conditional use permit, as provided for in Article XXA of this Appendix, is necessary for the establishment of an adult use. A conditional use permit may be issued by the City Council after recommendation by the Planning Commission and finding that the location, size, design and operating characteristics of the proposed adult use will be compatible with and will not adversely affect or be materially detrimental to neighboring uses.

C. No structure containing an adult use in the C-2 or C-2A districts shall be located nearer than 500 feet to:

a. Any school, church, park, playground or a library property;

b. Any other adult use;

c. Any residentially zoned property which fronts on the same street or which contains any school, church, park, playground or library; otherwise, the minimum distance from such structures to a residential zone shall be 200 feet.

For the purposes of this subsection, distances shall be measured on a straight line (1) from the structure containing the adult use to the nearest point of the property named in "a" or "C" above, or (2) between the structure containing the adult use and the structure containing any other adult use.

PAS Essential

INFO PACKET

PAS EIP-02 January 2007

# Adult Use Impact Studies and Regulations

*The Planning Advisory Service (PAS) researchers are pleased to provide you with information from our world-class planning library. This packet represents a typical collection of documents PAS provides in response to research inquiries from our 1,500 subscribers. For more information about PAS visit www.planning.org/pas.*

**American Planning Association**

*Making Great Communities Happen*

**Definitions**

- Davidson, Michael and Dolnick, Fay, eds. 2004. *A Planners Dictionary*. Planning Advisory Report No. 521-522, pp. 47-51. Chicago: American Planning Association.

**Articles**

- Bergthold, Scott D. 2002. "How to Avoid the Top Ten Pitfalls of Adult Business Regulation." *Land Use Law & Zoning Digest*, May.
- Cooper, Connie B. and Kelly, Eric Damian. 2006. "Regulating Sex Businesses." *Zoning Practice*, October.
- Kelly, Eric Damian. 2004. "Current and Critical Legal Issues in Regulating Sexually Oriented Businesses." *Planning & Environmental Law*, July.

*Packet includes 4 additional articles.*

**Reports**

- Kelly, Eric Damian and Cooper, Connie B. 2000. *Everything You Always Wanted to Know about Regulating Sex Businesses*. Planning Advisory Report No. 495-496, pp. 21-86. Chicago: American Planning Association.
- Linz, Daniel, Bryant, Paul and Yao, Mike Z. 2004. "Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California." Unpublished Manuscript. Department of Communication, University of California, Santa Barbara.

*Packet includes 3 additional reports.*

**Impact Studies**

*NOTE: The studies included in this packet represent a collection of the some of the most widely cited impact studies. These studies are considered "classic" and are referred to throughout current literature and regulations.*

- Duncan Associates. 2000. "Sexually-Oriented Business Study Rochester, New York." July.
- Indianapolis (IN), City of. 1984. "Adult Entertainment Businesses in Indianapolis: An Analysis."
- New York (NY), City of. Department of City Planning. 1994. "Adult Entertainment Study." November.
- Newport News (VA), City of. Department of Planning and Development. 1996. "Adult Use Study." March.

*Packet includes 6 additional impact studies.*

**Regulations**

- New York (NY), City of. 2004. *Zoning Resolution*. Article III. Chapter 2. Sec. 32-01. Special Provisions for Adult Establishments.
- Saint Paul (MN), City of. 2005. *Zoning Code*. Division 6. 65.660. Adult Entertainment.
    - San Diego (CA), City of. 2006. *Municipal Code*. Section 141.0601. Adult Entertainment Businesses.
    - Tucson (AZ), City of. 2004. Land Use Code. Article III. Division 5. Restricted Adult Activities Use Group.

*Packet includes 6 additional regulations*

# *National Law Center Summary of the*
# ST. CROIX CO., WISCONSIN
## LAND USE STUDY
### DATED SEPTEMBER, 1993

QOL preservation

OVERVIEW: At the time the St. Croix County Planning Department did this study, the County had two adult cabarets, but did not have a problem with concentration of sexually-oriented businesses (SOBs). The study acknowledges that SOB zoning ordinances have generally been upheld by the courts as constitutional and suggests the County consider following the lead of other communities who have enacted similar ordinances. The main concern surrounded possible growth of SOBs resulting from future plans for an interstate highway system linking St. Croix County and the great Twin Cities metro area. To preserve the County's "quality of life" the study indicates the need to take preventative vs. after-the-fact action.

SUMMARY: The study notes the continued growth of the SOB industry and analyzes the economic, physical, and social impact it has on the community. It examines documented economic impact of SOBs in Los Angeles, CA, Detroit, MI, Beaumont, TX, and Indianapolis, IN, noting that concentrations of SOBs results in decreased property values, rental values, and rentability/salability. General economic decline is also associated with concentration of SOBs. Residents surveyed in other studies perceived a less negative impact on property values of residential and commercial areas the further away SOBs were located. The study also noted that economic decline caused physical deterioration and blight. During night time operation hours, traffic congestion and noise glare could also be problems. Social impacts studied included negative effects on morality, crime, community reputation and quality of life. It noted the 1970 Commission on Obscenity and Pornography saying porn has a deleterious effect upon the individual morality of American citizens. It sites the Phoenix, AZ study reporting a tremendous increase in crime in three study areas containing SOBs (43% more property crimes, 4% more violent crimes, and over 500% more sex crimes). The study mentions Justice Powell's quote *in Young v. American Mini-Theatres* regarding using zoning to protect "quality of life."

The study analyzes different zoning techniques, including dispersal and concentration of SOBs, and their constitutionality. It also discusses the use of "special use" and "special exception" permits. Other regulatory techniques discussed include licensing ordinances, active law enforcement, sign regulations, and nuisance provisions. The study includes detailed examples of SOB definitions, a proposed zoning ordinance, and a bibliography of the sources used for this study.

RECOMMENDATIONS: The study recommended that the county adopt a zoning ordinance using the dispersal technique. It also suggested the county explore the possibility of licensing SOBs.

# *National Law Center Summary of the*
# NEWPORT NEWS, VIRGINIA
## LAND USE STUDY
### DATED MARCH, 1996

OVERVIEW: As of November, 1995, there were 31 "adult use" establishments: 14 "adult entertainment" establishments ("exotic dancing girls", "go-go" bars, "gentlemen's clubs", etc.); 8 "adult book/video stores" (outlets selling and renting pornographic magazines, videos, and sex devices); and 9 night clubs (music, dancing, or other live entertainment). Of the 31 uses, 17 are in the General Commercial zone, 5 in the Regional Business District zone, 7 in the Retail Commercial zone, and 2 are in the Light Industrial zone. They are dispersed along two streets with a few clusters. A proposed ordinance would require "adult uses" to be 500 feet from other "adult" uses and to locate at least 500 feet away from sensitive uses (churches, schools, homes, etc.), with no distance limits in the downtown zone.

CRIME: The Police Department researched calls for police responses to the 31 businesses, by address, for the period of January 1, 1994, to October 31, 1995, with a cross-check to assure accuracy of the calls to the correct address. The effects of concentrations of "adult uses" were also checked by comparing study areas with control areas. Study area 1, with 4 "adult" uses, had 81% more police calls than nearby control area 1. When adjusted for population differences, the study area had 57% higher police calls and 40% higher crimes than the control area. For the 31 sexually-oriented businesses, there were 425 calls of those: 65% were to strip clubs and go-go bars, averaging 23 calls per "adult entertainment" business; night clubs had 30% of the calls, averaging 14 calls per business; and "adult" bookstores and video stores had 4%, averaging 2 calls per business; . The reasons for the calls included: 25 assaults; 18 malicious destructions of property; 39 intoxications; 60 fights; and 151 disorderly conduct incidents. A selected list of restaurants with ABC licenses averaged 11 calls for service during the same period. One particular downtown "adult entertainment" establishment had 116.7 "police calls per 100 occupancy" compared to a regular restaurant, non-adult use, located across the street, with 50 calls per 100 occupancy.

MERCHANTS/REAL ESTATE: A very high percentage of realtors indicated that having "adult uses" nearby can reduce the number of people interested in occupying a property by 20 to 30%; would hurt property values and resale of adjacent residential property. Realtors expressed concern for personal safety, increased crime, noise, strangers in the neighborhood, and parking problems. Merchants associations surveyed supported strengthening the city's regulations of "adult uses" and expressed a common concern that additional "adult uses" would contribute to deterioration of their areas.

# *National Law Center Summary of the*
# HOUSTON, TEXAS
## LAND USE STUDY
### DATED NOVEMBER 3, 1983

OVERVIEW: Report by the Committee on the Proposed Regulation of Sexually-Oriented Businesses determining the need and appropriate means of regulating such businesses. Four public hearings provided testimony from residents, business owners, realtors, appraisers, police, and psychologists. The committee and legal department then reviewed the transcripts and drafted a proposed ordinance. More hearings obtained public opinion on the proposal and the ordinance was refined for vote by the City Council.

TESTIMONY: The testimony was summarized into six broad premises: (1) The rights of individuals were affirmed. (2) Sexually-oriented businesses can exist with regulations that minimize their adverse effects. (3) The most important negative effects were on neighborhood protection, community enhancement, and property values. (4) Problems increased when these businesses were concentrated. (5) Such businesses contribute to criminal activities. (6) Enforcement of existing statutes was difficult.

ORDINANCE: (1) Required permits for sexually-oriented businesses (non-refundable $350 application fee). (2) Distance requirements: 750 ft. from a church or school; 1,000 ft. from other such businesses; 1,000 ft. radius from an area of 75% residential concentration. (3) Amortization period of 6 months that could be extended by the city indefinitely on the basis of evidence. (4) Revocation of permit for employing minors (under 17), blighting exterior appearance or signage, chronic criminal activity (3 convictions), and false permit information. (5) Age restrictions for entry.

## *National Law Center Summary of the*

# EL PASO, TEXAS
## LAND USE STUDY
### DATED SEPTEMBER 26, 1986

OVERVIEW: This study done by the Department of Planning, Research and Development, the City Attorney's Office, the Police Department Data Processing Division, and New Mexico State University involved one year of studying the impacts of SOBs on the El Paso area. A separate report by the New Mexico State University on perceived neighborhood problems is also included. The study is in response to resident concern about the negative impacts resulting from the significant growth in SOBs over the past ten years. The study results show that SOBs are an important variable in the deviation from normal rates for real estate market performance or crime. Also included in the study are detailed maps showing the locations of SOBs in El Paso and within the selected study areas.

FINDINGS: In studying the impacts caused by SOBs, three study areas (with SOBs located in the area) and three control areas (similar areas in size and population, but without SOBs) within El Paso were identified and studied. Using the results of the study areas and the attitudes of the residents living near SOBs, the study concluded that the following conditions existed within the study areas: (1) the housing base within the study area decreases substantially with the concentration of SOBs; (2) property values decrease for properties located within a 1-block radius of SOBs; (3) there is an increase in listings on the real estate market for properties located near SOBs; (4) the presence of SOBs results in a relative deterioration of the residential area of a neighborhood; (5) there is a significant increase in crime near SOBs; (6) the average crime rate in the study areas was 72% higher than the rate in the control areas; (7) sex-related crimes occurred more frequently in neighborhoods with even one SOB; (8) residents in the study areas perceived far greater neighborhood problems than residents in control areas; (9) residents in study areas had great fear of deterioration and crime than residents in control areas.

The study of perceived neighborhood problems done by the New Mexico State University revealed strong concern by residents of the impact of SOBs on children in the neighborhood. In addition, some respondents told survey interviewers they feared retaliation from SOBs if they gave information about problems related to SOBs. Overall, this survey showed a strong, consistent pattern of higher neighborhood crime, resident fear and resident dissatisfaction in the neighborhoods containing SOBs.

RECOMMENDATIONS: The main recommendations included that a zoning ordinance be adopted with distance requirements between SOBs and sensitive uses, that a licensing system be established, that annual inspections be required, that signage regulations be established, and that a penalty/fine section be included for violations.

# *National Law Center Summary of the*
# CLEVELAND, OHIO
## LAND USE STUDY
### DATED AUGUST 24, 1977

OVERVIEW: This is a Cleveland Police Department report from Captain Carl Delau, commander of the City's vice and obscenity enforcement units and reported by him while he participated in a panel discussion at the National Conference on the Blight of Obscenity held in Cleveland July 28-29, 1977. The topic was "The Impact of Obscenity on the Total Community." Crime statistics are included for 1976 robberies and rapes. Areas evaluated were census tracts (204 in the whole city, 15 study tracts with sexually-oriented businesses). At the time of the study, Cleveland had 26 pornography outlets (8 movie houses and 18 bookstores with peep shows). their location was not regulated by city zoning laws.

FINDINGS: For 1976, study tracts had nearly double the number of robberies as the city as a whole (40.5 per study tract compared to 20.5 for other city tracts). In one study tract with five sexually-oriented businesses and 730 people, there were 136 robberies. In the city's largest tract (13,587 people, zero pornography outlets) there were only 14 robberies. Of the three tracts with the highest incidence of rape, two had sexually-oriented businesses and the third bordered a tract with two such businesses. In these three, there were 41 rapes in 1976 (14 per tract), nearly seven times the city average of 2.4 rapes per census tract.

CONCLUSION: "Close scrutiny of the figures from the Data Processing Unit on any and every phase of the degree of crime as recorded by census tracts indicates a much higher crime rate where the pornography outlets are located."

# *National Law Center Summary of the*
# NEW HANOVER CO., NORTH CAROLINA
## LAND USE STUDY
### DATED JULY, 1989

OVERVIEW: This Planning Department report cites several studies and reports outlining adverse economic, physical, and social effects of adult businesses generally and specifically in jurisdictions across the country. While noting that New Hanover County does not currently have a noticeable problem with adult establishments, the report emphasizes the need to institute "preventative" zoning measures to protect and preserve the quality of life. It also offers an overview of common zoning approaches and the attendant constitutional issues.

FINDINGS:

1) Municipalities across the country have documented, both empirically and anecdotally, the adverse effects of adult businesses on property values, rental values, neighborhood conditions, and other commercial businesses in the immediate area.
2) Cities have documented a link between adult businesses and urban blight, increased traffic, and light and noise pollution.
3) Studies have linked concentrations of adult businesses to an increase in crime, specifically prostitution, drugs, assault, and other sex crimes.
4) Community reputations and general quality of life are also negatively impacted by the presence of adult businesses.
5) An adult bookstore has been closed and re-opened several times after raids by law enforcement authorities. It is also reported that a topless dancing establishment may be opened in the County.
6) New zoning regulations would control the establishment of adult businesses near churches, schools, and residential areas.

RECOMMENDATIONS: 1) New Hanover should adopt the dispersal (Detroit) zoning approach. 2) Adult businesses should not be permitted to locate within 1,000 feet of each other. 3) Adult businesses should not be permitted within 500 feet of any school, church, park, or residential zone. 4) Adult businesses should only be allowed to locate in designated business and industrial districts, and only by a special use permit. 5) Signs and displays used by adult businesses should be regulated to protect the public, especially teenagers and children, from exposure to obscene material ("any display, device or sign that depicts or describes sexual activities or specified anatomical areas should be out of view of the public way and surrounding property"). 6) The County Attorney's Office and Sheriff's Department should explore the viability of requiring licensing for adult businesses. 7) Definitions for "adult business establishments," "specified sexual activities," and "specified anatomical areas" should be added to the zoning ordinance.

# *National Law Center Summary of the*
# ST. PAUL, MINNESOTA
## LAND USE STUDY
### DATED ARIL, 1988 (SUPPLEMENTAL TO 1987 STUDY)

OVERVIEW: As a "result of a growing concern among St. Paul citizens that the City's existing adult entertainment zoning provisions, adopted in 1983," did not "adequately address the land use problems associated with adult entertainment", the City Council directed the Planning Commission to study possible amendments to the Zoning Code. The Commission's proposed amendment was based on findings made during public hearings. The "substitute" "Amendment", adopted by the City Council, is a result of those findings and the findings made by the Council during its public hearings. The 1988 Study includes the findings, addresses the nine key features of the "substitute" "Amendment", and gives the rationale for each.

FINDINGS, "AMENDMENT", AND RATIONALE:

1) "[A]dult uses are harmful to surrounding commercial establishments but that significant spacing requirements between adult uses can minimize the harm in zones reserved for the most intensive commercial activity."

2) The "Amendment" treats all nine defined adult uses the same. Included are: "adult bookstores", "cabarets", "conversation/rap parlors", "health/sport clubs", "massage parlors", "mini-motion picture theaters", "motion picture theatres", "steamroom/bathhouse facilities", and "other adult uses." Each is defined as providing "matter", "entertainment", or "services" which is "distinguished or characterized by an emphasis on the "depiction", "description", "display" or "presentation" of "specified sexual activities" or "specified anatomical areas." "Most, if not all, existing statistical studies of the impact of adult uses do not differentiate between different types of adult uses and do not recognize that the land use impact of various types of adult uses is significantly different." "[E]qual treatment is consistent with the emphasis on deconcentration".

3) The "Amendment" set spacing between adult uses at 2,640 feet outside of the downtown area and 1,320 feet downtown. A six-block goal could not be met because of the necessity to provide a "sufficient land mass". The Phoenix and Indianapolis land use studies indicate that "the negative land use impact of a single adult use extends for up to three blocks".

4) Distances between adult uses and residential zones were increased from 200 feet to 800 feet "outside of downtown" and from 100 to 400 feet downtown in the substitute "Amendment". The goal of 1,980 feet outside of "downtown" and 990 feet downtown could not be met because of the necessity to provide "enough land and sites for potential future adult uses."

5) Distances from "protected uses" outside of downtown were increased from zero to 400 feet and from 100 to 200 feet downtown. Protection for zones "other than residential or small neighborhood business zones" was "justified" because their populations are "particularly vulnerable to the negative impacts of adult uses." "Protected uses" are: day care centers; houses of worship; public libraries; schools; public parks/parkways/public recreation centers and facilities;
fire stations (because of use for bicycle registration and school field trips); community residential facilities; missions; hotels/motels (which often have permanent residents).

# *National Law Center Summary of the*
# ST. PAUL, MINNESOTA
## LAND USE STUDY
### (CONTINUED)

6) Limiting one type of adult use per building was justified by experience with two pre-existing "multi-functional" adult businesses, numerous studies by other cities, and St. Paul's own study in 1978, which documented significantly higher crime rates associated with two adult businesses in an area, and significantly lower property values associated with three adult uses in an area. The 1987 study included statistics showing that most "prostitution arrests in the city occur within four blocks on either side of the concentration of four adult businesses." Other problems included "the propositioning" and "sexual harassment of neighborhood women mistaken for prostitutes", "discarding of hard-core pornographic literature" ("which is "most strongly associated with adult bookstores") "on residential property where it becomes available to minors", a "generally high crime rate," and "a general perception" that such an area "is an unsafe place due to the concentration of adult entertainment that exists there". Redevelopment experience in St. Paul showed that adult use areas caused a "blighting influence inhibiting development". Multi-functional adult uses will attract more customers which "increases the likelihood that such problems will occur." A "Sex for Sale Image" attracts more street prostitutes and their customers, and demoralizes other businesses and neighborhood residents".

7) Amount of land available for 24 existing adult uses (which includes split-off of two multi-functional businesses with three-four types per business) was 6.5% of the City's total land mass, for a maximum of 44 sites based on "absolute site capacity", calculated without regard for existing infrastructure, or 28 sites based on "relative site capacity" on existing street frontage calculated without regard for existing development or suitability of land for development.

8) Annual review of the "Special Condition Use Permit" was included in the "Amendment" "to ensure that no additional uses are added to the type of adult use that is permitted."

9) Prohibition of obscene works and illegal activities was included in the "Amendment" to "guard against the conclusion that the Zoning Code permits activities which the City can and should prohibit as illegal."

# *National Law Center Summary of the*
# MINNEAPOLIS, MINNESOTA
## LAND USE STUDY
### DATED OCTOBER, 1980

OVERVIEW: This report is divided into two sections: the relationship of bars and crime and the impact of "adult businesses" on neighborhood deterioration. In the study, an "adult business" is one where alcohol is served (including restaurants) or a sexually-oriented business (i.e., saunas, adult theaters and bookstores, rap parlors, arcades, and bars with sexually-oriented entertainment). Census tracts were used as study areas and evaluated for housing values and crime rates. Housing values were determined by the 1970 census compared to 1979 assessments. Crime rates were compared for 1974-75 and 1979-80. The study is strictly empirical and reported in a formal statistical manner; therefore it is difficult for layman interpretation of the data.

FINDINGS: The report concludes that concentrations of sexually-oriented businesses have significant relationship to higher crime and lower property values. Other than statistical charts, no statements of actual crime reports or housing values are included in the report. thus, the lay reader has only the most generalized statements of how the committee interpreted the empirical data.

RECOMMENDATIONS: First, that adult businesses be at least 1/10 mile (about 500 feet) from residential areas. Second, that adult businesses should not be adjacent to each other or even a different type of late night business (i.e., 24-hour laundromat, movie theaters). third, that adult businesses should be in large commercial zones in various parts of the city (to aid police patrol and help separate adult businesses from residential neighborhood). The report said "policies which foster or supplement attitudes and activities that strengthen the qualities of the neighborhoods are more likely to have desired impacts on crime and housing values than simple removal or restriction of adult businesses."

# *National Law Center Summary of the*
## LAND USE STUDY
### DATED FEBRUARY, 1984

OVERVIEW: After a 10 year growth in the number of sexually-oriented businesses (to a total of 68 on 43 sites) and numerous citizen complaints of decreasing property values and rising crime, the city compared 6 sexually-oriented business "study" areas and 6 "control" locations with each other and with the city as a whole. The study and control areas had high population, low income and older residences. In order to develop a "best professional opinion," the city collaborated with Indiana University on a national survey of real estate appraisers to determine valuation effects of sexually-oriented businesses on adjacent properties.

CRIME: From 1978-82, crime increases in the study areas were 23% higher than the control areas (46% higher than the city as a whole). Sex related crimes in the study areas increased more than 20% over the control areas. Residential locations in the study areas had a 56% greater crime increase than commercial study areas. Sex related crimes were 4 times more common in residential study areas than commercial study areas with sexually-oriented businesses.

REAL ESTATE: Homes in the study areas appreciated at only 1/2 the rate of homes in the control areas, and 1/3 the rate of the city. "Pressures within the study areas" caused a slight increase in real estate listings, while the city as a whole had a 50% decrease, denoting high occupancy turnover. Appraisers responding to the survey said one sexually-oriented business within 1 block of residences and businesses decreased their value and half of the respondents said the immediate depreciation exceeded 10%. Appraisers also noted that value depreciation on residential areas near sexually-oriented businesses is greater than on commercial locations. The report concludes: "The best professional judgment available indicates overwhelmingly that adult entertainment businesses -- even a relatively passive use such as an adult bookstore -- have a serious negative effect on their immediate environs."

RECOMMENDATIONS: Sexually-oriented businesses locate at least 500 feet from residential areas, schools, churches or established historic areas.

# ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY

## Suggestions for Citizen and Community Action and Corporate Responsibility

Excerpts from the 1986 Commission's Final Report

## *I. PREFACE*

Our legal framework has developed in many respects into a system where citizens have delegated their right to redress certain harms to government officials. Government, in turn, is charged with the responsibility of providing appropriate remedies for its citizens, including the investigation and prosecution of individuals and corporations.

A preliminary analysis of governmental responsibilities is significant for several reasons. First, the Constitution of the United States and the Amendments thereto, delineate and apportion the powers delegated to the federal, state, and local governments. Each of these levels of government has restrictions on the type of activity it can regulate as well as the manner of such regulation. Some activities can be regulated at all levels of government, while others are the sole responsibility of a single level.

Second, government has been created to act on behalf of and in the best interests of its citizens. The citizens, therefore, have every right to request and expect that the laws developed by the community (whether at the federal, state or local level) will be enforced by its elected and appointed government officials.

Third, the law is not so simplistic that individual and collective rights are mutually exclusive. Often, there are competing rights. It is this petition which ultimately must be reconciled by both government and citizens alike.

While citizens should and must rely heavily on official government action to ensure that obscenity and pornography-related laws are enforced, there are also a number of alternative remedies available to them in their community. The private actions initiated by groups or individuals are often as effective as a government-initiated action. For example, citizens can organize pickets and economic boycotts against producers, distributors and retailers of pornographic materials. They can also engage in letter writing campaigns and media events designed to inform the public about the impact of pornographic materials on the community.

A citizen's right to free speech is guaranteed under the First Amendment to the United States Constitution.[1] This right entitles individuals to organize and speak out even against those offensive materials that are not proscribed by law or cannot under the Constitution be regulated. While such action is permissible and often desirable, there are social if not legal risks of going too far in mandating social conformity in this area. To avoid these pitfalls, citizens are encouraged to be vigorous, well-informed, but responsible advocates and to exercise self-restraint so that in exercising their rights they do not prevent other citizens from exercising theirs.

## *II. INTRODUCTION*

Citizen interest in pornography control is a vital component of any local law enforcement program. Since one aspect of the constitutional test for obscenity is the notion of contemporary community standards, this is an area of the law which presents a significant opportunity for public input.

Citizens concerned about pornography in their community should initially determine the nature and availability of pornographic materials in their community, existing prosecution policies, law enforcement practices and judicial attitudes in the community. They should inquire whether these enforcement mechanisms are adequately utilized. They should determine whether the official perception of the current community standards is truly reflection of public opinion. If enforcement mechanisms appear inadequate or ineffective, if legislative change is necessary to enhance the effectiveness of the criminal justice system, or if the volume of pornography or offensive material is a particular problem in the community, citizens should consider developing a community action program.

A successful community action program should contain the following components:

1. Sincere citizen interest in controlling the proliferation of pornographic material in their community;

2. A police department that is willing to allocate a reasonable portion of its resources to obscenity enforcement;

3. A prosecutor who, in keeping with his or her oath of office, will aggressively pursue violations of obscenity statutes with due regard for the [redacted] to distribute constitutionally protected material;

4. A judiciary that is responsive to obscenity violations and will sentence offenders appropriately.

Additional methods by which community action organizations can express their concern about pornography is their community include:

1. Citizen involvement in educating legislators, law enforcement officials and the public at large as to the impact of pornography on their particular community;

2. Citizen action in the area of lawful economic boycotts and picketing of establishments which produce, distribute or sell sexually explicit materials in the community;

3. If the techniques of anti-display and nuisance laws as well as zoning ordinances are determined to be appropriately tailored to the pornography problem in their community, citizens are encouraged to advocate such measures to their local legislators; and

4. A business community that exercises sound judgment as to the effect (on the community they serve) of material offered in their establishment.

In the area of pornography regulation it is important that the above items be seriously addressed and effectively coordinated. The best written laws will be ineffective if prosecutors do not enforce them or if judges fail to recognize the extent of citizen concern when sentencing offenders. The goals of the community effort against pornography should be to establish constitutionally sound obscenity laws that meet their particular needs, to encourage adequate enforcement of these laws and to we private action to curb the flow of pornography and obscenity in their community.

At the same time, citizens should be aware of the risks of an overzealous approach. First, citizens should recognize that there is a diversity of [redacted]s as to what, if any, regulations should be imposed on pornographic material. The United States Supreme Court has established [redacted]itional guidelines for obscenity, which are discussed elsewhere in the Report, but not without considerable division of opinion. Undoubtedly, diversity of views regarding regulations, enforcement priorities and appropriate community action will exist to varying degrees in each community. These views should be recognized and addressed by citizen advocates.

In maintaining a balanced approach, citizens should be aware of the legal criteria for distinguishing material which is obscene from that which is merely distasteful to some. However, citizen groups may wish to focus on materials which are not legally obscene and which are constitutionally protected from government regulation. Citizens may pursue a variety of private actions with respect to their non obscene but offensive pornographic material.

It is also important for citizen activists to recognize the rights of other individuals and organizations when exercising their own. Advocates of strict enforcement of pornography laws should recognize the rights of individuals with opposing views. Moreover, while citizens have every right to picket, the pickets should not preclude others from entering or leaving business premises.

Finally, community action groups should guard against taking extreme or legally unsound positions or actions, such as unfounded attacks on the content of school reading lists, library shelves and general discussions of sex-related topics. With respect to their communications with a public official, members of citizen action groups should also be aware that such official keep duty bound to determine the legality of material without regard to that official's personal opinion.

The decision to form or support a citizen action group is one that must be made by each community and participating individuals. If a decision is reached to establish such a group, its members should become involved in advocating, establishing and maintaining community standards related to pornography. The following discussion highlights ways in which citizens can maximize their efforts in this regard while recognizing competing constitutionally protected interests. The suggestions which have been developed were prompted by hundreds of telephone calls and tens of thousands of letters from concerned citizens seeking advice on how to address the pornography issue.

## *III. METHODS BY WHICH CITIZENS CAN EXPRESS CONCERN ABOUT [redacted]ORNOGRAPHY AND OTHER OFFENSIVE MATERIALS IN THEIR AREA (COMMUNITY).*

**SUGGESTION 1: Citizens concerned about pornography in their community can establish and maintain effective community action organizations.**

Informed and vocal citizen action and community involvement are the cornerstones of an aggressive program for enforcement of obscenity laws. Presently some form of obscenity law exists at the federal level and in all but a few states. While there are some areas of the law in which this Commission has recommended change,[2] the lack of prosecution of obscenity cases appears to be directly attributable to a failure of [redacted]cement. Public expression of concern about pornography and a call for redoubled law enforcement efforts will undoubtedly trigger an [redacted]ease in official action.

In organizing a plan of community action, a reasonable objective should be identified. This objective may take the form of increased prosecution, tougher sentencing or private action against merchants. Citizens should also acquaint themselves with the fundamental elements of obscenity law and the principal judicial decisions in this area. It is equally vital that concerned citizens work together to establish a community standard which reflects the collective view of the community.

Citizens can become effective advocates by acting as role models both within their families and their community. To this end, they can choose (1) not to consume pornography; (2) not to patronize individual businesses or corporations which produce, distribute or sell pornography, while patronizing those that do not; (3) to voice their concerns to other citizens and government officials about the pornography problem in their community; and (4) to organize with other concerned individuals toward a common goal.

In establishing and maintaining a community standard, citizens can engage in a variety of activities. Perhaps the best way to establish and maintain a community standard is through educational campaigns. These can take the form of letter writing campaigns, telephone banks, picketing and lawful boycotts. The end product of the information gathering and disseminating process should be the emergence of a solid collective community standard. It is important that in taking these actions citizens be respectful of the constitutional rights of persons or businesses engaged in the marketing of materials thought to be offensive by citizen group members.

## SUGGESTION 2: Community action organizations can solicit support from a broad spectrum of civic leaders and organizations.

A community action organization should solicit membership and support from religious, charitable, educational, political, parent-teacher, civic, and other community organizations. Citizens should also seek the endorsement of public officials for their activities. Moreover, the group should select responsible citizens as organizational leaders. In this way, the community action organization will reflect a cross section of civic [redacted]ders and organizations and maintain diverse and broad based support.

## SUGGESTION 3: Community action organizations can gather information about pornography in their community.

The mainstay of any effective advocacy process is complete information. Citizen action groups must be informed as to which local, state and federal officials are responsible for the enforcement of obscenity laws. These groups must also determine the nature and extent of the pornography problem in their community and have a working knowledge of the laws governing this material.

There are basically three law enforcement tiers in each of the federal, state and local government systems. The first is the investigative tier. At the state and local level, the police or other law enforcement agency investigates alleged violations of the law. At the federal level, the investigative agencies which have jurisdiction over obscenity violations include: the Federal Bureau of Investigation (interstate transportation of obscene material), the Postal Inspection Service (illegal use of the mail to send obscene material), and the United States Customs Service (importation of obscene material).

The second tier involves the prosecutorial function. In some jurisdictions the local prosecutor may bring criminal actions as well as civil suits[3] on behalf of the citizens they represent, against those individuals and corporations who have allegedly violated the law.[4]

There are prosecutors at the local and state levels who are responsible for enforcing local and state ordinances and statutes respectively. There are also prosecutors at the federal level which are part of the United States Department of Justice and are located throughout the nation in regional United States Attorneys Offices. There are ninety-four such offices in the United States.

The third tier is the judiciary. The judicial branch is responsible for offering a forum for the resolution of civil disputes and criminal allegations. The judge is also responsible for sentencing those convicted of criminal offenses. There are judges at each level of government who are responsible for interpreting and upholding the laws in their jurisdiction.

[redacted]mportant to note that the same illegal act may in some instances give rise to both civil and criminal actions. Moreover, some offenses may be actionable under local, state and federal law. It is equally important to remember that many of the officials responsible for law enforcement are elected or appointed for a term of years. These individuals are sensitive to citizen input, but in the final analysis are obligated to base their prosecutorial decision on their interpretation of the law.

With this law enforcement structure in mind, there are four basic steps citizens should follow in gathering information on pornography in their

community.

The first step in this information gathering process is to review local, state and federal obscenity and pornography-related laws. Second, citizens should also familiarize themselves with the pertinent legal decisions governing the control of obscene material. It is important to understand what is not obscene as well as what is obscene. In order to develop this understanding citizens are encouraged to review state and federal case law which discusses materials which have been found obscene as well as cases where sexually explicit materials have been found to be constitutionally protected. Citizens are also encouraged to consult with attorneys or other knowledgeable persons, on the laws in this area.

Third, concerned citizens should survey pornography producers, distributors, retailers and the actual materials available in the market place. The following is a breakdown of the types of media and establishments that often offer pornographic material in most communities in the United States. The series of questions listed below each heading should facilitate a thorough survey of these establishments and media.

***A. Establishments and media survey questions***

1. "Adults Only"[5] Pornographic Theatres

How many pornographic theaters are here in the community? Where are they located? What movies are shown? Are sexually explicit advertisements in full public view? Are any of the theaters of the drive-in type? What precautions, if any, are taken to prevent minors from gaining access to these establishments?

2. "Adults Only" Pornographic Outlets

How many pornographic outlets are there in the community and where are they located? What materials are sold? Magazines? Paperbacks? Sexual devices? Videos? Films? Are there peep show booths where movies are shown? Are there live peep shows? Is sexual activity taking place in these establishments? Are these pornographic outlets serving as a solicitation point for prostitution? Are these pornographic outlets adequately inspected for public health violations?

3. Retail Magazine Outlets

How many retail magazine outlets in the community offer pornographic material? Where are they located? What magazines and paperbacks do they stock? Are they displayed on the counter? Behind the counter? In racks with general magazines? In blinder racks? What precautions, if any, are taken to keep minors from being exposed to these materials?

4. Video Tape Cassette Retailers

How many of the video tape cassette stores, and convenience stores selling and renting videos in the community, stock sexually explicit or sexually violent videos? Where are the sexually explicit or sexually violent videos displayed? What precautions, if any are taken to keep minors from purchasing, renting and being exposed to these videos?

5. Cable, Satellite and Over-the-Air Subscription Television

Is there a cable franchise or over-the-air subscription service in your community? Are sexually explicit or obscene programs being distributed? When?

6. Dial-A-Porn

Does a telephone company in your community have a Dial-A-Porn service available through its MANS Announcement Network Service (976 prefix)? What is the nature of this service? Are there prerecorded sexually explicit conversations? Are there live telephone conversations? Are children in the community calling this service? How are the Dial-A-Porn services advertised and are these advertisements directed to the attention of minors? What precautions, if any, are being taken to shield minors from exposures to Dial-A-Porn?

7. Hotels

How many hotels in the community advertise and provide sexually explicit or sexually violent movies for their guests? Where are these hotels located? What precautions, if any, are taken to preclude minors from viewing these movies? Are these hotels used for prostitution or other related crimes?

8. Computer Pornography

Are pornographic computer services available in your community? What is the nature of the service? Are conversations preprogrammed? Are conversations live? Are children in the community using this service? What precautions, if any, are being taken to keep minors from gaining access to this system?

*B. Officials*

Concerned citizens should also acquaint themselves with the names of the elected and appointed officials responsible for undertaking enforcement action against obscenity. At the local level, these officials include the mayor, city council members, county prosecutor, zoning officials and the chief of police. In the case of a military community, citizens should contact the Base Commander to inform him of the pornography problem present in the community and the distribution of material on the military base.

The community action leaders may also contact the state attorney general, state legislators, public health officials and the governor, if local efforts prove unsuccessful.

In addition, if inadequate federal enforcement in a matter of concern, citizen action groups should consider contacting such federal officials and agencies as Members of Congress, United States Senators, the Department of Justice through its United States Attorneys, the Federal Bureau of Investigation, the United States Postal Inspection Service and the United States Customs Service.

## SUGGESTION 4: Community action organizations can educate the public about the effect pornography has on their community.

Citizen interest in the pornography issue is a vital component of any community action program. In order to instill such interest, community action groups should disseminate information concerning the nature and extent of pornography in the community. This should include an assessment of the current enforcement effort and the rationale for that policy. Citizen groups can provide this invaluable educational service by not only sharing their concerns about pornography, but by sharing their knowledge. This information will encourage other citizens to focus on the pornography issue and make an evaluation of its effect on their community based on a factual analysis.

## SUGGESTION 5: Community action organizations can communicate with law enforcement officials and prosecutors about the pornography in their jurisdiction.

Citizens and community action organizations should determine whether laws relating to obscenity are being adequately enforced in their area. Officials should be alerted to violations of laws relating to obscenity and unlawful sexual activity within their jurisdiction.

The section below entitled *Police* contains a detailed series of questions concerning (1) investigations conducted, complaints filed and arrests made, (2) indictments, prosecutions and convictions, (3) citizen complaints, (4) problems faced by law enforcement officials and (S) law enforcement priorities, which can be used when discussing the pornography issue with any law enforcement agency official.

***Questions for law enforcement agencies***

1. *Police* - If it appears that inadequate police resources are being devoted to enforcement of obscenity and pornography-related laws, citizens should meet with police officials and voice their concern. The following questions may serve as a foundation for an analysis of the police role in enforcing laws in this area.

a. In the past year, how many obscenity and pornography-related complaints were filed with the police department? How many actual investigations were conducted? How many obscenity and pornography-related arrests did the department make? Did those arrests involve child pornography? Did the arrests involve adult obscenity violations? Other? Did those arrests evolve as a result of investigation or through some other circumstance?

b. How many obscenity and pornography-related cases did the police department present to the local prosecutor for prosecution during the preceding year? How many cases have been presented to the local prosecutor for prosecution in the current year? How many of the cases did the prosecutor present for indictment? What type of cases were these? How many cases did the prosecutor decline to prosecute? What types of cases were these? What was the basis for the prosecutor's decision not to prosecute these cases?

what types of cases have obscenity convictions been obtained in the past year? Of the cases prosecuted, how many resulted in convictions? Of the convictions obtained, how many resulted in incarceration? How many resulted in fines? In how many cases was the charge reduced by negotiation?

d. How many citizens' complaints concerning pornography were received in the preceding year? How many in the current year? What action was taken on these complaints?

e. What problems do the law enforcement agents encounter in making obscenity and pornography-related arrests? What problems do law enforcement agents face in presenting these cases for prosecution?

[redacted]at is the police department's general policy concerning obscenity and pornography related law enforcement? What does the police [redacted]rtment perceive as the community standard?

2. *Local Prosecutor* - The local prosecutor may be the district, county, city, state or commonwealth's attorney, depending upon the jurisdiction. Community action groups should arrange a meeting with their local prosecutor and express their interest in the pornography problem in their area. The line of questions listed under Police above should provide a framework for questions for the local prosecutor. Citizens should specifically inquire about the prosecutor's assessment of the community standard in their area and the basis for the opinion.

3. *United States Attorney* - Violations of federal obscenity laws should be referred to the United States Attorney in the jurisdiction where the violation occurred. The Office of the United States Attorney is a division of the United States Department of Justice and is guided in their prosecutorial decision making by Departmental Guidelines. Prosecutorial priorities are established on the basis of the United States Attorney's assessment of a particular problem in his or her district. If pornography appears to be a major concern in a geographical area, the United States Attorney should be made aware of the severity of the problem. The United States Attorney, upon confirmation of this fact, should contact the other members of the Law Enforcement Coordinating Committee (LECC's) in his or her jurisdiction[6] to devise a coordinated approach to this problem.

In addition to those questions suggested under *Police*, the following is a list of questions which community action leaders might wish to ask the United States Attorney:

a. How many obscenity cases were referred to the Office of the United States Attorney by the Federal Bureau of Investigation, United States Customs Service, United States Postal Inspection Service or Federal Communication Commission during the past five years?

b. How many of those cases were prosecuted?

c. In how many cases was organized crime a factor?

[redacted]w many citizens' complaints concerning obscenity were referred to the United States Attorney's office during the past five years for investigation by (1) The Postal Investigation Service when the United States mails were used illegally to send obscene material, (2) The United States Customs Service when the importation of obscene material was involved, (3) The Federal Bureau of Investigation where interstate transportation of obscene material was involved, or (4) The Federal Communications Commission where violations pertaining to cable pornography, obscene or indecent broadcasting or dial-a-porn were involved?

4. *Local Offices of the Federal Bureau of Investigation, the United States Postal Inspection Service and the United States Customs) Service* - The local offices of the Federal Bureau of Investigation, the United States Postal Inspection Service and the United States Customs Service are the investigatory arms of the federal government for obscenity violations. Pornographic materials found in the community which may violate federal obscenity laws should be referred to these agencies for further investigation. These agencies should then refer all confirmed violations of federal law to the United States Attorney for prosecution, or may if appropriate, be referred to the local or state prosecutor. Community action organizations may wish to visit the local offices of these agencies and inquire about the level of obscenity enforcement in their area.

## SUGGESTION 6: Citizens can file complaints, when appropriate, with the Federal Communications Commission about obscene broadcasts.

See the in depth discussion of the Federal Communications Commission (FCC) and its legal responsibility in the obscenity area in Part Three. If the FCC is unresponsive to citizen complaints, citizens should advise their state and federal legislative representatives of such inaction and request their intervention.

## SUGGESTION 7: Community action organizations can conduct a "Court Watch" program.

A "Court Watch" program has the two-fold purpose of informing citizens bout the court disposition of significant obscenity cases and expressing the citizens' view about the handling of these types of cases. Citizen involved in a "Court Watch" program will often sit through a court hearing or trial. They will write to the prosecutor, judge, or police officer and relay their opinions of the investigation, prosecution and [redacted]ition of the case.

"Court Watch" participants will also relay their findings to other interested parties, the media and legislators. In addition, these individuals will often publicly disseminate the information they have gathered when officials come up for reappointment or reelection.

"Court Watch" programs have been conducted by Mothers Against Drunk Driving (MADD) for the past several years. Through their efforts, MADD has not only increased community awareness about drunk driving but has also been successful in influencing legislators and the law enforcement community. As a result, penalties for drunk driving have been significantly increased in many states.

[redacted]m, a "Court Watch" program will inform the judiciary and other law enforcement officials of the community's concern about obscenity in their area.

## SUGGESTION 8: Community action organizations are encouraged to keep informed of developments in obscenity and pornography-related laws and may wish, when appropriate, to lobby for legislative changes and initiatives.

In many, if not most jurisdictions, the unfettered flow of obscenity is a direct product of the laxity of enforcement, rather than the inadequacy of law. Citizens are urged to encourage the enforcement of existing laws before they attempt to introduce new legislation. If the laws themselves prove to be inadequate, then the community should identify and adopt more effective statutes. Citizens should, therefore, carefully assess the obstacles to enforcement. As with state laws, federal statutes should be updated as the pornography industry moves into new areas of technology and consumption not presently addressed by existing laws.

## SUGGESTION 9: Community action organizations can provide assistance and support to local, state and federal officials in the performance of their duties.

Community action organizations can be a valuable resource to legislators and law enforcement agencies, by providing assistance and support. Such support can be evidenced in many ways, including letter writing campaigns, petition drives, attendance at public hearings, testimony at legislative hearings and electoral support.

## SUGGESTION 10: Citizens can use grassroots efforts to express opposition to pornographic materials to which they object.

[redacted]e types of pornographic materials may be harmful, offensive and incompatible with certain community values, but nonetheless fall short of [redacted]egal standard for prosecution as obscenity. In these instances grassroots efforts may be an effective countermeasure. Grassroots actions are measures initiated and coordinated privately by citizens, without governmental intervention.

Grassroots measures may include picketing and store boycotts, contacting cable casting companies to protest sexually explicit programs, contacting sponsors of television and radio programs with pornographic or offensive content and the use of the media to express public concern through letters to the editor and audience participation programs.

A number of community action organizations have confronted retailers of pornography with the magnitude of public concern about the display and sale of this material and have experienced positive results. Some stores have been persuaded to store the material in blinder racks behind the counter. Other merchants have elected to discontinue the sale of material altogether.

When discussions with retailers prove ineffective, pickets and economic boycotts are an alternative method of citizen action. Pickets and boycotts serve to publicly identify merchants which sell these types of materials. If utilized appropriately, they can be an effective means of communicating public opposition to such material and alerting retailers that every option available will be exercised to discourage their circulation.

It is well established that citizens have a constitutional right to boycott for political purposes. In *Missouri v. National Organization For Women*,[7] the state of Missouri brought an action against the National Organization for Women (NOW) when they organized a campaign for a convention boycott of states which had not ratified the Equal Rights Amendment. The court held that such boycotts were a legitimate means of petition, protected by the First Amendment.[8]

This issue was later addressed by the Supreme Court in *NAACP v. Claiborne Hardware Co.*[9] In this case, a local brunch of the NAACP launched a boycott of white merchants in Claiborne County, Mississippi, to secure compliance by both civic and business leaders with a list of demands for racial equality. In 1969, those merchants filed suit against the NAACP for injunctive relief and damages. The Supreme Court upheld the NAACP's actions stating:

[redacted]m, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association and petition, though not identical, are inseparable. (citation omitted). Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change.[10]

While pickets and boycotts are constitutionally permissible, and in some instances socially desirable, citizens exercising these practices should

be sensitive to the competing rights of others who adopt an opposing viewpoint. This approach is not only socially responsible but is effective advocacy.

Moreover, the visibility of pickets and lawful boycotts will undoubtedly attract both media and corporate attention. It is important, therefore, that the community action organizations carefully articulate their concerns. A rational and logical discussion of these issues is the best method to evoke constructive debate geared toward an acceptable resolution of the pornography problem in the community.

Most importantly, retailers are in business to make money. They realize that their success is a direct product of consumer satisfaction and community patronage. Citizen pickets and boycotts are a sign of community dissatisfaction. Therefore, retailers are unlikely to view organized pickets and lawful economic boycotts lightly.

These types of citizen initiatives can also be effective against cable and satellite television companies who show offensive or sexually explicit programs. Cable operators are not required to offer sexually explicit subscription services.[11] The economic realities of consumer dissatisfaction with such programming may be felt when customers cancel subscriptions or potential subscribers notify the cable company that they are not subscribing to the basic service because sexually explicit programming is offered on the system. Citizen groups should also actively participate in the cable franchising process by informing local officials and cable company representatives what type of cable programming the community is willing to patronize.

Advertisers may also be influential in furthering grassroots initiatives. Advertisers are in the business of promoting positive public relations. If an advertiser believes that sponsoring a program, advertising in a particular magazine, or wing provocative advertisements will have a negative impact on sales, it may reconsider this advertising program.

Community action organizations can also utilize numerous outlets for public comment offered by the media. Newspapers and magazines usually have "letters to the editor" columns which invite comment on current or topical issues. Radio and television talk shows may offer audience participation. These outlets offer a means of reaching large segments of the community.

Another important grassroots measure is organized involvement in the legislative process. Citizen action is essential to the enactment of local pornography-related legislation. Citizens should determine if their community has nuisance, zoning and anti-display laws and U said laws would serve the particular needs of the community.[12] Nuisance laws prohibit certain illegal activities from taking place in pornographic establishments and often result in closing down the operation if a violation is found. Zoning laws regulate the way land can be used in the community.

Finally, anti-display laws regulate the method by which pornographic materials can be publicly displayed. Statutes or ordinances may be enacted or restrict the display of sexually explicit materials to minors. In order to conform to constitutional requirements, such laws should apply only to materials that are obscene as to minors[13] and should also contain reasonable time, place, and manner restrictions.[14]

In light of the legislative options available, communities can constitutionally exercise control over the location of pornographic establishments as well as the display of pornographic materials by retailers.

Citizens should contact their legislators, law enforcement officials, community leaders and media representatives to discuss the role such statutes might play in controlling the distribution of pornography in their community. Citizen action groups should educate these individuals and organizations as to how such laws could ease the circulation of pornography in their community. Only by making the control of pornography a community objective, and endorsing legislation toward that end, will the citizen action group realize its goals.

## SUGGESTION 11: Citizens can exercise their economic power by patronizing individual businesses and corporations which demonstrate responsible judgment in the types of materials they offer for sale.

Citizens should recognize individual businesses and corporations which exercise sound judgment in the selection of their book, magazine and video tape inventory. Businesses which elect not to produce, or distribute pornography in an effort to uphold or reinforce community standards should be commended. The same logic applies with equal force to radio and television station which offer pornographic or offensive programming. Citizens can use their economic power by patronizing those businesses and corporations which support a standard of quality in the community. Such patronage and subscription will serve as further evidence to merchants that the local community has set its standard with respect to such material.

## SUGGESTION 12: Parents should monitor the music their children listen to and the recording artists and producers should use discretion in the fare they offer to children.

Concern has been expressed over many of the lyrics heard in contemporary rock music. Many popular idols of the young commonly sing about rape, masturbation, incest, drug usage, bondage, violence, homosexuality and intercourse. Given the significant role that music plays in the lives of young people, and considering the fact that even pre-teenagers often listen to such material several hours a day,[15] this issue was

considered carefully by the Commission. Two conclusions ensued.

First, it is recommended that parents closely monitor the music heard by their children. An effort should be made by parents to evaluate the [redacted] expressed on radio and television, in rock videos and on pornographic records. Considerable concern has also been expressed about the [redacted]nce and sexual explicitness portrayed on the covers of such albums. Some of the album covers displayed to the Commission appeared to exhibit depictions satisfying the legal standard for obscenity.

Second, in order to facilitate this parental involvement, the Commission endorses the agreement reached in November, 1985, between the Parents Music Resource Center and the Recording Industry Association of America. By the terms of this voluntary arrangement, the recording industry agreed to label albums containing explicit sex, violence, drug or alcohol abuse with the words, "explicit lyrics" or "parental advisory," or else the actual lyrics would be printed on the album jackets.

The Commission strongly recommends that the recording artists and producers use greater discretion in the music they offer to juveniles. As a first step, however, this voluntary agreement will help parents and teachers take a more active role in limiting their children's exposure to this material.

### SUGGESTION 13: All institutions which are taxpayer funded should prohibit the production, trafficking, distribution, or display of pornography on their premises or in association with their institution to the extent constitutionally permissible.

Federally funded or assisted institutions should be prohibited from producing, trafficking, distributing, or displaying pornography except for certain well defined legitimate purposes. These institutions include, but are not limited to, hospitals, schools, universities, prisons, government office buildings, military installations and outposts, and mental health facilities. We recognized that in many areas governmental action may, as a matter of constitutional law, be taken only with respect to materials that are legally obscene, and we do not suggest that institutions go beyond their constitutional limitations. In other cases, however, of which schools are the most obvious example, content-based restrictions of the material available in the institutions need not be limited to the legally obscene, and we recognize not only the right but the responsibility of such institutions to control content consistent with the needs of the institution.

### [redacted]GGESTION 14: Businesses can actively exercise their responsibility as "corporate citizens" by supporting [redacted] community's effort to control pornography.

As "corporate citizens," businesses should be responsive to community sentiment regarding the production and distribution of pornographic materials. Many different types of businesses are involved in the various stages of production and retail distribution including film processors, typesetting and printing services, delivery services, warehouses, commercial realtors, computer services, cable and satellite companies, recording companies, hotels, credit cud companies and numerous others. These businesses have a responsibility to exercise due cue to insure that they are not contributing to the moral detriment of their community. Businesses can be encouraged to insure that they are not being unknowingly wed as an instrument for the spread of obscene or pornographic material which the community has requested not be produced or sold on moral, social or other legitimate grounds.

Corporations are encouraged to conduct site inspections of their inventory to safeguard against the sale of material which offend the community standard. In the case of credit card companies, a review of the types of businesses that their "merchant" members are conducting might be useful. Information and entertainment companies such as cable and satellite systems, computer network services and recording companies should monitor their systems for obscene or other material which offends the community they serve. Broadcasters, advertisers and retailers should diligently protect children and unwilling adults from exposure to sexually explicit communications.

A second role for corporations, as members of local communities, is to actively support citizen action efforts to curb the proliferation of pornography in the community.

Moreover, corporations, as part of their more general social responsibility, are encouraged to establish and participate in pornography "victim" assistance programs.[16] They can do this by contributing to social service agencies who specialize in or deal with sexual abuse.[17] They can also provide direct financial assistance, in the form of scholarships and vocational programs, to "victims" of pornography.[18]

Finally, corporations can sponsor local educational programs on pornography and its effects on the community. These programs could then be [redacted]ided to schools, businesses, legislators, law enforcement officials, churches, and other interested groups.

Corporations can and do have an impact on community standards and law enforcement practices. It is up to corporations to act as responsible citizens to ensure that their community is not just a location for another retail outlet, but a worthwhile place to live.

## *IV. CONCLUSION*

Citizen and community involvement in law enforcement and the formulation of legal initiatives is an age-old tradition. Citizens create laws through their elected officials and delegate enforcement of these laws to police, prosecutors and judges.

[redacted]n the law enforcement mechanism inadequately addresses a particular problem, citizens and communities must explore other avenues. [redacted]y times citizens must on their own publicly advocate a community environment which reflects their view of an ideal place to live.

This Commission encourages citizen and community involvement. Examples abound of where citizens have made a difference in the quality of life in their community. "Neighborhood Watch" programs, where citizens protect each others' homes is a prime example of positive citizen efforts. Mothers Against Drunk Driving is another example in which citizen action has made communities across the country a safer place to live. This Commission applauds such efforts and encourages others to improve the quality of life in their community.

*References*

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

2. See Recommendations for Law Enforcement Agencies in Part Three.

3. Civil laws include nuisance laws and may include zoning.

4. In some jurisdictions a civil action brought on behalf of the community is done through the city attorney's office, in other jurisdictions the civil action is purely private in nature.

5. The term "Adults Only" is meant only to describe the nature of the material presented and not necessarily the age of the patrons.

6. See the discussion in Recommendations for Law Enforcement Agencies about LECCs.

7. 620 F.2d 1301 (8th Cir. 1980).

8. Id. at 1319.

[redacted]U.S. 886 (1982).

10. Id. at 911.

11. See Chapter 2 of Part three for a discussion of the regulation of cable and satellite systems.

12. See Chapter 7 in Part Three and Chapter 6 in this Part for a detailed legal discussion of the use of effectiveness of these laws.

13. See Ginsberg v. New York, 390 U.S. 629, 64547 (1968).

14. See Young u American Mini-Theatres, 427 U.S. 50, 63 (1976).

15. Washington, D.C., Hearing Vol. 1, Kandy Stroud, p. 24344.

16. See Chapters I and 2 of this Part for a discussion of victimization.

17. See Chapters I and 2 of this Part which discusses the numerous forms of victimization associated with pornography.

18. Id.

# Chapter 1: The Problem of Sexually Oriented Businesses

## Quick Guide to Chapter 1:

**What is an "adult" business?**

Any business that exploits interest in sex in a graphic manner; we prefer the term "sexually oriented business", or "SOB." (1.2)

**What types of problems occur inside sexually oriented businesses?**

A typical sexually oriented "bookstore" contains private viewing rooms, or "peepshow" booths, where patrons engage in masturbation or promiscuous and unsafe sex acts with prostitutes or other patrons; the booths are covered with bodily fluids and sometime have openings to allow anonymous acts of oral and anal intercourse. In nude dancing establishments, patrons and dancers often engage in public sexual contact; private dances are opportunities for acts of prostitution. (1.3)

**What types of problems occur outside SOBs?**

The neighborhood or business district surrounding sex businesses typically suffers a decline in property values and increases in crime especially sex crimes. (1.4)

**Who is behind SOBs?**

We know that organized crime controls the national distribution of hard-core pornography, and thus controls the products sold in sex businesses. We also know from the trial and convictions of organized crime kingpins like Rueben Sherman and John Gotti that organized crime figures control entire chains of sexually oriented businesses. (1.5)

**What is the best way to get rid of SOBs?**

Communities that have been the most effective in driving SOBs out of town have been those that use a combination of aggressive enforcement of criminal obscenity laws and the type of stringent time, place, and manner regulations detailed in this book. (1.6)

## 1.1 - Recognizing the Problem

> [The city council found] that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas. The decision to add adult motion picture theaters and adult bookstores to the list of businesses which, apart from a special waiver, could not be located within 1000 feet of two other "regulated uses" was in part, a response to the significant growth in the number of such establishments. In the opinion urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

So wrote the United States Supreme Court over two decades ago in a Detroit case that put the nation's high court, for the first time ever, in the position of considering the deleterious impact of "adult" establishments on neighborhoods. *Young v American Mini Theatres, Inc.*, 427 U.S. 50, 54-55 (1976).

The Court wrote that the city's effort to "preserve the quality of urban life is one that must be accorded high respect," and that "the city must be allowed to experiment with solutions to admittedly serious problems." *Id.*, 427 U.S. at 71. The Court accepted the city's conclusion that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films." *Id.*, 427 U.S. at 71, n.34.

This recognition by the Court was significant because it sent a signal to communities around America that, despite the alleged First Amendment interests of "adult" establishments, local governments were entitled to regulate them differently and more stringently than other businesses because of all the problems they created. These enterprises have proliferated because of their profitability, but legal restrictions and regulations have increased in response. *Young* gave local governments permission to "experiment with solutions to admittedly serious problems," by creating new regulatory schemes to protect their neighborhoods. These "experiments" have been the subject of much litigation. Caselaw now provides communities with a pretty good idea of which restrictions will be upheld as constitutional and which will be particularly effective in protecting against negative secondary effects.

The increase in sexually transmitted diseases, including AIDS, and the release of the *Final Report of the Attorney General's Commission on Pornography* [1] in 1986, which outlined not only who profited from this illicit industry but also what was sold and what went on inside the typical sexually oriented business, led to a new wave of public regulation of sexually oriented businesses during the late 1980s.

Cities across the country adopted local ordinances to protect against negative secondary effects. State legislatures, health departments and city and county officials began to recognize the deleterious, even dangerous effects of these businesses on the public health, the accompanying decline in property values, and high crime in neighborhoods situated near such facilities. Naturally, they sought legislative solutions.

Some bolder cities, without benefit of recent caselaw, attempted to prohibit any sexually oriented businesses from locating in their community and were quickly restrained by federal and state courts.

With the new wave of regulation came a tidal wave of litigation, as the well-funded pornography industry began challenging these legislative efforts to restrict their locations and activities. One such legal battle occurred in the city of Renton, Washington, and wound up in the United States Supreme Court.

In that case, the Court once again drew attention to the concerns raised by communities threatened by sex businesses:

The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of

urban life." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

Two Supreme Court cases, issuance of the Final Report of the Attorney General's Commission on Pornography, and the experience of many communities invaded by sex businesses led, for the first time, to widespread public exposure of the reality of problems caused by these establishments. The stage was set for a decade of turf battles, as local governments took on sex shops city by city, county by county, state by state. That turf battle has intensified with each passing year and continues to this day.

## 1.2 - Defining the Terms

Professor Jules Gerard, author of the leading scholarly legal treatise in this area, *Local Regulation of Adult Businesses*, admits in his book's opening paragraph that "'Adult business' is essentially a euphemism for an enterprise that purveys sex in one form or another."

["Adult business"] comprises a large variety of sexual oriented businesses that may include movie theaters, bookstores, TV rental stores, hotels and motels, houses of prostitution (sometimes masquerading as escort agencies, massage parlors, or "rap" studios), peep shows, topless/bottomless bars, and the like. "Adult entertainment" is a term that refers to the materials or services that theses businesses market. These may include movies, TV tapes, photographs, books, magazines, sexual devices, such as condoms, and similar articles, as well as performances to be witnessed, such as nude dancing, and tactile services, such as massages, and the like. One business frequently will offer more than one kind of adult entertainment; a bookstore may include a peepshow featuring a live nude dancer, for example.

Jules Gerard, *Local Regulation of Adult Businesses*, at 1 (1996).

While the terms "adult business" and "adult entertainment" appear in numerous ordinances, we have no desire to perpetuate usage of this "euphemism" except where necessary to deal with specific ordinance language. (In fact, use of the word "adult" to describe pornography and businesses that exploit sex was a creation many years ago by leaders of the pornography industry, who were seeking ways to market their product that would be more acceptable in society.) We prefer, where possible, to use the term "sexually oriented businesses", which also provides us with a useful acronym for these shady enterprises -- "SOBs."

## 1.3 - A Peek Inside SOBs – Health Dangers

In 1985, the Attorney General's Commission on Pornography was formed and went to work. Amid much national publicity, the Commission during 1985 and 1986 held a series of six public hearings across the United States. One of the most frequently cited concerns of witnesses before the Commission was the effect of sexually oriented businesses on their local urban environments. In particular, health concerns related to "peep show" booths contained in the typical "adult bookstore" were identified by several witnesses.

The *Commission's Final Report* described how these booths, which are sometimes referred to as "private video viewing rooms," are typically used:

> Inside the booths the viewer may see approximately two minutes of the movie for 25 cents. As the number of sexually explicit scenes or diversity of sexual contact increase, the viewing time decreases. Tokens or quarters are needed to operate the peep shows and can be obtained at the outlet sales counter.
>
> The average peep show booth has enough room for two adults to stand shoulder to shoulder. The inside of the booth is dark, when the door is closed, except for the light, which emanates from the screen or enters from the bottom of the door.
>
> The inside walls of the peep show booth are often covered with graffiti and messages. The graffiti is generally of a very sexual nature and consists of telephone numbers, names, requests and offers for homosexual acts, anatomical descriptions and sketches. The booth may also contain a chart that is used to schedule appointments and meetings in that particular booth, In

some cases, this arrangement has been used for solicitation of prostitutes.

* * *

In addition to movie viewing, the booths also provide places for anonymous sexual relations. Many booths are equipped with a hole in the side wall between the booths to allow patrons to engage in anonymous sex. The holes are used for oral and anal sex acts. Sexual activity in the booths involves mostly males participating in sexual activity with one another. However, both heterosexual and homosexual men engage in those activities. The anonymity provided by the "glory holes" allows the participant to fantasize about gender and other characteristics of their partners.

The booth is sometimes equipped with a lock on the door. Many patrons intentionally leave the door unlocked. Some patrons look inside the booths in an attempt to find one already occupied. It is commonplace for a patron to enter an occupied booth, close the door behind him, and make advances toward the occupant. He may grab the occupant's genitals in an effort to invoke sexual activity or attempt to arrange a later sexual encounter. The sexual activities reported in peep show booths include masturbation, anal intercourse, and felatio.

Inside the booths, the floors and walls are often wet and sticky with liquid or viscous substances, including semen, urine, feces, used prophylactics, gels, saliva or alcoholic beverages. The sloes of a patron's shoes may stick to certain areas of the floor. The booths rare often littered with cigarette butts and tobacco. The trash and sewage and application of disinfectants or ammonia on occasion create a particular nauseating smell in the peep booths.

*Final Report of the Attorney General's Commission on Pornography ("Final Report")*, at 1473-76.

One witness before the Commission called these booths "AIDS transmission centers" because of the frequency with which patrons engage in unsafe public sexual conduct in the booths. Experiences in big cities like Philadelphia and San Francisco, and small towns like Eau Claire, Wisconsin, provide ample factual support for that testimony.

A Television NewsCenter 13 account from Eau Claire described one man's experience in that small Midwest town:

***Reporter***: Tonight on "AIDS in a Small Town" we continue to tell you the story of a man we call Rick. Tonight the story is of a man spreading a virus.

***Rick***: I will never tell anyone what I have. That is kind of stupid.

***Reporter***: Why is that?

***Rick***: It kills your sex life.

***Reporter***: We have introduced to you a man we are calling Rick. Rick is homosexual, he lives in Eau Claire, and he carries the AIDS virus. What we haven't told you yet is that he claims to be spreading the virus by having anonymous sex with other men. Does that bother you at all that you are spreading the disease?

***Rick***: No, I look at it as to the point that in riding in a car. If you get into a car with somebody and there is a seatbelt available to you and you don't use it and you get killed, whose fault is it? To a point I feel a little guilty but I always have condoms and if no one wants to use them or no one suggests it then hey, whose fault is it?

* * *

***Harlan Heinz, psychologist***: *It is* not much different from the killer, the person who goes around murdering people without a conscience. I think that is a similar kind of lack of character development. I think that is an exception. Some people who feel that they are going to die in a few years would have this attitude. But I think that's few, I think that's an exception and it is a

person without a conscience or without any kind of feeling for the welfare of mankind.

* * *

***Dr. Michael Finkel***: Anyone who continues to behave irresponsibly in such matters should have some sort of penalty. There should be some way that we can stop these people.

* * *

***Dr Ken Alder***: This is really distressing. I think that a person who does these things is very definitely a risk to other people's health.

***Harlan Heinz, psychologist***: It is very difficult to treat a person like this and I think that basically you would not be able to cure this person This mind would be very difficult to reach.

* * *

***Reporter***: Right now, Wisconsin has no law specifically against the spreading of AIDS. But there could be a law coming very soon.

***Gov. Tommy Thompson***: I don't know if we want to classify it as a felony but I am certainly looking at some sort of criminal sanctions.

***Reporter***: Can you get specific at all?

***Gov. Tommy Thompson:*** We haven't really resolved or made a final decision on it. We are looking at a lot of legislation this year to protect the citizens

* * *

***Reporter***: Rick says if Thompson's administration gets a law approving restricting the spread of AIDS, he will obey it. But until then he will continue his lifestyle and that includes anonymous sex with other men.

***Reporter:*** How are you doing that, where all do you have sex?

***Rick***: Basically, I go to all the bookstores.

***Reporter***: Eau Claire's adult bookstores show adult movies inside private booths. Booths no larger than a small closet. But in many of the booths, there are small holes made in the walls. The holes are about waist high off of the floor.

***Reporter***: Who do you meet in these rooms?

***Rick***: I have seen a few married men in there.

***Reporter***: Do you have most of your sex in adult bookstores?

**Rick:** Yeah.

***Reporter***: ***Is*** that the easiest way for you to have sex is through these holes?

Rick: Very easy.

* * *

***Reporter:*** You have a hole in one of your booths. Why is that hole there?

> ***Bookstore Owner:*** That hole was there when the booth came down here from Chicago. And it has been there ever since I have had that booth and I have had that booth there since 1984 when they came in here with all that stuff.
> ***Reporter:*** Glen Peterson runs an adult bookstore in Eau Claire. The hole in one of the booths looks as if a knot of wood was as punched out. Peterson said he has tried to block it twice but he has given up because it has been repeatedly removed. Today we told him Rick's story of spreading the virus.
>
> Does that make you want to get rid of the hole more?
>
> ***Bookstore owner:*** Yeah. I think I will make sure I can patch this up good where they can't tear it down again because I don't want to get sued if somebody else catches AIDS over this. So I am going to have to take care of it today, I guess.
>
> ***Reporter:*** And although it seems Glen Peterson knows what he is going to do, the City of Fan Claire sure doesn't seem to. City Attorney Ted Fischer says there is no ordinance on the books dealing with the issue at this time, though Milwaukee and St. Paul do. And Councilperson Wally Rogers says it may be up to the Health Board to take action but Health Board President Tom Henry says it might be up to the city to have an ordinance first. We will have more on that as our series continues.

During the early 1990s Pennsylvania officials became increasingly concerned about the transmission of AIDS and other sexually transmitted diseases. Pennsylvania Attorney General Ernie Preate closed a number of bookstores as "public health nuisances." The Philadelphia Daily News reported that Preate said the bookstores "encourage anonymous and unprotected sex practices that spread

AIDS and other sexually transmitted diseases," and that they "often have groin-level holes in walls separating two [redacted]ns to facilitate sex acts, primarily among gay males."

In 1992 Preate shut down three Philadelphia bookstores, citing their promotion of public sex acts. A Philadelphia Inquirer story quoted Preate as saying that the "primary business of these so-called bookstores is not book sales but the facilitation of disease-spreading sex. These businesses are the bathhouses of the 1990s and pose an indisputable threat to public health."

The Inquirer story gave more details about the investigation's findings:

> During a six-month investigation, undercover agents found "glory holes cut into the walls of the video booths, permitting patrons to take part in sex acts with those in adjoining booths, according to court papers.
>
> The state also alleges that agents were solicited for oral sex by patrons, who in some cases masturbated in view of the agents and grabbed the agents groins.
>
> At Book Bin East, in an area of the store called "California Couch Dancing," female employees allegedly solicited an agent to pay them to dance naked or perform sexual acts.
>
> The state, citing an affidavit filed by Dr. Michael R. Spence of Hahnenemann University Hospital, says the unprotected sexual activity among anonymous partners at the stores endangers public health by promoting the spread of the AIDS virus, hepatitis B and other sexually transmitted diseases.
>
> "Pa. officials shut down sections of Philadelphia adult bookstores," The Philadelphia Inquirer, July 30, 1992.
>
> In testimony before the state Common Pleas Court, one witness admitted that he regularly cruised the city's adult bookstores and engaged in unprotected sexual activity, and that he carried the HIV virus. "Witnesses describe sex acts in video booths," The Philadelphia Inquirer, August 25, 1992.

Strong evidence suggests that when San Francisco closed its bathhouses in response to the AIDS epidemic during the mid-1980s, promiscuous homosexual activity moved from there into the city's "adult bookstores." The San Francisco Examiner reported on the activities in one such establishment in a way that drives home the point that "exercising free speech rights" was not a high priority for "bookstore" patrons:

At the Locker Room adult bookstore, the regulars used to laugh whenever some naïve tourist actually tried to use one of the "video preview booths" to watch an X rated movie.

The weird scenes that marked the bookstore's dirty, dimly lit peep-show arcade usually were more than enough to send out of towners fleeing down Polk Street, according to habitues of the place.

"There was every kind of sex you can think of back there -- orgies *and* stuff, hustler selling themselves, and free-lancers," [a] source said. "Almost everybody around the place was a speed freak or a junkie. You used to find discarded [hypodermic] needles all over the place, because low-life speed freaks would go in there and shoot up.

When cleaning out the stores, janitors were "glad to find [discarded] condoms" the source sa*id.* "At least it meant [customers] were trying to take some precautions."

"No joke," says another person familiar with the two stores. "There were lots of guys sleazing around back there, big time."

* * *

The rear portion of both stores were honeycombs of more than 20 peep-show booths, where customers in theory went to pump in tokens into vending machine style slots and view adult films.

But sources familiar with the arcades said they were sleazy places where customers engaged in prostitution, intravenous drug use and anonymous sex of the sort the City hadn't seen since bathhouses were closed in the face of the AIDS epidemic

Police, who had been stripped of their power to inspect bookstores when the board of Supervisors deregulated the sex industry here in 1985, rarely went into the stores. Neither did the Health Department.

The result at the Locker Room and Ben Her was a dangerous, anything goes atmosphere, the sources sa*id.*

Sources said so many syringes were found discarded in the arcades that janitors wore thick rubber gloves to avoid being accidentally jabbed and infected with AIDS.

On one Occasion, according to a source, a customer complained he had been jabbed when he sat down on a bench where a syringe had been discarded. It was unclear what became of the customer

Another source said that on three occasions arcade janitors retrieved lost wallets that contained documents indicating customers were HIV positive.

*"Sleaze ruled in two City adult arcades",* San Francisco Examiner, June 4, 1991, A-1.

Sexual activity is associated with all sexually oriented businesses, not just "adult bookstores." Even the so-called "safe sex" alternative, nude-dancing establishments, clearly promote unsafe public sexual contact, not just harmless viewing of dancers. As far back as the early 1970s, the Supreme Court acknowledged this element of nude dancing establishments:

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer; or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

*California v. LaRue*, 409 U.S. 109, 111 (1972).

Every type of sexually oriented business poses public health and safety hazards for a community, because what occurs inside these establishments is never contained there. The testimony regarding married, heterosexual men engaging in unsafe homosexual acts with HIV-positive men is particularly frightening, considering that the disease may then be spread unknowingly to the men's wives and future children.

But the negative secondary effects don't end with what happens inside the typical sex business. Many of the negative secondary effects cited by communities to justify time, place and manner regulation are external to the establishments.

## 1.4 - A Peek Outside SOBs - Impact on Neighborhoods

In *Young*, the Supreme Court recognized that cities could reasonably draw the conclusion that bad things happened to the parts of town where sexually oriented businesses moved. In *Renton*, the Court reiterated that point, and indicated that communities were entitled to rely on experiences in other places as a basis for enacting local legislation.

One of the most comprehensive studies of the impact of sexually oriented businesses on communities was undertaken in the state of Minnesota, under the leadership of Attorney General Hubert Humphrey III, in 1989. After reviewing evidence from around the country, the Working Group on the Regulation of Sexually Oriented Businesses concluded "these studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, the Working Group heard testimony that the character of a neighborhood can dramatically change when there is a concentration of sexually oriented businesses adjacent to residential property." (The Working Group's report is reproduced as Appendix F).

Their review of studies from communities including St. Paul, Minneapolis, Indianapolis, Phoenix and Los Angeles showed that when SOBs moved into areas they suffered from a statistically significant increase in crime, especially sexual crime, including rape, indecent exposure and child molestation. The studies also showed a significant decrease in the value of residential and commercial property when a sex business moved into the area. (*Working Group Report)* at 6-10.)

Specific testimony before the Working Group described circumstances that are consistent with what occurs in most neighborhoods where SOBs locate:

Pornographic materials are left in adjacent lots. One person reported to the police that he had found 50 pieces of pornographic material in a church parking lot near a SOB. Neighbors report finding used condoms on their lawn and sidewalks and that sex acts with prostitutes occur on streets and alleys in plain view of families and children. The working group heard testimony that arrest rates understate the level of crime associated with SOBs. Many robberies and thefts from "johns" and many assaults upon prostitutes are never reported to the police.

Prostitution also results in harassment of neighborhood residents. Young girls on their way to school or young women on their way to work are often are often propositioned by johns ... [Near a theater that caters to homosexuals] neighborhood boys and men are also accosted on the street. A police officer testified that one resident had informed him that he found used condoms in his yard all the time. Both his teen-age son and daughter had been solicited on their way to school and to work.

*Working Group Report* at 12. What happens inside SOBs is seemingly never contained there, but inevitably spills out into the surrounding community.

## 1.5 - A Peek Behind SOBs – Organized Crime

we discuss the problems associated with sexually oriented businesses, we must remember not only what happens inside and outside the physical establishments, but also who is behind these businesses -- who are the owners and backers of this "industry"? When we realize who is financially behind these establishments, some of the regulations -- licensing, for example -- make more sense.

The answer to this question can be found in any number of government reports, starting with the Final Report of the Attorney General's Commission on Pornography. The Commission heard corroborating testimony from a number of organized crime informants, who indicated that major organized crime families controlled the national distribution of obscene material because of its profitability. They also testified that these families were involved in other criminal activity including murder, arson, prostitution, narcotics, money laundering, tax violations, fraud and extortion related to their control of the industry. One detective told the Commission that if organized crime families "do not own the business outright, they most certainly extract street tax from independent smut peddlers." Final Report at 1048.

Reuben Sturman, who at one point was the world's largest distributor of pornography, reputedly earning in the neighborhood of $1 million per day, was finally convicted on income tax evasion charges in 1989 in Cleveland. Subsequently, he was convicted for obscenity distribution and racketeering in Las Vegas federal court; arrested for escape and possession of a firearm after he walked away from a minimum security prison in California and was recaptured; convicted of extortion in federal court in Chicago after he paid four men to do criminal damage with pipe bombs to several sex businesses in Chicago, Phoenix and other cities; and convicted in federal court in Cleveland for witness and jury tampering. In the Chicago case, the owners of several SOBs had stopped paying Sturman while he was in jail. One man died when a bomb exploded prematurely in Chicago. *See Mahn v. United States*, 1995 WL 562139 (N.D. Ill. Sept. 20, 1995)(denial of habeas corpus relief for surviving passenger in car who was injured during the fatal explosion). Clearly, organized, violent criminal activity is associated at some level with every sexually oriented business allowed to operate. Sturman's ties to organized crime families were well documented.

John Gotti, head of the Gambino crime family, was convicted in 1992 for ordering several murders. In the course of his trial it became clear that Gotti controlled a great deal of the illegal pornography business through his La Cosa Nostra organization. "As the 'boss of bosses', Gotti oversees hundreds of 'soldiers' who reap more than $100 million a year from gambling, loan sharking, racketeering -- and pornography." Providence Journal Bulletin, June 26, 1991, at A-1, A-6 ("*Pornography is Guarino's game; the mob, Central are on his team*").

One former FBI agent testified that, in his opinion based on 23 years experience in pornography and obscenity investigations, "it is practically impossible to be in the retail end of the pornography industry [today] without dealing in some fashion with organized crime, either the mafia or some other facet of non-mafia, nevertheless highly organized crime."

The Commission also heard testimony from those who were involved in "tax evasion which arose from skimming activities at ... sexually oriented bookstores." *See U.S. v. Wisotsky*, 83-741-Cr EBD (S.D.Fla. 1985). One witness told the Commission that he made $1,200 to $1,600 daily in quarters at each of his three stores, none of which was reported income, "[b]ecause who can tell how many customers come in today, and drop how many quarters, in how many machines?" Indictments of SOB owners for tax evasion have been common, as many of these businesses regularly skim money from the coin-operated "peep show" viewing booths.

As the Minnesota Attorney General's Working Group on the Regulation of Sexually Oriented Businesses concluded:

> Evidence of the vulnerability of sexually oriented businesses to organized crime involvement underscores the importance of criminal prosecution of these businesses when they engage in illegal activities ... It may also disclose organized crime association with local pornography businesses ... Regulation to permit license revocation of subsequent crimes may also expose and increase control over criminal businesses.

*Working Group Report* at 20.

The typical sexually oriented business will come into town claiming to be a reputable business that simply is exercising First Amendment rights by providing much-needed "mature" entertainment for a certain segment of society. It will claim to run a clean business, with honest and upstanding businessmen in charge, not like those bad SOB owners you may have heard of from other towns. Furthermore, the true owners of the business will rarely be listed on any license applications and their identity may be carefully guarded.

The reality with virtually all SOBs is that they are connected at some level to organized crime, and their regular business practices include skimming, tax evasion, prostitution and other illegal activities. The longer they can convince local officials of their innocence, and of how they are different than every other sleazy business, the longer they will avoid imposition of significant time, place and manner regulation by your community.

## 1.6 - Scope of the Problem

Sexually oriented businesses, which were virtually unknown in America only four decades ago, are proliferating across the land today. Once relegated to skid rows of large cities, they now are moving into upper-class neighborhoods, and into smaller rural communities that never expected to face this type of incursion.

It is difficult to count the number of sexually oriented businesses in the country because so many open and close so quickly, and because they strive to avoid state regulation. Some estimates indicate that the pornography industry's revenues in the United States are between $11 and $14 billion annually. While worldwide they are estimated to exceed $52 billion annually. *See, e.g.,* Matthew Green, Comment, *Sex On The Internet: A Legal Click Or An Illicit Trick?*, 38 Cal. W. L. Rev. 527 (2002)(citing statistics from several sources)

While estimates vary, it is clear that the number of sexually oriented businesses has grown significantly during the last decades and the variety of "entertainment" has increased greatly.

In part, this proliferation has occurred as a result of declining standards of moral conduct in society generally. From the acceptance of profanity in public and in the media, to acceptance of nudity in mainstream Hollywood movies and cable television, to increased levels of sexual promiscuity, moral standards are unquestionably in significant decline.

Other factors contributing to the proliferation include technological developments such as videos and the Internet which facilitate easier consumption within the privacy of the home. *See, e.g.,* Eric Damian Kelly and Connie Cooper, *Everything You Always Wanted to Know About Regulating Sex Businesses*, Ch. 1 (American Planning Association Planning Advisory Service Report No. 495/496 2000), Notwithstanding other reasons, it is clear that a significant factor in the proliferation of SOBs is the lack of enforcement of legal restrictions on the sale of pornographic material. The Supreme Court has always recognized that obscene material is outside the protection of the First Amendment, but for many years the Court was imprecise in defining obscenity. Since 1973, the Court has articulated a clear definition of obscenity, but confusion from the past has contributed to an unwillingness to expend law enforcement resources on prosecuting "dirty books."

This failure to enforce state and federal obscenity laws has created a climate in most communities where the only restrictions pornographers face before opening a business are time, place and manner regulations imposed by local governments. The fear of prosecution for selling illegal obscenity is not a factor in many parts of the country.

However, communities that have been most successful in eliminating sexually oriented businesses have used a combination of strict obscenity law enforcement and time, place and manner regulations. Most SOBs cannot survive economically when they sell only non-obscene pornography, especially when faced with stringent zoning, licensing other restrictions. But because many communities do not enforce obscenity laws, time, place and manner regulations must be in place because they may be the only legal roadblocks to the presence of a SOB in your community.

## 1.7 - Conclusion

The problems associated with sexually oriented businesses, both inside and outside the establishments, are universal to SOBs. And it is these problems -- the negative secondary effects -- that form the constitutional basis for regulating these establishments in a more stringent fashion than other types of businesses.

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[1] A copy of the complete report is available on the Community Defense Counsel web site at: http://www.communtydefense.org

City of Renton v. Playtime Theatres, Inc.
U.S.Wash.,1986.

Supreme Court of the United States
CITY OF RENTON, et al., Appellants
v.
PLAYTIME THEATRES, INC., et al.
**No. 84-1360.**

Argued Nov. 12, 1985.
Decided Feb. 25, 1986.
Rehearing Denied April 21, 1986.
See 475 U.S. 1132, 106 S.Ct. 1663.

Suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school. The United States District Court for the Western District of Washington ruled in favor of the city. The Court of Appeals for the Ninth Circuit, 748 F.2d 527, reversed and remanded for reconsideration, and the city appealed. The Supreme Court, Justice Rehnquist, held that the ordinance was a valid governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment.

Reversed.

Justice Blackmun concurred in the result.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

West Headnotes

**[1] Constitutional Law 92 2227**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2224 Motion Pictures and Videos
92k2227 k. Zoning and Land Use. Most Cited Cases
(Formerly 92k90.4(4))
City ordinance that prohibited adult motion picture theaters from locating from within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school was properly analyzed as a form of time, place and manner regulation of speech. U.S.C.A. Const.Amend. 1.

**[2] Constitutional Law 92 2227**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2224 Motion Pictures and Videos
92k2227 k. Zoning and Land Use. Most Cited Cases
(Formerly 92k90.4(4))
A zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school was a valid governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment. U.S.C.A. Const.Amend. 1.

**[3] Constitutional Law 92 2219**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2219 k. Theaters in General. Most Cited Cases
(Formerly 92k90.4(4), 92k90.1(4))
The First Amendment does not require a city, before enacting an adult theater zoning ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever the evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. U.S.C.A. Const.Amend. 1.

**[4] Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations

414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Cities may regulate adult theaters by dispersing them or by effectively concentrating them.

***41** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondents purchased two theaters in Renton, Washington, with the intention of exhibiting adult films and, at about the same time, filed suit in Federal District Court, seeking injunctive relief and a declaratory judgment that the First and Fourteenth Amendments were violated by a city ordinance that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The District Court ultimately entered summary judgment in the city's favor, holding that the ordinance did not violate the First Amendment. The Court of Appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests, and remanded the case for reconsideration as to whether the city had substantial governmental interests to support the ordinance.

*Held:* The ordinance is a valid governmental response to the serious problems created by adult theaters and satisfies the dictates of the First Amendment. Cf. ****925** *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310. Pp. 928-933.

(a) Since the ordinance does not ban adult theaters altogether, it is properly analyzed as a form of time, place, and manner regulation. "Content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Pp. 928-929.

(b) The District Court found that the Renton City Council's "predominate" concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves. This finding is more than adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus the ordinance is a "content-neutral" speech regulation. Pp. 928-930.

(c) The Renton ordinance is designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication. A city's interest in attempting to preserve the quality of urban life, as here, must be accorded high respect. Although the ordinance was enacted without the benefit of studies specifically relating to ***42** Renton's particular problems, Renton was entitled to rely on the experiences of, and studies produced by, the nearby city of Seattle and other cities. Nor was there any constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, or by effectively concentrating them, as in Renton. Moreover, the ordinance is not "underinclusive" for failing to regulate other kinds of adult businesses, since there was no evidence that, at the time the ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. Pp. 930-932.

(d) As required by the First Amendment, the ordinance allows for reasonable alternative avenues of communication. Although respondents argue that in general there are no "commercially viable" adult theater sites within the limited area of land left open for such theaters by the ordinance, the fact that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a violation of the First Amendment, which does not compel the Government to ensure that adult theaters, or any other kinds of speech-related businesses, will be able to obtain sites at bargain prices. P. 932.

748 F.2d 527 (CA9 1984), reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. ---.

****926** *E. Barrett Prettyman, Jr.,* arguedthe cause for appellants. With him on the briefs were *David W.*

*Burgett, Lawrence J. Warren, Daniel Kellogg, Mark E. Barber,* and *Zanetta L. Fontes.*

*Jack R. Burns* argued the cause for appellees. With him on the briefs was *Robert E. Smith.**

* Briefs of *amici curiae* urging reversal were filed for Jackson County, Missouri, by *Russell D. Jacobson;* for the Freedom Council Foundation by *Wendell R. Bird* and *Robert K. Skolrood;* for the National Institute of Municipal Law Officers by *George Agnost, Roy D. Bates, Benjamin L. Brown, J. Lamar Shelley, John W. Witt, Roger F. Cutler, Robert J. Alfton, James K. Baker, Barbara Mather, James D. Montgomery, Clifford D. Pierce, Jr., William H. Taube, William I. Thornton, Jr.,* and *Charles S. Rhyne;* and for the National League of Cities et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch,* and *Lawrence R. Velvel.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David Utevsky, Jack D. Novik,* and *Burt Neuborne;* and for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger.*

*Eric M. Rubin* and *Walter E. Diercks* filed a brief for the Outdoor Advertising Association of America, Inc., et al. as *amici curiae.*

***43** Justice REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction, but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. 748 F.2d 527 (1984). We noted probable jurisdiction, ****927**471 U.S. 1013, 105 S.Ct. 2015, 85 L.Ed.2d 297 (1985), and now reverse the judgment of the Ninth Circuit.[FN1]

FN1. This appeal was taken under 28 U.S.C. § 1254(2), which provides this Court with appellate jurisdiction at the behest of a party relying on a state statute or local ordinance held unconstitutional by a court of appeals. As we have previously noted, there is some question whether jurisdiction under § 1254(2) is available to review a nonfinal judgment. See *South Carolina Electric & Gas Co. v. Flemming,* 351 U.S. 901, 76 S.Ct. 692, 100 L.Ed. 1439 (1956); *Slaker v. O'Connor,* 278 U.S. 188, 49 S.Ct. 158, 73 L.Ed. 258 (1929). But see *Chicago v. Atchison, T. & S.F. R. Co.,* 357 U.S. 77, 82-83, 78 S.Ct. 1063, 1066-1067, 2 L.Ed.2d 1174 (1958).

> The present appeal seeks review of a judgment remanding the case to the District Court. We need not resolve whether this appeal is proper under § 1254(2), however, because in any event we have certiorari jurisdiction under 28 U.S.C. § 2103. As we have previously done in equivalent situations, see *El Paso v. Simmons,* 379 U.S. 497, 502-503, 85 S.Ct. 577, 580-581, 13 L.Ed.2d 446 (1965); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 927, 95 S.Ct. 2561, 2565, 45 L.Ed.2d 648 (1975), we dismiss the appeal and, treating the papers as a petition for certiorari, grant the writ of certiorari. Henceforth, we shall refer to the parties as "petitioners" and "respondents."

***44** In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business ... which ... has as its primary purpose the selling, renting or showing of sexually explicit materials." App. 43. The resolution contained a clause explaining that such businesses "would have a severe impact upon surrounding businesses and

residences." *Id.,* at 42.

In April 1981, acting on the basis of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3526. The ordinance prohibited any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. App. to Juris. Statement 79a. The term "adult motion picture theater" was defined as "[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' ... for observation by patrons therein." *Id.,* at 78a.

***45** In early 1982, respondents acquired two existing theaters in downtown Renton, with the intention of using them to exhibit feature-length adult films. The theaters were located within the area proscribed by Ordinance No. 3526. At about the same time, respondents filed the previously mentioned lawsuit challenging the ordinance on First and Fourteenth Amendment grounds, and seeking declaratory and injunctive relief. While the federal action was pending, the City Council amended the ordinance in several respects, adding a statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet.

In November 1982, the Federal Magistrate to whom respondents' action had been referred recommended the entry of a preliminary injunction against enforcement of the Renton ordinance and the denial of Renton's motions to dismiss and for summary judgment. The District Court adopted the Magistrate's recommendations and entered the preliminary injunction, and respondents began showing adult films at their two theaters in Renton. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent****928** injunction should issue on the basis of the record as already developed.

The District Court then vacated the preliminary injunction, denied respondents' requested permanent injunction, and entered summary judgment in favor of Renton. The court found that the Renton ordinance did not substantially restrict First Amendment interests, that Renton was not required to show specific adverse impact on Renton from the operation of adult theaters but could rely on the experiences of other cities, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the ordinance were no greater than necessary to further the governmental interests involved. Relying on *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the court held that the Renton ordinance did not violate the First Amendment.

***46** The Court of Appeals for the Ninth Circuit reversed. The Court of Appeals first concluded, contrary to the finding of the District Court, that the Renton ordinance constituted a substantial restriction on First Amendment interests. Then, using the standards set forth in *United States v. O'Brien, supra,* the Court of Appeals held that Renton had improperly relied on the experiences of other cities in lieu of evidence about the effects of adult theaters on Renton, that Renton had thus failed to establish adequately the existence of a substantial governmental interest in support of its ordinance, and that in any event Renton's asserted interests had not been shown to be unrelated to the suppression of expression. The Court of Appeals remanded the case to the District Court for reconsideration of Renton's asserted interests.

In our view, the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc., supra.* There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. *Id.,* 427 U.S., at 72-73, 96 S.Ct., at 2453 (plurality opinion of STEVENS, J., joined by BURGER, C.J., and WHITE and REHNQUIST, JJ.); *id.,* at 84, 96 S.Ct., at 2459 (POWELL, J., concurring). The Renton ordinance, like the one in *American Mini Theatres,* does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.,* at 63, and n. 18, 96 S.Ct., at 2448 and n. 18; *id.,* at 78-79, 96 S.Ct., at 2456

(POWELL, J., concurring).

[1] Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the ***47** purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See *Carey v. Brown,* 447 U.S. 455, 462-463, and n. 7, 100 S.Ct. 2286, 2291, and n. 7, 65 L.Ed.2d 263 (1980); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 98-99, 92 S.Ct. 2286, 2289, 2291-2292, 33 L.Ed.2d 212 (1972). On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. See *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 807, 104 S.Ct. 2118, 2130, 80 L.Ed.2d 772 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647-648, 101 S.Ct. 2559, 2563-2564, 69 L.Ed.2d 298 (1981).

****929** At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres,* does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's "*predominate* concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves. App. to Juris. Statement 31a (emphasis added). But the Court of Appeals, relying on its decision in *Tovar v. Billmeyer,* 721 F.2d 1260, 1266 (CA9 1983), held that this was not enough to sustain the ordinance. According to the Court of Appeals, if "*a motivating factor* " in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F.2d, at 537 (emphasis in original). This view of the law was rejected in *United States v. O'Brien,* 391 U.S., at 382-386, 88 S.Ct., at 1681-1684, the very case that the Court of Appeals said it was applying:

***48** "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive....

"... What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id.,* at 383-384, 88 S.Ct., at 1683.

The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. See App. to Juris. Statement 90a. As Justice POWELL observed in *American Mini Theatres,*"[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." 427 U.S., at 82, n. 4, 96 S.Ct., at 2458, n. 4.

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976) (emphasis added); *Community for Creative Non-Violence, supra,* 468 U.S., at 293, 104 S.Ct., at 3069; *International Society for Krishna Consciousness, supra,* 452 U.S., at 648, 101 S.Ct., at 2564. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express ***49** less favored or more controversial views." *Mosley, supra,* 408 U.S., at 95-96, 92 S.Ct., at 2289-2290.

It was with this understanding in mind that, in

*American Mini Theatres,* a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials,[FN2] zoning ordinances designed**930 to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. Justice STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication,"427 U.S., at 70, 96 S.Ct., at 2452, noting that "[i]t is th [e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech,"*id.,* at 71, n. 34, 96 S.Ct., at 2453, n. 34. Justice POWELL, in concurrence, elaborated:

> FN2. See *American Mini Theatres,* 427 U.S., at 70, 96 S.Ct., at 2452 (plurality opinion) ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate ...").

"[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings.... Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. ***50** See, *e.g., Tinker v. Des Moines School Dist.,* 393 U.S. 503, 509-511 [89 S.Ct. 733, 737-739, 21 L.Ed.2d 731] (1969); *Procunier v. Martinez,* 416 U.S. 396, 413-414 [94 S.Ct. 1800, 1811, 40 L.Ed.2d 224] (1974); *Greer v. Spock,* 424 U.S. 828, 842-844 [96 S.Ct. 1211, 1219-1220, 47 L.Ed.2d 505] (1976) (POWELL, J., concurring); cf. *CSC v. Letter Carriers,* 413 U.S. 548 [93 S.Ct. 2880, 37 L.Ed.2d 796] (1973)." *Id.,* at 82, n. 6,96 S.Ct., at 2458, n. 6.

[2] The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. See *Community for Creative Non-Violence,* 468 U.S., at 293, 104 S.Ct., at 3069; *International Society for Krishna Consciousness,* 452 U.S., at 649, 654, 101 S.Ct., at 2564, 2567. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres,* a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion); see *id.,* at 80, 96 S.Ct., at 2457 (POWELL, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial"). Exactly the same vital governmental interests are at stake here.

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 585 P.2d 1153 (1978). The opinion of the Supreme Court of Washington in *Northend Cinema,* which ***51** was before the Renton City Council when it enacted the ordinance in question here, described Seattle's experience as follows:

"The amendments to the City's zoning code which are at issue here are the ****931** culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City.... [T]he City's Department of Community Development made a study of the need for zoning controls of adult theaters.... The study analyzed the City's zoning scheme, comprehensive plan, and land uses around existing adult motion picture theaters...." *Id.,* at 711, 585 P.2d, at 1155.

"[T]he [trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record." *Id.,* at 713, 585 P.2d, at 1156.

"The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." *Id.,* at 719, 585 P.2d, at 1159.

[3] We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the ***52** problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

[4] We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas.... [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres,* 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion). Moreover, the Renton ordinance is "narrowly tailored" to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), and *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

Respondents contend that the Renton ordinance is "under-inclusive," in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail. There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that "the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials." App. 42. That Renton chose first to address the potential problems created ***53** by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on ****932** this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. See *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955).

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." App. to Juris. Statement 28a.

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. Brief for Appellees 34-37. The Court of Appeals accepted these arguments,[FN3] concluded that ***54** the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial

restriction" on speech. 748 F.2d, at 534.

> FN3. The Court of Appeals' rejection of the District Court's findings on this issue may have stemmed in part from the belief, expressed elsewhere in the Court of Appeals' opinion, that, under *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), appellate courts have a duty to review *de novo* all mixed findings of law and fact relevant to the application of First Amendment principles. See 748 F.2d 527, 535 (1984). We need not review the correctness of the Court of Appeals' interpretation of *Bose Corp.,* since we determine that, under any standard of review, the District Court's findings should not have been disturbed.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech,"*American Mini Theatres,* 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.,* at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. See *id.,* at 71, 96 S.Ct., at 2453 (plurality opinion). Renton has not used "the power to zone as a pretext for suppressing expression,"*id.,* at 84, 96 S.Ct., at 2459 (POWELL, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres,* the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the ***55 **933** First Amendment.[FN4] The judgment of the Court of Appeals is therefore

> FN4. Respondents argue, as an "alternative basis" for affirming the decision of the Court of Appeals, that the Renton ordinance violates their rights under the Equal Protection Clause of the Fourteenth Amendment. As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself. See *Young v. American Mini Theatres, Inc.,* 427 U.S., at 63-73, 96 S.Ct., at 2448-2454.
>
> Respondents also argue that the Renton ordinance is unconstitutionally vague. More particularly, respondents challenge the ordinance's application to buildings "used" for presenting sexually explicit films, where the term "used" describes "a continuing course of conduct of exhibiting [sexually explicit films] in a manner which appeals to a prurient interest." App. to Juris. Statement 96a. We reject respondents' "vagueness" argument for the same reasons that led us to reject a similar challenge in *American Mini Theatres, supra.* There, the Detroit ordinance applied to theaters "used to present material distinguished or characterized by an emphasis on [sexually explicit matter]." *Id.,* at 53, 96 S.Ct., at 2444. We held that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id.,* at 58-59, 96 S.Ct., at 2446. We also held that the Detroit ordinance created no "significant deterrent effect" that might justify invocation of the First Amendment "overbreadth" doctrine. *Id.,* at 59-61, 96 S.Ct., at 2446-2448.

*Reversed.*

Justice BLACKMUN concurs in the result.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions. But even assuming that the ordinance may fairly be characterized as content neutral, it is plainly unconstitutional under the standards established by the decisions of this Court. Although the Court's analysis is limited to ***56** cases involving "businesses that purvey sexually explicit materials,"*ante,* at 929, and n. 2, and thus does not affect our holdings in cases involving state regulation of other kinds of speech, I dissent.

I

"[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. v. Public Service Comm'n of N.Y.,* 447 U.S. 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980). The Court asserts that the ordinance is "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community,"*ante,* at 929 (emphasis in original), and thus is simply a time, place, and manner regulation.[FN1] This analysis is misguided.

FN1. The Court apparently finds comfort in the fact that the ordinance does not "deny use to those wishing to express less favored or more controversial views." *Ante,* at 929. However, content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 316, 94 S.Ct. 2714, 2724, 41 L.Ed.2d 770 (1974) (BRENNAN, J., dissenting); see also *Consolidated Edison Co. v. Public Service Comm'n of N.Y.,* 447 U.S. 530, 537, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"). Moreover, the Court's conclusion that the restrictions imposed here were viewpoint neutral is patently flawed. "As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact.... To treat such restrictions as viewpoint-neutral seems simply to ignore reality." Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U.Chi.L.Rev. 81, 111-112 (1978).

The fact that adult movie theaters may cause harmful "secondary" land-use effects may arguably give Renton a compelling****934** reason to regulate such establishments; it does not mean, however, that such regulations are content neutral. ***57** Because the ordinance imposes special restrictions on certain kinds of speech on the basis of *content,* I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consolidated Edison Co., supra,* at 536, 100 S.Ct., at 2332 (quoting *Niemotko v. Maryland,* 340 U.S. 268, 282, 71 S.Ct. 325, 333,95 L.Ed. 267 (1951) (Frankfurter, J., concurring in result)). "[B]efore deferring to [Renton's] judgment, [we] must be convinced that the city is seriously and comprehensively addressing" secondary-land use effects associated with adult movie theaters. *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 531, 101 S.Ct. 2882, 2904, 69 L.Ed.2d 800 (1981) (BRENNAN, J., concurring in judgment). In this case, both the language of the ordinance and its dubious legislative history belie the Court's conclusion that "the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." *Ante,* at 929.

A

The ordinance discriminates on its face against certain forms of speech based on content. Movie theaters specializing in "adult motion pictures" may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Other motion picture theaters, and other forms of "adult entertainment," such as bars, massage parlors, and adult bookstores, are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the "secondary effects" associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit. The Court ignores this discriminatory treatment, declaring that Renton is free "to address the potential problems created by one particular kind of adult business," *ante,* at 931, and to amend the ordinance in the ***58** future to include other adult enterprises. *Ante,* at 932 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955)).[FN2] However, because of the First Amendment interests at stake here, this one-step-at-a-time analysis is wholly inappropriate.

> FN2. The Court also explains that "[t]here is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton." *Ante,* at 931. However, at the time the ordinance was enacted, there was no evidence that any *adult movie theaters* were located in, or considering moving to, Renton. Thus, there was no legitimate reason for the city to treat adult movie theaters differently from other adult businesses.

"This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See *e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Police Dept. of Chicago v. Mosley,* 408 U.S., at 95 [92 S.Ct., at 2290]." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 215, 95 S.Ct. 2268, 2275, 45 L.Ed.2d 125 (1975).

In this case, the city has not justified treating adult movie theaters differently from other adult entertainment businesses. The ordinance's underinclusiveness is cogent evidence that it was aimed at the *content* of the films shown in adult movie theaters.

****935** B

Shortly *after* this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been "to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land ***59** use planning." App. to Juris. Statement 81a. The amended ordinance also lists certain conclusory "findings" concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance. *Id.,* at 81a-86 a. The city points to these provisions as evidence that the ordinance was designed to control the secondary effects associated with adult movie theaters, rather than to suppress the content of the films they exhibit. However, the "legislative history" of the ordinance strongly suggests otherwise.

Prior to the amendment, there was no indication that the ordinance was designed to address any "secondary effects" a single adult theater might create. In addition to the suspiciously coincidental timing of the amendment, many of the City Council's "findings" do not relate to legitimate land-use concerns. As the Court of Appeals observed, "[b]oth the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter." 748 F.2d 527, 537 (CA9 1984).[FN3] That some residents may be offended by the *content* of the films shown at adult movie theaters cannot form the basis for state regulation of speech. See *Terminiello v. Chicago,* 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

> FN3. For example, "finding" number 2 states that
>
> "[l]ocation of adult entertainment land

> uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive, consensual sexual relations." App. to Juris. Statement 86a.
>
> "Finding" number 6 states that
>
> "[l]ocation of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses." *Ibid.*

Some of the "findings" added by the City Council do relate to supposed "secondary effects" associated with adult movie ***60** theaters.[FN4] However, the Court cannot, as it does, merely accept these *post hoc* statements at face value. "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Schad v. Mount Ephraim,* 452 U.S. 61, 77, 101 S.Ct. 2176, 2187, 68 L.Ed.2d 671 (1981) (BLACKMUN, J., concurring). As the Court of Appeals concluded, "[t]he record presented by Renton to support its asserted interest in enacting the zoning ordinance is very thin." 748 F.2d, at 536.

> FN4. For example, "finding" number 12 states that
>
> "[l]ocation of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses." *Id.,* at 83a.

The amended ordinance states that its "findings" summarize testimony received by the City Council at certain public hearings. While none of this testimony was ever recorded or preserved, a city official reported that residents had objected to having adult movie theaters located in their community. However, the official was unable to recount any testimony as to how adult movie theaters would specifically affect the schools, churches, parks, or residences "protected" by the ordinance. See App. 190-192. The City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater, and never considered whether residents' concerns could be met by "restrictions****936** that are less intrusive on protected forms of expression." *Schad, supra,* 452 U.S., at 74, 101 S.Ct., at 2186. As a result, any "findings" regarding "secondary effects" caused by adult movie theaters, or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions. Such "findings" were not such as are required to justify the burdens***61** the ordinance imposed upon constitutionally protected expression.

The Court holds that Renton was entitled to rely on the experiences of cities like Detroit and Seattle, which had enacted special zoning regulations for adult entertainment businesses after studying the adverse effects caused by such establishments. However, even assuming that Renton was concerned with the same problems as Seattle and Detroit, it never actually reviewed any of the studies conducted by those cities. Renton had no basis for determining if any of the "findings" made by these cities were relevant to *Renton's* problems or needs.[FN5] Moreover, since Renton ultimately adopted zoning regulations different from either Detroit or Seattle, these "studies" provide no basis for assessing the effectiveness of the particular restrictions adopted under the ordinance.[FN6] Renton cannot merely rely on the general experiencesof ***62** Seattle or Detroit, for it must "justify its ordinance in the context of *Renton's* problems-not Seattle's or Detroit's problems." 748 F.2d, at 536 (emphasis in original).

> FN5. As part of the amendment passed after this lawsuit commenced, the City Council added a statement that it had intended to rely on the Washington Supreme Court's opinion in *Northend Cinema, Inc. v. Seattle,* 90

Wash.2d 709, 585 P.2d 1153 (1978), cert. denied *sub nom. Apple Theatre, Inc. v. Seattle,* 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979), which upheld Seattle's zoning regulations against constitutional attack. Again, despite the suspicious coincidental timing of the amendment, the Court holds that "Renton was entitled to rely ... on the 'detailed findings' summarized in the ...*Northend Cinema* opinion." *Ante,* at 931. In *Northend Cinema,* the court noted that "[t]he record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." 90 Wash.2d, at 719, 585 P.2d, at 1159. The opinion however, does not explain the evidence it purports to summarize, and provides no basis for determining whether Seattle's experience is relevant to Renton's.

FN6. As the Court of Appeals observed:

> "Although the Renton ordinance *purports* to copy Detroit's and Seattle's, it does not solve the same problem in the same manner. The Detroit ordinance was intended to disperse adult theaters throughout the city so that no one district would deteriorate due to a concentration of such theaters. The Seattle ordinance, by contrast, was intended to *concentrate* the theaters in one place so that the whole city would not bear the effects of them. The Renton Ordinance is allegedly aimed at protecting certain uses-schools, parks, churches and residential areas-from the perceived unfavorable effects of an adult theater." 748 F.2d, at 536 (emphasis in original).

In sum, the circumstances here strongly suggest that the ordinance was designed to suppress expression, even that constitutionally protected, and thus was not to be analyzed as a content-neutral time, place, and manner restriction. The Court allows Renton to conceal its illicit motives, however, by reliance on the fact that other communities adopted similar restrictions. The Court's approach largely immunizes such measures from judicial scrutiny, since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for adult theaters.[FN7] Rather than speculate about Renton's motives for adopting such measures, our cases require the conclusion that the ordinance, like any other content-based restriction on speech, is constitutional "only if the [city] can show ****937** that [it] is a precisely drawn means of serving a compelling [governmental] interest." *Consolidated Edison Co. v. Public Service Comm'n of N.Y.,* 447 U.S., at 540, 100 S.Ct., at 2334; see also *Carey v. Brown,* 447 U.S. 455, 461-462, 100 S.Ct. 2286, 2290-2291, 65 L.Ed.2d 263 (1980); *Police Department of Chicago v. Mosley,* 408 U.S. 92, 99, 92 S.Ct. 2286, 2292, 33 L.Ed.2d 212 (1972). Only this strict approach can insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression.

FN7. As one commentator has noted:

> "[A]nyone with any knowledge of human nature should naturally assume that the decision to adopt almost any content-based restriction might have been affected by an antipathy on the part of at least some legislators to the ideas or information being suppressed. The logical assumption, in other words, is not that there is not improper motivation but, rather, because legislators are only human, that there is a substantial risk that an impermissible consideration has in fact colored the deliberative process." Stone, *supra* n. 1, at 106.

***63** Applying this standard to the facts of this case, the ordinance is patently unconstitutional. Renton has not shown that locating adult movie theaters in proximity to its churches, schools, parks, and residences will necessarily result in undesirable "secondary effects," or that these problems could not be effectively addressed by less intrusive restrictions.

II

Even assuming that the ordinance should be treated like a content-neutral time, place, and manner restriction, I would still find it unconstitutional. "[R]estrictions of this kind are valid provided ... that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of

the information." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 648, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981). In applying this standard, the Court "fails to subject the alleged interests of the [city] to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations." *Community for Creative Non-Violence,* 468 U.S., at 301, 104 S.Ct., at 3073 (MARSHALL, J., dissenting). The Court "evidently [and wrongly] assumes that the balance struck by [Renton] officials is deserving of deference so long as it does not appear to be tainted by content discrimination." *Id.,* at 315, 104 S.Ct., at 3080. Under a *proper* application of the relevant standards, the ordinance is clearly unconstitutional.

A

The Court finds that the ordinance was designed to further Renton's substantial interest in "preserv[ing] the quality of urban life." *Ante,* at 930. As explained above, the record here is simply insufficient to support this assertion. The city made no showing as to how uses "protected" by the ordinance would be affected by the presence of an adult movie theater. Thus, the Renton ordinance is clearly distinguishable from ***64** the Detroit zoning ordinance upheld in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). The Detroit ordinance, which was designed to disperse adult theaters throughout the city, was supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood. *Id.,* at 55, 96 S.Ct., at 2445; see also *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 711, 585 P.2d 1153, 1154-1155 (1978), cert. denied *sub nom. Apple Theatre, Inc. v. Seattle,* 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979) (Seattle zoning ordinance was the "culmination of a long period of study and discussion"). Here, the Renton Council was aware only that some residents had complained about adult movie theaters, and that other localities had adopted special zoning restrictions for such establishments. These are not "facts" sufficient to justify the burdens the ordinance imposed upon constitutionally protected expression.

B

Finally, the ordinance is invalid because it does not provide for reasonable alternative avenues of communication. The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five ****938** percent of the city. However, the Court of Appeals found that because much of this land was already occupied, "[l]imiting adult theater uses to these areas is a substantial restriction on speech." 748 F.2d, at 534. Many "available" sites are also largely unsuited for use by movie theaters. See App. 231, 241. Again, these facts serve to distinguish this case from *American Mini Theaters,* where there was no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses. See *American Mini Theaters, supra,* 427 U.S., at 71, n. 35, 96 S.Ct., at 2453 n. 35 (plurality opinion) ("The situation would be quite different if the ordinance had the effect of ... greatly restricting access to ... lawful speech"); see also *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1214 (CA5 1982) (ordinance effectively banned adult theaters ***65** by restricting them to " 'the most unattractive, inaccessible, and inconvenient areas of a city' "); *Purple Onion, Inc. v. Jackson,* 511 F.Supp. 1207, 1217 (ND Ga.1981) (proposed sites for adult entertainment uses were either "unavailable, unusable, or so inaccessible to the public that ... they amount to no locations").

Despite the evidence in the record, the Court reasons that the fact "[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Ante,* at 932. However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel "the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Ibid.* However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders. The ordinance "greatly restrict[s] access to ... lawful speech," *American Mini Theatres, supra,* 427 U.S., at

71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion),
and is plainly unconstitutional.

U.S.Wash.,1986.
City of Renton v. Playtime Theatres, Inc.
475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, 54 USLW
4160, 12 Media L. Rep. 1721

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CBAS Enterprize, Inc. v. City of Maumee
N.D.Ohio,2003.

United States District Court,N.D. Ohio,Western Division.
BAS ENTERPRIZE, INC., et al., Plaintiff,
v.
THE CITY OF MAUMEE, et al., Defendant.
**No. 3:02 CV 7583.**

Sept. 22, 2003.

Lessor and lessee of business property brought action against city for declaratory, injunctive, and monetary relief, challenging both validity of city ordinance restricting locations in which sexually oriented businesses were permitted uses and city's application of that ordinance to lessee. Parties cross-moved for summary judgment. The District Court, Katz, J., held that: (1) *O'Brien* test for evaluating restrictions on symbolic speech was appropriate test for determining constitutionality of ordinance; (2) ordinance was content-neutral restriction designed to combat negative secondary effects associated with adult entertainment establishments, and thus was valid restriction on speech; (3) lessee was subject to ordinance amendment; (4) ordinance was valid exercise of municipal police power under Ohio law; (5) lessor and lessee were entitled to refund of bond posted in conjunction with temporary restraining order (TRO); and (6) city was entitled to award of attorney fees of $4,461.00 in connection with civil contempt proceedings.

Summary judgment for city.

West Headnotes

**[1] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in General. Most Cited Cases
(Formerly 92k90.4(1))
*O'Brien* test for evaluating restrictions on symbolic speech was appropriate test for determining constitutionality of city zoning ordinance restricting locations in which sexually oriented businesses were permitted uses. U.S.C.A. Const.Amend. 1.

**[2] Constitutional Law 92 1504**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1504 k. Exercise of Police Power; Relationship to Governmental Interest or Public Welfare. Most Cited Cases
(Formerly 92k90(3))

**Constitutional Law 92 1505**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1505 k. Narrow Tailoring. Most Cited Cases
(Formerly 92k90(3))
Under *O'Brien* test for evaluating restrictions on symbolic speech, law will meet constitutional muster if it (a) is within the constitutional power of the government, and (b) furthers an important or substantial government interest that (c) is unrelated to the suppression of free expression, and (d) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. U.S.C.A. Const.Amend. 1.

**[3] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses;

Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(3))
To establish necessary link, under First Amendment, between concentrations of adult operations and asserted secondary impacts in support of ordinance restricting adult entertainment businesses, city need not conduct new studies, but rather may rely on those already generated by other cities, so long as whatever evidence city relies upon is reasonably believed to be relevant to the problem that city addresses, and may also rely on the previous findings in existing jurisprudence. U.S.C.A. Const.Amend. 1.

**[4] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(3))
In seeking to show requisite link between adoption of ordinance restricting locations in which sexually oriented businesses were permitted uses and adverse secondary effects associated with adult entertainment businesses, small municipality could rely on studies conducted in large cities, inasmuch as it was character of conduct in a study that determined its relevance. U.S.C.A. Const.Amend. 1.

**[5] Constitutional Law 92 2212**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2212 k. Content Neutrality. Most Cited Cases
(Formerly 92k90.4(3))

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
City zoning ordinance restricting locations in which sexually oriented businesses were permitted uses was content-neutral restriction designed to combat negative secondary effects associated with adult entertainment establishments, and thus was valid restriction on speech. U.S.C.A. Const.Amend. 1.

**[6] Zoning and Planning 414 376**

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k375 Right to Permission, and Discretion
414k376 k. Change of Regulations as Affecting Right. Most Cited Cases
Building permit application was not complete when it was submitted to city's zoning and buildings division, in that plans required corrections, and therefore applicant did not come within provision of ordinance that precluded application of amendment imposing restrictions on sexually oriented businesses to structures for which building permit had been granted or for which complete application with necessary plans were filed with zoning inspector prior to amendment's enactment.

**[7] Statutes 361 188**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
In interpreting legislation, words are given their plain and ordinary meaning absent evidence of legislative intent to the contrary.

**[8] Statutes 361 188**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

When the text of a statute contains an undefined term, that term receives its ordinary and natural meaning.

**[9] Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
City ordinance restricting locations in which sexually oriented businesses were permitted uses was rationally related to public health, safety, morals, and general welfare of city and its residents, and thus was valid exercise of municipal police power under Ohio law.

**[10] Injunction 212 150**

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 k. Restraining Order Pending Hearing of Application. Most Cited Cases
Movants were entitled to refund of bond posted in conjunction with temporary restraining order (TRO) when district court adopted parties' stipulation and proposed order rendering request for injunctive relief moot, notwithstanding opposing party's contention that proceeds were properly applied to any award of attorney fees or sanctions imposed pursuant to opposing party's motion to show cause why movants should not be held in contempt for violating adopted order, inasmuch as purpose of bond, under rule, was to provide payment for costs or damages incurred by party found to have been wrongfully enjoined or restrained. Fed.Rules Civ.Proc.Rule 65(c), 28 U.S.C.A.

**[11] Contempt 93 68**

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k68 k. Costs and Fees. Most Cited Cases
City was entitled to award of attorney fees of $4,461.00 in connection with civil contempt proceedings in which district court found that building permit applicant had violated order that required city to grant applicant certificate of occupancy for business as long as that business operated in conformance with relevant zoning laws, notwithstanding applicant's contention that sanctions already imposed, which included its inability to use certain areas of business' premises so long as they remained closed areas and requirement that it pay city almost $8500 for monitoring business' operations, were sufficient and obviated need for further sanctions.

**[12] Contempt 93 68**

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k68 k. Costs and Fees. Most Cited Cases
Award of attorney fees is appropriate for civil contempt in situations in which court orders have been violated.

***675** John P. Feldmeier, H. Louis Sirkin, Cincinnati, OH, for Plaintiffs/Counter-Defendants.
Sheilah H. McAdams, Marsh McAdams Scharfy Brogan & Schaefer, Maumee, OH, Joan C. Szuberla, Spengler Nathanson, Toledo, OH, for Defendants/Counter-Claimants.

*MEMORANDUM OPINION*

KATZ, District Judge.
This matter is before the Court on Plaintiffs' motion for summary judgment (Doc. No. 12) and Defendants' cross-motions for summary judgment (Doc. No. 20). Plaintiffs have filed a combined response and reply (Doc. No. 30) and Defendants have filed a reply (Doc. No. 31). Also pending before the Court is Plaintiffs' motion to refund TRO Bond (Doc. No. 13) as to which Defendants have filed a response (Doc. No. 18). Defendants have also filed a motion for attorney's fees (Doc. No. 26) as to which Plaintiffs have filed a response (Doc. No. 29) and Defendants have filed a reply (Doc. No. 32).

The Court has jurisdiction to decide this matter pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 2201 & 2202, ***676**42 U.S.C. § 1983 and 28 U.S.C. § 1367. For the reasons stated below, Plaintiffs' motion for summary judgment will be denied. Defendant's cross-motion for summary judgment will be granted. Plaintiffs' motion to refund TRO bond will be granted. Defendants' motion for award of attorney's fees in connection with contempt proceeding will also be granted.

***BACKGROUND***

On May 30, 2002, Plaintiff BAS Enterprize, Inc., d/b/a as Halo Ventures, Inc. ("Halo Ventures") entered into a lease agreement with Plaintiff BAJA Investments LLC ("BAJA") for the property located at 1500 Holland Road (the "property") in the City of Maumee, Ohio ("Maumee"). The lease agreement became effective on June 1, 2002. On that same day, Halo Ventures submitted an application for a building permit to Maumee's Division of Building and Zoning within the Department of Public Safety, which included blue prints that included a label "No Change In Use." [FN1]At that point in time, the property was zoned by Maumee as a C-2 General Commercial District.

FN1. Previously, the property had been used as a micro-brewery and restaurant.

On June 3, 2002, the Maumee City Council (the "City Council") unanimously voted to approve as an emergency amendment to its Zoning Code (the "Code"), Ordinance No. 88-2002 (the "Ordinance"), following the recommendation of the Municipal Planning Commission, to which it had previously referred the Ordinance.[FN2] The Municipal Planning Commission had considered the Ordinance at a public hearing on May 28, 2002. The Ordinance added definitions to Section 1103.01 of Code for sexually oriented businesses, adult entertainment, and adult uses of land.

FN2. Ohio law provides municipal planning commissions the authority to make zoning recommendations "in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare ..."OHIO REV.CODE § 713.06.

Moreover, the Ordinance also amended Section 1127.02 of the Code to require that a sexually oriented business locate within the M-2 Industrial District, where such business would be a permitted use. The Ordinance does not completely ban adult establishments, but allows adult cabarets [FN3] and other sexually oriented businesses featuring nude dancing, and display of specified anatomical areas [FN4] and specified sexual activities [FN5] to operate in the M-2 Industrial District. (Doc. No. 12, Mohler Aff., Ex. ***677** 2(B), p. 7). The Ordinance also included several performance standards such as spacial and/or distance requirements and the limitation that no sexually oriented business may locate within one-thousand (1000) feet of a residential zoning district, library, education institution, park, recreational facility, religious place of worship, child day care facility, playground, swimming pool or any planned unit development that includes residential land uses.

FN3. The Ordinance defines an Adult Cabaret to be:

> A nightclub, bar restaurant or other similar establishment that regularly features live performances characterized by the exposure of specified anatomical areas or by specified sexual activities, or films, motion pictures, video cassettes, DVD, slides, or other photographic reproductions in which a substantial portion of the total presentation time is devoted to showing of material characterized by the emphasis upon the depiction or description of the specified activities or specified anatomical areas. (Doc. No.12, Mohler Aff., Ex. 2(B), p. 2).

FN4. The Ordinance defines specified sexual anatomical areas as to include:

> [L]ess than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the areola; or human male genitals in a discernable turgid state, even if completely and opaquely covered. *Id.* at 6.

FN5. The Ordinance defines specified sexual activities to include:

> i. the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts; ii. sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; iii. masturbation, actual or simulated; [and] iv. excretory functions as part or in connection with any of the activities set forth in subdivisions. *Id.*

On July 18, 2002, Maumee provided Halo Ventures with the requested building permit (the "permit"). Prior to issuing the permit, however, Bruce Wholf ("Wholf"), Maumee's Building and Zoning Inspector, issued two Correction Letters dated June 12 and June 26, 2002 due to deficiencies in the documents Halo Ventures had submitted on May 30, 2002. Pursuant to the permit, Halo Ventures began internal renovations to the property. A substantial amount of correspondence and conversations between Maumee and Halo Ventures then took place as Wholf tried to determine if the intended use of the property was for a sexually oriented business.

Halo Ventures completed renovations to the property and applied for a Certificate of Occupancy on October 17, 2002. The application described the intended use of the property as a "Restaurant, Bar, Nightclub, Live entertainment." (Doc. No. 21, Wholf Aff., Ex. 3(H)). On October 30, 2002, Wholf sent Halo Ventures a letter asserting that the reference to live entertainment on the Certificate of Occupancy application raised a concern that the property would be used for the purposes of a sexually oriented business, which was prohibited in the C-2 General Commercial District under the Code as amended by the Ordinance. He emphasized that this was not the first time this issue had arisen. Wholf maintained Halo Ventures needed to provide further information regarding the intended use to ensure compliance with the Code.

On October 31, 2002, Halo Ventures responded that the intended use and operation of business as set forth in its application for a Certificate of Occupancy would be consistent with the prior use of the property, and again requested Maumee to make the necessary inspection. Wholf then responded on November 5, 2002, reiterating his ongoing concerns about the nature of the intended use and its conformity withe Code, which he was responsible for enforcing. Halo Ventures sent further correspondence including a letter dated November 11, 2002, which maintained that "the live entertainment to be presented at 1500 Holland Road will be in full compliance with the City of Maumee Zoning Code and will not constitute a 'sexually oriented business' as defined in the City Zoning Code."*Id.* at Ex. 3(M).

Though neither a Certificate of Occupancy nor a food service permit had been issued, Halo Ventures opened for business on November 21, 2002, operating as XO, presenting expressive entertainment and dance performances. That same evening, Wholf issued an administrative order closing XO and posted notices of illegal occupancy. On December 6, 2002, Plaintiffs filed a nine (9) count Verified Complaint seeking declaratory, injunctive and monetary relief.[FN6] Plaintiffs also filed a motion ***678** for a preliminary injunction, along with a motion for a TRO seeking to prevent Defendants' from enforcing the administrative order and the Ordinance. On June 9, 2002, the Honorable John W. Potter held a hearing on Plaintiffs' motion for a TRO and ordered Defendants "to perform an inspection for the issuance of a certificate of occupancy to plaintiffs and to issue a ruling to plaintiffs regarding their application for a certificate of occupancy forthwith." (Doc. No. 4). The hearing on Plaintiffs' motion for a preliminary injunction was vacated as the parties entered into a stipulation that Maumee would issue a Certificate of Occupancy subject to Plaintiffs operating XO "in accordance with all applicable and relevant zoning laws for the C-2 General Commercial District, including amendments to the City of Maumee Zoning Ordinance enacted on June 3, 2002," until the Court reached the ultimate merits of Plaintiffs' Complaint. (Doc. No. 8).

FN6. Plaintiffs' Complaint alleges that Maumee's zoning ordinance is an illegal content-based restraint on freedom of expression in violation of the First and Fourteenth Amendment of the United States Constitution, and Article I, Section 11 of the Ohio Constitution (Count I); that Maumee's zoning ordinance fails to provide proper procedural safeguards including prompt judicial review and issuance of a license in violation of the First and Fourteenth Amendment of the United States Constitution, and Article I, Section 11 of the Ohio Constitution (Count II); Defendants have required information from Plaintiffs not sought from other applicants of Certificates of Occupancy in violation of the right to equal protection under the Fourteenth Amendment to the United States Constitution, and the Ohio Constitution (Count III); Plaintiffs' use of the property is a lawful non-conforming use (Count IV); the Ordinance represents an illegal content-based restraint on freedom of

expression in violation of the First, Fifth and Fourteenth Amendment of the United States Constitution, and Article I, Section 11 of the Ohio Constitution (Count V); the Ordinance is invalid because Defendants failed to provide notice and public hearings required by codified ordinances at the time the Ordinance was adopted (Count VI); the Ordinance constitutes an invalid exercise of the municipal police power (Count VII); application of the Ordinance to Plaintiffs has resulted in unrecouped profits in violation of the Fifth and Fourteenth Amendments of the United States Constitution (Count VIII); and Defendants have unconstitutionally applied the Ordinance and abused their authority to grant a Certificate of Occupancy in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 11 of the Ohio Constitution (Count IX).

Plaintiffs assert that they are entitled to summary judgment on the premise that the Ordinance represents a presumptively invalid content-based restriction on expressive conduct, their use of the property is a lawful non-conforming use and the Ordinance constitutes an invalid exercise of the municipal police power. Defendants' cross-motion for summary judgement is based on the same issues.[FN7]

FN7. Defendants argue that this demonstrates Plaintiffs have consolidated the nine (9) counts in their complaint into three claims for purposes of summary judgment. While Plaintiffs do not concede this point, the bases of the parties' motions for summary judgment appear to address Counts I, II, III, IV, V, VII, and IX. Moreover, James Turner ("Turner"), President of Halo Ventures, was present and participated in the May 28, 2002, public hearing during which the Municipal Planning Commission considered the Ordinance prior to its enactment, which would obviate Count VI. Given the Court's disposition of the parties' motions for summary judgment *infra,* Plaintiffs' claims under Count VIII cannot survive.

***DISCUSSION***

*A. SUMMARY JUDGMENT STANDARD*

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). The moving party bears the initial responsibility of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." ***679***Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The movant may meet this burden by demonstrating the absence of evidence supporting one or more essential elements of the non-movant's claim. *Id.* at 323-25, 106 S.Ct. 2548. Once the movant meets this burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2541, 91 L.Ed.2d 202 (1986) (*quoting*FED.R.CIV.P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Rather, Rule 56(e)"requires the nonmoving party to go beyond the pleadings" and present some type of evidentiary material in support of its position. *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553; *see also Harris v. General Motors Corp.,* 201 F.3d 800, 802 (6th Cir.2000). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552.

"In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences therefrom in a light most favorable to the nonmoving party." *Williams v. Belknap,* 154 F.Supp.2d 1069, 1071 (E.D.Mich.2001) (citing *60 Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th

Cir.1987)). However, " 'at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter,' "*Wiley v. U.S.*, 20 F.3d 222, 227 (6th Cir.1994) (quoting *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505); therefore, "[t]he Court is not required or permitted ... to judge the evidence or make findings of fact." *Williams*, 154 F.Supp.2d at 1071. The purpose of summary judgment "is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 130 F.Supp.2d 928, 930 (S.D.Ohio 1999). Ultimately, this Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52, 106 S.Ct. 2505; *see also Atchley v. RK Co.*, 224 F.3d 537, 539 (6th Cir.2000).

*B. VALIDITY OF THE ORDINANCE*

1. Constitutional Validity

[1][2] Plaintiffs' argue that the Ordinance represents a presumptively invalid content-based restriction designed to suppress the presentation of protected expressive conduct. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), the United States Supreme Court stated:

Being in a "state of full nudity" is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think it falls only within the outer ambit of the First Amendment's protection. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. [560, 565-66, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) ] (plurality opinion); *Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981).

To determine what level of scrutiny applies ... we must decide "whether the ***680** State's regulation is related to the suppression of expression."(citations omitted). If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from [*United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)] for evaluating restrictions on symbolic speech. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test must be justified under a more demanding standard. (citation omitted).

In *Harris v. Fitchville Township Trs.*, 99 F.Supp.2d 837, 842-43 (N.D.Ohio 2000), this Court, applied the *O'Brien* test to determine the constitutionality of an ordinance designed to regulate public nudity to combat the negative secondary effects due to the presence of adult establishments. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (asserting that zoning ordinances employed to address negative secondary impacts of sexually explicit businesses "are to be reviewed under the standards applicable to 'content-neutral' time, place and manner regulations"). *See also Barnes*, 501 U.S. at 566, 111 S.Ct. 2456 (describing the standards set forth in *O'Brien* as embodying the standards applicable to content-neutral time, place and manner regulations); *DLS v. City of Chattanooga*, 107 F.3d 403, 410 n. 6 (6th Cir.1997) (noting that the standard for assessing time, place and manner regulations "is materially identical to the *O'Brien* test"). Accordingly, the validity of the Ordinance is analyzed using the four-factor *O'Brien* test, and will:

meet[ ] constitutional muster if it: (a) is within the constitutional power of the government; and (b) furthers an important or substantial government interest that (c) is unrelated to the suppression of free expression; and (d) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Harris*, 99 F.Supp.2d at 842.

[3] In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437, 122 S.Ct. 1728, 152 L.Ed.2d 670 (U.S.2002) (plurality opinion) the Supreme Court asserted that a municipality "certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary impacts." A city need not conduct new studies, but may rely on those "already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. A city may also rely on the previous findings in existing jurisprudence. *Renton*, 475 U.S. at 50-51, 106 S.Ct. 925. *See also Erie*, 529

U.S. at 297, 120 S.Ct. 1382. Nevertheless, "a municipality [cannot] get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728.

Plaintiffs assert that Defendants have failed to establish the requisite nexus between adoption of the Ordinance and the circumscription of potential adverse secondary effects associated with adult entertainment.[FN8] Halo Ventures and BAJA direct the Court to *Lakeland Lounge of Jackson v. City of Jackson, Mississippi,* 973 F.2d 1255 (5th Cir.1992) and ***681***J & B Entm't v. City of Jackson, Mississippi,* 152 F.3d 362 (5th Cir.1998). In *Lakeland,* the court asserted that preambulatory language contained in a zoning ordinance expressing a purpose to address negative secondary effects may not in and of itself be sufficient to sustain its validity "without specific attention to secondary effects." *Lakeland,* 973 F.2d at 1259. The *Lakeland* court, however, stated:

> FN8. Since this argument focuses on the second prong of *O'Brien,* for purposes of this motion the Court shall presume that Plaintiffs' are not challenging the Ordinance's validity under the other three prongs.

Nevertheless, in context here, where (1) the drafters of the ordinance did rely upon studies of secondary effects, (2) a majority of the council members did receive some information about the secondary effects during an open hearing of the planning board, and (3) nothing in the record otherwise suggests impermissible motives on the part of the councilmembers, the language of the preamble shows the city council's awareness of the studies upon which the planning staff relied when framing the ordinance and reflects that a reasonable legislature with constitutional motives could have enacted the ordinance.
*Id.* (citations omitted). *See also Encore Videos, Inc., v. City of San Antonio,* 330 F.3d 288, 291 (5th Cir.2003).

Notably, in *Lakeland,* the court asserted that the city council "could properly place some reliance upon others" to do requisite research, and need not even personally review the studies on which the drafters relied. *Id.* at 1258. *See also Threesome Entm't v. Strittmather,* 4 F.Supp.2d 710, 719 (N.D.Ohio 1998) (asserting that municipal legislators need not review such studies themselves "so long as they receive recommendations from knowledgeable persons") (citing *Lakeland,* at 1258-59).

In *J & B Entm't* the court found that despite preambulatory language in the ordinance, the city could not satisfy the second prong of *O'Brien* as there was an "absence of any evidence suggesting that the city enacted the [o]rdinance with 'specific attention to secondary effects.' " *J & B Entm't,* 152 F.3d at 374. The *J & B Entm't* court noted that "[t]he record contains neither any deposition testimony nor any affidavit from any [c]ity council member or city employee that might clarify" the rationale for enacting the Ordinance. *Id.* at 373. In fact "[n]o explanation of what specific secondary effects motivated Jackson to enact the [o]rdinance appear[ed] in its text, and the [c]ity [c]ouncil failed to make any specific legislative findings prior to enactment." *Id.* at 374.

In the case *sub judice,* the preamble of the Ordinance unequivocally expresses the City Council's concern over negative secondary effects, especially on children, associated with adult entertainment businesses. In fact, the Preamble of the Ordinance states in pertinent part:

WHEREAS, documentation regarding the negative secondary impacts of sexually oriented businesses on neighborhoods, property values, and quality of life issues is found in previously published studies for cities including: Denver, Colorado; New York, New York; Indianapolis, Indiana; Springfield, Missouri; Kansas City, Missouri; Boston, Massachusetts; copies of which studies are on file in the City offices; and

WHEREAS, it is the desire of Council to protect the children of the City of Maumee from exposure to sexually oriented activities and materials.

(Doc. No. 12, Mohler Aff., Ex. 2(B), p. 1).

Moreover, Section 1127(a)(2) of the Code as amended by the Ordinance also reads:

*Purpose for Regulation of Sexually Oriented Business.* Additional regulations are imposed upon sexually oriented businesses because of the expected

secondary impacts on the residential neighborhoods and other specific land uses.

*Id.* at 7.

[4] The affidavits of Shielah McAdams, the Law Director of Maumee, Wholf and ***682** Randy Mielnik, a senior Vice President of Poggemeyer Design Group, the drafters of the Ordinance, demonstrate that they discussed relevant case law from the United States Supreme Court and the Sixth Circuit Court of Appeals, and relied on studies of the secondary effects of adult businesses prepared by other cities.[FN9] (Doc. No. 21, Ex. 2, McAdam's Aff., ¶ 6; Doc. No. 21, Wholf Aff., Ex. 3, ¶ 2; Doc. No. 21, Mielnik Aff., Ex. 4, ¶¶ 6-7). These affidavits also establish that the focus of the drafters was not to prohibit adult business from operating in Maumee, but to limit the impact of expected negative secondary impacts. (Doc. No. 21, McAdams Aff., ¶ 13; Doc. No. 21, Wholf Aff., ¶ 2; Doc. No. 21, Mielnik Aff., ¶ 8).

> FN9. Plaintiffs also argue that Defendant cannot show that studies from large cities cited in the Ordinance's preamble, and relied on by the drafters, are relevant to a small municipality such as Maumee. The Court will not linger on this argument other than to note that it is the character of the conduct in a study that determines its relevance. *See Erie*, 529 U.S. at 297, 120 S.Ct. 1382 (maintaining that relevance is based on the character of the adult entertainment; *Renton* (expressing no concern, that Renton, a city of 32,000 persons, could rely on the experience of Seattle and other cities, without reference to a disparity in size)); *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County, Md.*, 256 F.Supp.2d 385, 394-95 (D.Md.2003) (asserting that under *Erie* the test is whether covered entities "are part of a category reasonably believed to cause some of the secondary effects referred to in [other] studies").

Granted, the minutes of the Municipal Planning Commission's meeting of May 28, 2002, do not mention negative secondary impacts, and there is no evidence that any members of the City Council were in attendance. (Doc. No. 12, Feldmeier Aff., Ex. 3(B), p. 11). On the other hand, McAdams asserts that she made a presentation regarding the Ordinance to the Municipal Planning Commission at that meeting where "I identified our primary objective as the protection of children from exposure to the effects of such businesses." (Doc. No. 21, Ex. 2, McAdam's Aff., ¶ 9). She also maintains that the Municipal Planning Commission was informed of the applicable law. In addition, a transcript excerpt of the May 28 meeting shows that concerns over negative secondary impacts associated with adult establishments were discussed as part of a public hearing on the Ordinance. (Doc. No. 37, Ex. 3, pp. 27-28, 35). Such concerns included the need to minimize the potential effects on residential areas, playgrounds, churches and juveniles. *Id.* at 28.

McAdams also represents that:

> The drafters of the [O]rdinance were well aware of the possible negative secondary effects of adult businesses on neighborhoods, property values and quality of life and most particularly, of the effects of exposure to such businesses on juveniles. *Members of the City Council were made aware of these concerns. The primary concern of the Council and my own in determining where adult businesses could operate in the City was to assure that these businesses would be remote from places where minors would be likely to be exposed to them.* (Emphasis added).

(Doc. No. 21, Ex. 2, McAdam's Aff., ¶ 12).

While no member of City Council appears to have been present at the May 28 Municipal Planning Commission meeting, all members were in attendance at the City Council's February 18, 2002, meeting referring the Ordinance to the Municipal Planning Commission for its review and consideration. Significantly, a transcript excerpt of this meeting states:

> [I]f this goes to the Planning Commission, *I think it should be related that our, our primary concern is this, these ***683** be placed as far a distance as we can from child day care kids and schools, and that we've ask[ed] Ms. McAdams to look into how, how we can do that and that,* that's what the discussion was in the committee as a whole. (Emphasis added).

(Doc. No. 37, Ex. 2, pp. 3-4).

In addition, the City Council unanimously passed the Ordinance at its June 3 meeting with all members present. (Doc. No. 12, Feldmeier Aff., Ex. 3(C), pp. 1, 3; Doc. No. 37, Ex. 1).

[5] Plainly, Defendants have satisfactorily demonstrated that the Ordinance was designed and adopted to further a substantial government interest in accordance with the second prong of *O'Brien.* The City Council reasonably relied on McAdams, Wholf and Mielnik to perform the necessary research and draft the Ordinance, and accepted the recommendation of the Municipal Planning Commission which had, at least in part, relied upon the research and recommendation is of the drafters of the Ordinance. The record demonstrates unambiguously that throughout the process the rationale for adopting the Ordinance was to limit the negative secondary effects associated with adult entertainment establishments, especially the impact on juveniles. It is consistent with the language contained not only in the preamble but also the body of the Ordinance. The Ordinance is a "content-neutral" restriction designed to combat negative secondary effects associated with adult entertainment establishments. Accordingly, Plaintiffs' motion for summary judgment on the premise that the Ordinance is a content-based restriction on protected speech is denied. Defendants' cross-motion for summary judgment on the basis that the Ordinance is a valid content-neutral regulation is granted.[FN10]

> FN10. Defendants also note that *Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884 (6th Cir.2000), cited for the proposition that prior restraints on speech are presumptively invalid, is distinguishable from the case *sub judice.* They assert, and Plaintiffs do not dispute, that *Nightclubs* involved a licensing scheme, and the sole issue on appeal was whether there were sufficient procedural safeguards. *Id.* at 888-89. In contrast, the Ordinance *sub judice* is a zoning ordinance that allows adult establishments to operate in the M-2 Industrial District, and does not require the businesses or their employees to obtain licenses or permits.

2. Lawful Non-Conforming Use

[6] Since Halo Ventures submitted an application on May 30, 2002, which was prior to the City Council's enactment of the Ordinance on June 3 (Doc. No. 12, Ex. 1, Sayed Aff., ¶ 2, Doc. No. 1, ¶ 10), Plaintiffs argue that their use of the property is a lawful non-conforming use. Section 1105.09(d) of the Code provides:

> Nothing contained in this Zoning Ordinance shall require any change in the plans, construction, size or designated use of a building, structure or part thereof for which a building permit has been granted *or for which a complete application with the necessary plans has been filed with the Zoning Inspector before the enactment of amendment of this Ordinance* and the construction of which according to such permit or plan and specifications shall have been started within ninety days of the enactment of this or Ordinance or such amendment. *If any of the above requirements have not been fulfilled within the time stated above or if any building operations are discontinued for a period of ninety days, any further construction shall be in conformity with the provisions of the Ordinance.* (Emphasis added).

(Doc. No. 12, Mohler Aff., Ex. 2(A), p. 2).

Plaintiffs assert that the Code as it existed on May 30 did not distinguish between***684** sexually oriented businesses and other forms of entertainment allowing bars, taverns, indoor theaters, night clubs, dance floors and similar establishments for the purpose of amusement and entertainment to operate in the C-2 General Commercial District.

While Defendants assert a number of arguments in support of their position that Section 1105.09(d) is inapplicable to the case *sub judice,* the Court need only focus on their argument that Plaintiffs' application was not complete as submitted on May 30.[FN11] Defendants contend that Halo Ventures' application was not complete having failed to satisfy two conditions for an application to be complete, the approval of submitted plans by a state certified examiner and payment of the filing fee. (Doc. No. 21, Ex. 3, Wholf Aff., ¶ 4). *See* *Gibson v. City of Oberlin,* 171 Ohio St. 1, 167 N.E.2d 651, 654 (1960) (holding that a property owner has a vested right in the issuance of building permit when all legislative requirements have been satisfied). *See also* *Harris v. Fitchville Township Trs.,* 154 F.Supp.2d 1182, 1188 (N.D.Ohio 2001). The plans Halo Ventures submitted on May 30

were reviewed by a state certified plans examiner, and returned for corrections. *Id.* In fact, Wholf issued correction letters on June 12 and June 26, 2002 to which Plaintiffs responded.[FN12] (Doc. No. 21, Wholf Aff., Ex. 3(B) & (C)). Moreover, the filing fee was not paid until July 17. (Doc. No. 21, Ex. 3, Wholf Aff., ¶ 4). A building permit was issued on July 18, 2002. *Id.*

FN11. Defendants also maintain that Plaintiffs are not entitled to the benefit of Section 1105.09(d), having failed to establish a lawful use prior to enactment of the Ordinance, to exhaust administrative remedies or file a mandamus action.

FN12. The Court observes that Wholf issued another correction letter on July 30, 2002. (Doc. No. 21, Wholf Aff., Ex. 3(E)).

[7][8] Plaintiffs assert that "complete" is not defined in the Code, and Wholf's interpretation would render Section 1105.09(d) meaningless by conferring unlimited discretion to delay an application until an Ordinance making the contemplated use unlawful can be enacted. In interpreting legislation, words are given their plain and ordinary meaning absent evidence of legislative intent to the contrary. *Union Rural Elec. Coop., Inc. v. Public Util. Comm'n,* 52 Ohio St.3d 78, 555 N.E.2d 641, 643 (1990); *Coventry Towers, Inc. v. City of Strongsville,* 18 Ohio St.3d 120, 480 N.E.2d 412, 414 (1985). Moreover, "[w]hen the text of a statute contains an undefined term, that term receives its ordinary and natural meaning." *The Limited, Inc. v. Comm'n of Internal Revenue,* 286 F.3d 324, 332 (6th Cir.2002) (citations omitted).

Plaintiffs argue the payment of the filing fee is not mentioned in Section 1105.09(d). They also contend that as a matter of logic payment of any fees is not required until the plans submitted with the application are approved. Accepting these arguments as true, however, demonstrates the validity of Defendants contention that an application is not complete before the accompanying plans are approved by a certified examiner. This is also consistent with the plain and ordinary meaning of the word "complete". "Complete" is defined as "possessing all necessary parts, items, or elements: not lacking anything necessary." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged 465 (1986). Since the plans Halo Ventures submitted on May 30 required corrections, they were not complete, and Plaintiffs are not entitled to the benefit of Section 1105.09(d). Thus, Plaintiffs' motion for summary judgment ***685** on the basis that a lawful non-conforming use of the property had been established prior to enactment of the Ordinance is denied. Defendants' cross-motion for summary judgment premised on the same issue is granted.

3. Municipal Police Power

[9] Halo Ventures and BAJA assert that the Ordinance constitutes an invalid exercise of the municipal police power by treating adult establishments differently from other commercial establishments without having established the requisite link between the Ordinance and the negative secondary impacts its seeks to circumscribe. In *Goldberg Companies v. Council of the City of Richmond Heights,* 81 Ohio St.3d 207, 690 N.E.2d 510, 514-15 (1998), the Ohio Supreme Court stated:

A municipality or other zoning body is justified under the police power to enact zoning for the public welfare and safety. The powers, not unlimited, need only bear a rational relation to the health, safety, morals or general welfare. *Euclid v. Ambler,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 [ (1926) ].

. . . . .

[A] zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community. The burden of proof remains with the party challenging an ordinance's constitutionality, and the standard of proof remains "beyond fair debate." *See Cent. Motors [Corp. v. City of Pepper Pike,* 73 Ohio St.3d 581, 653 N.E.2d 639, 642 (1995) ].

The Court observes that there exists ample precedent for locational requirements that treat adult establishments differently from other commercial entities. *See Renton and Lakeland supra.* In *Napier v. City of Middletown,* No. CA 98-06-128, 1998 WL 857491, *5, 1998 Ohio App. LEXIS 5994 at *13 (Ohio Ct.App. 12th Dist. Dec. 14, 1998) the court asserted:

[A] municipality is justified by its police power to enact zoning for the public welfare and safety, and [ ] these powers need only bear a rational relation to the health, safety, morals or general welfare. (citations omitted). Further, sexually explicit dancing, which is not obscene does enjoy a limited degree of protection under the First Amendment of the United States Constitution. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). However, such activity is subject to valid time, place, and manner restrictions. *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29.

Although not central to its disposition of an appeal from an administrative zoning decision, the Court finds the *Napier's* discussion instructive.

Given the Court's disposition of the parties' arguments as to the constitutional validity of the Ordinance, *supra,* the Court rejects Plaintiffs' contention that the Ordinance is not rationally related to the public health, safety, morals, or general welfare of Maumee and its residents. The Ordinance is a valid exercise of the municipal police power. Accordingly, Plaintiffs' motion for summary judgment on the basis that the Ordinance is an invalid exercise of the municipal police power is denied. Defendants' cross-motion for summary judgment based on the same issue is granted.

*C. PLAINTIFFS' MOTION TO REFUND TRO BOND*

[10] Plaintiffs' move the Court to refund the TRO bond in the amount of $ 500.00, posted in conjunction with the TRO issued on December 9, 2002. Halo Ventures and BAJA argue that a refund of the TRO bond is justified by the Court's Order (Doc. No. 8) adopting the parties' ***686** stipulation and proposed Order. Under the terms of the Order, Defendants granted Plaintiffs a Certificate of Occupancy so long as XO operated in conformance with all applicable and relevant zoning laws for the C-2 General Commercial District, including amendments to the City of Maumee Zoning Ordinance enacted on June 3, 2002. As a result, the need for injunctive relief became moot, and Plaintiffs' withdrew their motion for a preliminary injunction and the hearing was vacated.

Defendants assert that the proceeds should not be refunded and be applied to any award of attorney's fees (or sanctions) imposed as a result of the Court's disposition, discussed *infra,* of Defendants' motion to show cause as to why Plaintiffs should not be held in contempt for violating the aforementioned Order. (Doc. No. 14). This argument is not well taken. Under the terms of the Federal Rules of Civil Procedure, the purpose of the bond is to provide "payment of such costs and damages as may be incurred by any party who is found to have been wrongfully enjoined or restrained." FED.R.CIV.P. 65(c). Accordingly, Plaintiffs' motion to refund the TRO bond is granted.

*D. DEFENDANTS' MOTION FOR AWARD OF ATTORNEY'S FEES IN CONNECTION WITH CONTEMPT PROCEEDING*

[11] Defendants' move the Court to award attorney's fees in the amount of $ 4,641.00 in connection with the contempt proceeding initiated as a result of their aforementioned motion to show cause.[FN13] The Court held a hearing and issued a Amended Order granting Defendants' motion which stated:

> FN13. Defendants have supplied supporting data. (Doc. No. 28).

Defendants' motion is granted; Plaintiffs are found by clear and convincing evidence to be in contempt of this Court's prior order. While the evidence adduced at the hearing failed to demonstrate an intent to violate said order, intent is not relevant in this civil contempt action. Further, it is clear that under the present configuration of the facility, compliance is not likely to occur. Good faith attempts to comply with the Court's prior Order is not a defense in a civil action. (Doc. No. 25).

[12] Plaintiffs argue that the sanctions the Court imposed as a result of finding them in contempt, including the inability to use certain areas of XO so long as they remained closed areas and paying Maumee almost $ 8500.00 for monitoring Plaintiffs' operations, are sufficient and obviate the need for further sanctions. "[An] award of attorney's fees is appropriate for civil contempt in situations where court orders have been violated." *McMahan v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir.2000). *See also Redken Lab., Inc. v. Levin,* 843 F.2d 226, 230 (6th Cir.1988) (noting that propriety of awarding attorney's fees in connection with civil contempt proceedings). Thus, Defendants' motion for attorney's fees in the amount of $ 4,641.00 is granted.

***CONCLUSION***

For the reasons stated above, Plaintiffs' motion for summary judgment (Doc. No. 12) is denied. Defendant's cross-motion for summary judgment (Doc. No. 20) on the same issues is granted. Plaintiffs' motion to refund TRO bond (Doc. No. 13) is granted. Defendants' motion for award of attorney's fees in connection with contempt proceeding (Doc. No. 26) is also granted.

IT IS SO ORDERED.

N.D.Ohio,2003.
BAS Enterprize, Inc. v. City of Maumee
282 F.Supp.2d 673

END OF DOCUMENT

CFunction Junction, Inc. v. City of Daytona Beach
M.D.Fla.,1987.

United States District Court,M.D. Florida,
Orlando Division..
FUNCTION JUNCTION, INC., a Florida corporation, Pink Pussycat, Inc., a Florida corporation, and Del Percio, Inc., a Florida corporation, Plaintiffs,
v.
CITY OF DAYTONA BEACH, a Florida municipal corporation, Defendant.
**No. 86-117-CIV-ORL-18.**

Dec. 17, 1987.
As Amended Jan. 27, 1988.

Owners of adult theaters brought action to challenge constitutionality of city zoning ordinance on location of adult theaters. The District Court, G. Kendall Sharp, J., held that ordinance did not violate First Amendment.

Judgment for city.

West Headnotes

**[1] Constitutional Law 92 2183**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2183 k. Nudity in General. Most Cited Cases
(Formerly 92k90.4(3), 92k90.4(2))

**Constitutional Law 92 2201**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2201 k. Nude Dancing in General. Most Cited Cases
(Formerly 92k90.4(3), 92k90.4(2))

**Constitutional Law 92 2239**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2239 k. Nudity in General. Most Cited Cases
(Formerly 92k90.4(2))
Nude dancing is protected expression under First Amendment, but merely nude conduct, such as nude sunbathing or topless cocktail waitressing, is devoid of constitutional protection. U.S.C.A. Const.Amend. 1.

**[2] Constitutional Law 92 2219**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2219 k. Theaters in General. Most Cited Cases
(Formerly 92k90.4(3))

**Obscenity 281 2.5**

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations. Most Cited Cases
City's zoning ordinance on location of adult theaters with nude dancing did not violate First Amendment; ordinance was governmental response to detrimental, secondary effects caused by adult theaters and served significant and substantial government interest in redevelopment of dilapidated and deteriorated areas of city; and ordinance allowed 400-foot distance between adult theaters and residential areas, churches, schools, and parks and permitted adult theaters in parts of city. West's F.S.A. § 163.01 et seq.; U.S.C.A. Const.Amend. 1.

***545** Richard L. Wilson, Orlando, Fla., for plaintiffs.
Frank B. Gummey, III, Daytona Beach, Fla., for

defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

G. KENDALL SHARP, District Judge.
This action, challenging the constitutionality of a City of Daytona Beach ordinance which regulates the location of adult theaters, was tried before the court without a jury. Based upon the testimony and evidence admitted at trial and the facts admitted in the joint pretrial stipulation, the court enters the following findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Plaintiffs are Florida corporations that operate lounges, which have provided nude or seminude (topless) dancing as entertainment within the City of Daytona Beach. Following the Florida Supreme Court decision in *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla.1985), which upheld the ability of Daytona Beach to ban nudity in conjunction with the sale of alcohol under the Twenty-first Amendment, plaintiffs cannot offer topless dancing in their establishments because they sell alcohol. Plaintiffs seek to revive nude or seminude dancing in their lounges by ceasing to sell alcohol.

The presentation of nude dancing would classify plaintiffs' establishments as adult theaters under Zoning Ordinance No. 78-400 of the City of Daytona Beach, Florida. Daytona Beach Ordinance No. 81-292, incorporated in Zoning Ordinance No. 78-400, precludes adult theaters from the zoning districts where plaintiffs' establishments presently are located and places them within specific BA zones throughout the city. Plaintiffs contend that Ordinance No. 81-292 poses an additional, prohibitive obstacle to their presentation of nonobscene nude dancing, protected under the First Amendment.

Ordinance No. 81-292, adopted by the City Commission on September 16, 1981, is part of a redevelopment program in Daytona Beach. Sections 1 through 4 of Ordinance No. 81-292 amend identified articles of Daytona Beach Zoning Ordinance No. 78-400. Chapter 3 of Zoning Ordinance No. 78-400 defines an adult theater:

ADULT THEATRE.

A use which exhibits any motion picture, exhibition, show, live show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and is harmful to minors, all as defined in § 847.013, F.S., as may be amended, and admission of minors to which is unlawful in accordance with § 847.013, F.S., as may be amended. This includes any exhibition to one ***546** or more persons, including facilities commonly known as peep booths or peep shows.

Zoning Ordinance No. 78-400, chapter 3, *Definitions, amended by* Ordinance No. 82-67 (1982). Ordinance No. 81-292, section 4 amended Zoning Ordinance No. 78-400 by adding section 51 to article 5, quoted below in pertinent part:

Section 51. *Adult Bookstores and Adult Theaters.*

51.1 Purpose: To reduce the adverse impacts of adult bookstores and adult theaters upon the City's neighborhoods by:

51.1.1 Avoiding the concentration of uses which cause or intensify physical and social blight.

51.1.2 Improving visual appearance of adult uses.

51.1.3 Reducing negative impacts on adult uses upon other business uses, neighborhood property values, residential areas, and public and semi-public uses.

51.1.4 Insuring that adult uses do not impede redevelopment and neighborhood revitalization efforts.

51.1.5 Avoiding allowing adult uses in heavily used public pedestrian areas.

51.2 Location.

51.2.1 Adult bookstores and adult theaters shall be permitted as a matter of right in BA, BA-1, and BA-2 Districts. These adult uses shall not pyramid into or be allowed within the BW Districts.

51.2.2 It shall be unlawful to locate any adult theater and adult bookstore within 400 feet of any area of the City zoned R-1aa, R-1a, R-1a(1), R-1b, R-1c, R-2, R-2a, RA, R-2b, RP, R-3, PUD, T-1 or T-2.

51.2.3 It shall be unlawful to locate any adult bookstore and adult theater within 1,000 feet of any other such adult bookstores or adult theaters.

51.2.4 It shall be unlawful to locate any adult bookstore and adult theater within 400 feet of any church, school, public park or playground, or any other public or semi-public place or assembly where large numbers of minors regularly travel or congregate.

51.2.5 Distances in 51.2.3 and 51.2.4 shall be measured from property line to property line, without regard to the route of normal travel.

51.3 Waivers. The City Commission, after study and recommendation by the City Planning Board, may grant as a special exception after holding a public hearing, a waiver of the locational provisions for adult bookstores and adult theaters, upon a finding that all of the following requirements have been met:

51.3.1 That the proposed use will not be contrary to the public interest and that the spirit and intent of the ordinance will be observed.

51.3.2 That the proposed use will not enlarge or encourage the development or further development of a blighted area.

51.3.3 That the establishment of an additional such regulated use in the area will not be contrary to any program of neighborhood conservation, or will interfere with any program of urban revitalization.

51.4 Nonconforming Adult Bookstores and Adult Theaters: Adult bookstores and adult theaters which have been established at their existing locations prior to the effective date of this ordinance revision, and which are not in conformity with the requirements of this ordinance revision may continue to operate until January 1, 1992. If a nonconforming spacing situation can be eliminated by the abatement of one or more such establishments, the establishment which has been in business for the longest period of time shall be permitted.

Zoning Ordinance No. 78-400, article 5, section 51.

Gerald Langston, Director of Planning and Redevelopment for the City of Daytona Beach, who coordinated with the task study group in formulating Ordinance No. 81-***547** 292, testified as an expert in the field of urban planning. He stated that Daytona Beach is an unusual Florida city because its structures are old in comparison to the proliferation of new communities. Thirty percent of Daytona Beach housing is pre-1940 and a substantial number are pre-1950. Furthermore, Daytona Beach exhibits the conditions prevalent in larger northern cities, such as a blighted core area, with the consequent problems of professionals residing outside the city, a high percentage of low income individuals and retirees living within the city, and difficulty in attracting quality housing.

Langston testified that preparations for the redevelopment plan began two years prior to Ordinance No. 81-292, enacted in September, 1981. The study of Daytona Beach blight in early 1981, identified two blighted areas: 1) the old downtown area, and 2) the beachside area. The conditions that led to the conclusion of blight were a significant percentage of deteriorating structures; a large number of small, 1940 and 1950-sized lots, which did not allow cars; a notable parking problem; a high incidence of crime, particularly, on the beachside; and a large percentage of antiquated, underground utility systems, such as drainage, water and sewer systems. The changed neighborhoods, attributed to blight, deterred investment, and hotel development ceased in 1975. In the late 1970's, Daytona Beach was denominated the “City of Sleaze.”

Pursuant to Florida Statutes, chapter 163, a special board, the Redevelopment Design and Review Board (Redevelopment Board), was created in Daytona Beach to deal with the blight problem. Langston works with this board, which includes redevelopment of zoning districts, involving changes in permitted uses. For example, certain uses, such as bars, may be limited or spaced, while some uses, such as blood banks, may be prohibited in particular areas. The Redevelopment Board also considered studies of blight in Boston and Detroit by the American Society of Planning Officials in 1979-1980. These studies

show strong evidence that the central location of adult uses, like the "Combat Zone" in Boston, causes the blighted area to grow and creates blight in fringe areas. Furthermore, Langston testified that adult businesses have impacted on crime in the area surrounding Daytona Beach.

Based upon his education, experience, knowledge of blight in Daytona Beach and his participation in drafting the subject ordinance, Langston testified that adult businesses that provide live nude and seminude entertainment promote and perpetuate urban decay. He explained, however, that a total ban was not considered because that would be unconstitutional. The Redevelopment Board merely limited placement of such establishments to particular zoned areas of Daytona Beach. Langston testified that the redevelopment program was "having a real visible impact on the city" in the core areas.

Plaintiff Function Junction, Inc., d/b/a the Sugar Shack, owned by Leonard Del Percio and his brother, was located on North Atlantic Avenue when the subject zoning ordinance was enacted. Prior to filing this action, it was relocated to 22 South Ocean Avenue. Plaintiff Pink Pussycat, Inc., d/b/a the Red Garter, owned by Christie Geaneas, his wife and son, has been located at 1001 Main Street for nineteen years. The Sugar Shack and the Red Garter are in the officially designated beachside blighted area of Daytona Beach.

Plaintiff Del Percio, Inc., d/b/a the Shingle Shack, owned by Leonard Del Percio, was located at 309 Madison Avenue when the subject zoning ordinance was enacted. Following enactment of the ordinance, it relocated to 640 North Ridgewood Avenue. Since the Shingle Shack occupies a corner lot, the relocation was merely an address change. Del Percio testified that he demolished part of the structure, resulting in a changed entrance and address for the lounge.

The Shingle Shack is not located in an officially designated blight area. It is, however, in a state-approved enterprise zone as defined by Florida Statutes, chapter 290, section 290.004(1)(a). Essentially, an enterprise zone is one in which there is a ***548** predominance of deteriorating structures, causing conditions detrimental to public health, safety, morals or welfare, such as juvenile delinquency and crime. Through the Florida Enterprise Zone Act, Florida Statutes, chapter 290, sections 290.001-290.015, the state has declared revitalization of enterprise zones to be a public policy and purpose and has established a process of identifying severely distressed areas through the local community. The state provides economic incentives by state and local governments to induce private investment in enterprise zones.

Langston testified that the land uses around the Shingle Shack in the area of the Ridgewood Avenue intersection include an adult bookstore, older housing and light industry. Crime also has been reported in the vicinity. Furthermore, Langston testified that "absolutely" nonblighted areas may be more blighted than officially designated blight areas for redevelopment. He explained that there is limited money, staff and time that can be allotted to a blighted area of the city. An area is designated as blighted if the city determines that, because of market conditions, it can be improved if given the opportunity. In a nonblighted area, the opportunity for improvement is bleak.

Langston also testified that an adult business impacts on crime in the surrounding area. David Smith, assistant state attorney, who has prosecuted prostitution and drug offenses in Daytona Beach, gave concurring testimony. Smith identified the beach area where the Sugar Shack and Red Garter are located as well as the area around the Shingle Shack as being areas of prostitution. He testified that "most definitely" there were more drug and prostitution offenses in topless bars than in other bars.

Del Percio admitted that two of his dancers had been involved in cocaine offenses; that he and his manager had been charged with violations of the nudity ordinance; that approximately a dozen of his dancers had been charged with violations of the nudity ordinance, most recently in February or March, 1987; and that he had been fined $10,000.00 for both his actions and those of his employees. Geaneas admitted that the Red Garter was closed involuntarily from July 8, 1983 through January 4, 1984 for drug offenses, which resulted in suspension of their alcoholic beverage license, and that a barmaid was charged with violation of the nudity ordinance. All three plaintiffs have been cited by the Florida Department of Business Regulation Division of Alcoholic Beverages and Tobacco in connection with drug violations at their

establishments.

On August 26, 1981, prior to enactment of the subject ordinance in September, 1981, the Daytona Beach City Commission held a special meeting for the purpose of educating the community regarding the extent of pornography and prostitution in the city. Attached to the minutes is an investigation report and list of twenty sexually oriented businesses in Daytona Beach and their activities. The Shingle Shack is listed as being in the area with "our biggest problems," which include drug and prostitution-related homicides, numerous rapes and robberies, with the area being known as "a haven for prostitutes." The Shingle Shack is described as "[t]opless dancing-wet T-shirt contest." Several arrests of dancers for lewd and lascivious conduct are noted and it is indicated to be a "[m]ajor prostitute hang-out" with arrests of customers, "who get carried away during performances."

Fred Holmes, Deputy Building Official for the City of Daytona Beach, whose department processes applications for occupational licenses, testified concerning the interpretation and application of Ordinance No. 81-292. Adult theaters, defined as involving exhibitions of nudity, are confined to BA zones. Holmes clarified that live, nude dancing or female breast exposure qualifies the establishment as an adult theater which must be located in a BA zone, although alcohol is excluded. While the amended zoning ordinance defines an adult theater, Florida Statutes, chapter 847, section 847.013 describes nudity, including breast exposure and activities harmful to minors. Holmes testified that even brief breast exposure would necessitate denying ***549** an application for an establishment providing such display if it were not in a BA zone.

Holmes testified that the preamble of the zoning ordinance allows the building officials to interpret and to enforce it. He interprets the portion of Ordinance No. 81-292, section 51.2.4, which states that it shall be unlawful to locate an adult theater within 400 feet of "any other public or semi-public place or assembly where large numbers of minors regularly travel or congregate" to mean places of public assembly of fifty or more people. This definition derives from the Life Safety Code, chapter 8, section 8-1.3, enacted as a Daytona Beach ordinance, which defines places of assembly to include "all buildings or portions of buildings used for gathering together 50 or more persons for such purposes as deliberation, worship, entertainment, dining, amusement, or awaiting transportation." Holmes uses the Life Safety Code definition because he considers it appropriate, and he expects his successors to follow his interpretation.

Ordinance No. 81-292 makes it unlawful to locate an adult theater within footage distances of certain zones or uses. Specifically, Section 51.2.2 requires 400 feet between an adult theater and residential zones of the city; section 51.2.3 requires 1,000 feet between an adult theater and another adult theater or adult bookstore; and section 51.2.4 requires 400 feet between an adult theater and any church, school, public park or playground, or any other public or semi-public place or assembly where large numbers of minors regularly travel or congregate. When Holmes reviews a license application, he makes a physical measurement in a circle around the location. The designated zones or uses must not be within the specified footage from the potential adult theater.

Holmes previously had identified in his deposition, interrogatory answers and an affidavit twelve potential sites for adult theaters in Daytona Beach. The Deputy Planning Director for the City of Daytona Beach photographed the sites as well as described the areas based on his personal inspection. These pictures and descriptions were admitted into evidence. While twelve sites potentially are available for adult theaters, Holmes testified that, because of compliance with spacing specifications of Ordinance No. 81-292, a total of eight adult theaters could operate under the present conditions.

Plaintiffs brought this suit because they claim that they are effectively precluded from operating their respective adult theaters by the spacing requirements within BA zones of Ordinance No. 81-292. Both Del Percio and Geaneas testified that they have lost profits at their establishments when the dancers have had to perform more fully clothed. This has occurred twice: following the Florida Supreme Court decision in *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla.1985), which held that the city could regulate nudity under the Twenty-first Amendment; and following the effective date of Ordinance No. 81-292, when plaintiffs' establishments could no longer operate as adult theaters in their current zoning districts. Plaintiffs presented the testimony of a private

investigator regarding the lack of locations for plaintiffs' establishments which meet the requirements of Ordinance No. 81-292. This witness admitted, however, that he was not a city zoning official, and that his site investigations were an attempt to coordinate the zoning ordinance with available sites in BA zones without any inquiries of the City of Daytona Beach as to whether or not a permanent adult theater was established at any particular location.

Cledith Oakley, a Florida real estate broker, testified that the Daytona Beach marketplace is constantly changing in land use. He stated that part of an automobile dealership, which plaintiffs have contended is the only location meeting the ordinance specifications, is a potential site for an adult theater, provided plaintiffs are willing to purchase the property. Oakley explained that scarcity or availability of adult uses is not the appropriate inquiry, but rather, supply and demand. He testified that there are a number of adult theaters in Daytona Beach, and that many such uses result in less profit for individual proprietors.

***550** Ordinance No. 81-292, section 51.3 permits the Daytona Beach City Commission to grant a waiver of the location provisions to an adult theater following review and recommendation of the City Planning Board, a public hearing and a finding that three requirements have been met. First, the proposed use will not be contrary to the public interest and the spirit and intent of the ordinance. Second, the proposed use will not further the development of a blighted area. Third, an additional regulated use will not be contrary to any programs of neighborhood conservation or urban revitalization.

Holmes testified that he was not aware of any application by plaintiffs for utilization of the waiver provisions for the Sugar Shack, the Red Garter or the Shingle Shack. In denying plaintiffs' motion for preliminary injunction, the court noted that plaintiffs had not attempted to exhaust their administrative remedy of waiver, which would be particularly applicable if the result that they sought would not contravene public interest in neighborhood conservation. Plaintiffs' attorney stipulated that plaintiffs have not applied for waivers. The court also notes that Ordinance No. 81-292 allows nonconforming adult theaters and bookstores that were established prior to the effective date of the ordinance to continue to operate until January 1, 1992. If a nonconforming spacing problem can be eliminated by abatement of one such establishment, then the establishment which has been in business the longest shall be permitted.

In this action, plaintiffs allege that Ordinance No. 81-292 leaves insufficient or no locations for their adult theaters. They seek a final judgment declaring Ordinance No. 81-292 unconstitutional, a permanent injunction enjoining its enforcement, and attorneys' fees. Defendant contends that the subject ordinance is constitutional on its face and in application. Defendant argues that Ordinance No. 81-292 is a reasonable time, place and manner zoning restriction, enacted to counter the secondary effects caused by adult businesses and that there are adequate, alternative avenues of communication.

## CONCLUSIONS OF LAW

The court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983. Plaintiffs claim attorneys' fees under 42 U.S.C. § 1988. The issue before the court is the constitutionality of Daytona Beach zoning Ordinance No. 81-292 as applied to the location of plaintiffs' establishments.

[1] Nude dancing is protected expression under the First Amendment. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981); *International Food & Beverage Systems v. City of Fort Lauderdale,* 794 F.2d 1520, 1525 (11th Cir.1986). In contrast, merely nude conduct, such as nude sunbathing or topless cocktail waitressing, "is devoid of constitutional protection." *International Food & Beverage Systems,* 794 F.2d at 1525; *South Florida Free Beaches, Inc. v. City of Miami,* 734 F.2d 608, 610 (11th Cir.1984). Constitutionally protected expression, however, is not absolute and may be regulated reasonably as to time, place, and manner, provided that the regulation is content neutral, serves a significant governmental interest, and allows ample alternative channels for communication to exist. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3068, 82 L.Ed.2d 221 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647-55, 101 S.Ct. 2559, 2563-67, 69 L.Ed.2d 298 (1981); *International Food & Beverage Systems,* 794 F.2d at 1525. The Supreme Court

recently has addressed time, place, and manner analysis in the context of a constitutional challenge to a Renton, Washington ordinance that prohibited the location of adult motion picture theaters within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school, a case similar to and dispositive of this action. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43, 106 S.Ct. 925, 926, 89 L.Ed.2d 29 (1986).

The Court found the Renton ordinance "completely consistent with our definition ***551** of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.' " *Renton,* 475 U.S. at 48, 106 S.Ct. at 929 (emphasis in original) (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976)). Recalling *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Court observed that the city could have attempted to close the theaters or to limit their number if it had been concerned with restricting the message conveyed. *Renton,* 475 U.S. at 48, 106 S.Ct. at 929; *American Mini Theatres,* 427 U.S. at 82 n. 4, 96 S.Ct. at 2458 n. 4 (Powell, J., concurring). The Court also found that the ordinance did not contravene "the fundamental principle that underlies our concern about 'content-based' speech regulations:" that the government may not select who may use a forum based upon its agreement with the views conveyed. *Renton,* 475 U.S. at 48-49, 106 S.Ct. at 929; *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-2290, 33 L.Ed.2d 212 (1972). Instead, the "*predominate* " concern of the Renton City Council was with the "*secondary effects* " of adult theaters on the surrounding community and not with the "*content*" of the films. *Renton,* 475 U.S. at 47, 106 S.Ct. at 929 (emphasis in original).

[2] The evidence in this case showed that the primary concern of the City of Daytona Beach in enacting Ordinance No. 81-292 as part of its redevelopment program was with the secondary effects caused by the proliferation of adult theaters in that community. Furthermore, Daytona Beach has not banned adult theaters, such as those operated by plaintiffs, but has regulated their location without reference to content of the exhibited expression. *Renton,* 475 U.S. at 46-48, 106 S.Ct. at 928-929. The court concludes that Ordinance No. 81-292 is content neutral.

The Supreme Court also found that the Renton ordinance was designed to promote a substantial governmental interest. "[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *Id.* at 50, 106 S.Ct. at 930 (quoting *American Mini Theatres,* 427 U.S. at 71, 96 S.Ct. at 2453). Furthermore, the Court held that Renton was entitled to rely on the experiences of other cities, regarding neighborhood blight caused by the presence of adult theaters, in enacting its adult theater zoning ordinance. *Renton,* 475 U.S. at 51, 106 S.Ct. at 930. In discussing the application of *Renton,* the Eleventh Circuit distinguished zoning cases from police action cases. *International Food & Beverage Systems,* 794 F.2d at 1527; *cf. Krueger v. City of Pensacola,* 759 F.2d 851 (11th Cir.1985); *Grand Faloon Tavern, Inc. v. Wicker,* 670 F.2d 943 (11th Cir.), *cert. denied,*459 U.S. 859, 103 S.Ct. 132, 74 L.Ed.2d 113 (1982) (police action cases as opposed to zoning cases). In contrast to actual police-type experience required by courts in police action cases, "[z]oning involves far wider interests and does not now depend for its validity on the experience of the chief of police or the blotter of the local station." *International Food & Beverage Systems,* 794 F.2d at 1527.

*Renton* recognized two constitutionally permissible methods of regulating the location of adult theaters to effectuate substantial governmental interests: concentration, as in Renton, or dispersion, as in Daytona Beach. *Renton,* 475 U.S. at 52, 106 S.Ct. at 931. Like the Renton ordinance, Ordinance No. 81-292 is " 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects." *Id.* at 52, 106 S.Ct. at 931; *cf. Schad,* 452 U.S. at 76-77, 101 S.Ct. at 2186-2187; *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 217-18, 95 S.Ct. 2268, 2276-77, 45 L.Ed.2d 125 (1975) (Ordinances, involving nude entertainment, were held to be offensive to the First Amendment because they were not precisely drafted to achieve substantial governmental interests.). Additionally, the Eleventh Circuit has explicated that a zoning ordinance should not be reviewed in isolation as a "whim of the commissioners" or as an imposition of "their notions of moral behavior on the community," but rather that it ***552** should be "tested by reference to the entire zoning scheme." *International Food & Beverage Systems,*

794 F.2d at 1527.

In this case, the court was presented with extensive evidence and testimony, regarding the dilapidated and deteriorated state of many of the areas within the City of Daytona Beach. By means of its redevelopment plan, of which Ordinance No. 81-292 is a component, Daytona Beach is seeking to improve its city for the future. In that commendable effort, the city necessarily must make zoning decisions that involve lines of demarcation. The court concludes that Ordinance No. 81-292 serves a significant and substantial governmental interest and that plaintiffs' continued offering of nude dancing in their establishments at their present locations would seriously thwart, if not undermine and stymie the Daytona Beach redevelopment plan.

Plaintiffs vehemently assert that there are few or no possible locations for their establishments within the areas of Daytona Beach zoned for their businesses. They also claim that they lost substantial profits during times when they have been prohibited from presenting nude dancing. The city has shown by affidavit, photographs, and testimony that twelve locations in Daytona Beach potentially could accommodate plaintiffs' lounges.

The Supreme Court was not convinced by the *Renton* respondents' arguments that there were no practical or commercially viable locations for their adult theaters:

That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech,"*American Mini Theatres,* 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.,* at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact").

*Renton,* 475 U.S. at 54, 106 S.Ct. at 932. Recognizing that the First Amendment "does not guarantee anyone a profit," the Eleventh Circuit explained that "[a]ll it [the First Amendment] requires is that 'speech,' 'expression,' and 'ideas' be allowed a physically adequate forum." *International Food & Beverage Systems,* 794 F.2d at 1526. While a city may limit alternative avenues of communication, it may not limit them " 'unreasonably,' " and "[w]hat is reasonable cannot be ascertained by reference to nothing except the wishes of the nude bar proprietors." *Id.*

The court is satisfied that the City of Daytona Beach has provided areas of the city for the protected expression of nude dancing within the zoning regulations, which are part of its redevelopment plan. In fact, Ordinance No. 81-292, by allowing a 400-foot distance between adult theaters and residential areas, churches, schools, and parks is more generous in its spacing requirements than the Renton ordinance, requiring a constitutionally acceptable 1,000-foot separation. While the city must adequately and reasonably provide locations for the protected expression of nude dancing, it is not required to guarantee these particular plaintiffs a profit at the expense of the public interest and a municipal redevelopment program of which Ordinance No. 81-292 is a part.

The court concludes that Ordinance No. 81-292 is a valid governmental response to the detrimental, secondary effects caused by adult theaters and that it was not enacted to suppress protected expression. *Renton,* 475 U.S. at 54, 106 S.Ct. at 932. Daytona Beach "has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning." *Id.*

***553** Finally, the court is cognizant that plaintiffs have made no effort to apply for the waiver provision of Ordinance No. 81-292 or to investigate the applicability of the nonconforming use provision. Plaintiffs cannot expect the court to create a special exception for them when they have made no attempt to comply with the appropriate, remedial provisions of a constitutionally sound zoning ordinance, responsive to the " 'admittedly serious problems' created by adult theaters." *Id.* (quoting *American Mini Theatres,* 427 U.S. at 71, 96 S.Ct. at 2453). The Clerk of Court will

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enter judgment in favor of defendant, the City of Daytona Beach.

It is SO ORDERED.

M.D.Fla.,1987.
Function Junction, Inc. v. City of Daytona Beach
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Little Mack Entertainment II, Inc. v. Township of Marengo
W.D.Mich.,2008.
Only the Westlaw citation is currently available.
United States District Court,W.D. Michigan,Southern Division.
LITTLE MACK ENTERTAINMENT II, INC., Plaintiff,
v.
TOWNSHIP OF MARENGO, Defendant.
**No. 4:05-CV-128.**

July 17, 2008.

Allan S. Rubin, Draper, Rubin & Shulman P.L.C., Southfield, MI, for Plaintiff.
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***OPINION***

JANET T. NEFF, District Judge.
***1** Plaintiff Little Mack Entertainment II, Inc. ("Little Mack") operates a retail business involving sexually explicit materials, located in defendant Marengo Township ("the Township"). Little Mack filed this case in November 2005, challenging defendant's zoning of adult businesses as unconstitutional. Little Mack sought redress under 42 U.S.C. § 1983, and declaratory and injunctive relief. The Township thereafter amended its zoning ordinance and, additionally, enacted Township of Marengo Ordinance 2005-4, which established licensing requirements and regulations for sexually oriented businesses within the township.

On February 20, 2006, Little Mack filed an amended complaint challenging the enactment of the amended zoning ordinance as invalid and further challenging the constitutionality of both the previous and the amended zoning ordinances and Ordinance 2005-4 (Dkt.32). The Court, Quist, J., denied the Township's motions to dismiss and denied without prejudice Little Mack's motion for a preliminary injunction (Dkt.39).[FN1] The case is now before the Court on the Township's motion for summary judgment. Having carefully considered the parties' oral argument, and the supplemental authority decided after this case was filed, the Court concludes that summary judgment is properly granted in favor of the Township.

FN1. This case was transferred to the undersigned on August 10, 2007 pursuant to Administrative Order No. 07-091.

I. Facts and Procedural Background

Little Mack leases and operates a business located at 18901 Partello Road in Marengo Township (Am.Compl.¶ 11). The business sells books, videos and novelties related to sexually explicit expression (Am.Compl.¶ 12). At the time this lawsuit was filed, sexually explicit materials comprised less than 35 percent of the business's stock in trade and less then 35 percent of its floor space (*id.*). Little Mack applied for a building permit for remodeling, which the Township denied, purportedly on the ground that Little Mack's business constituted an "adult business" under the zoning ordinance and, thus, required a variance. After this lawsuit was filed, the Township issued the building permit, but also enacted an amendment to the zoning ordinance and enacted Ordinance 2005-4 specifically regulating the operation of sexually oriented businesses (Am.Compl.¶¶ 14, 19, 22). On January 9, 2006, the Township notified Little Mack that it would not be allowed to operate a sexually oriented business at its current location because the location was within 600 feet of a parcel that is zoned residential, in violation of § 21 of Ordinance 2005-4 (Am.Compl.¶¶ 20-21, Ex. C).

Little Mack states that it desires to operate an adult business as defined in the various township ordinances at issue, but has not done so because of the ordinance restrictions (Am.Compl.¶ 15). Little Mack challenges the former zoning ordinance, the amended zoning ordinance, and Ordinance 2005-4 on numerous grounds under the First, Fourth, Fifth, and Fourteenth Amendments and corollary provisions of the Michigan Constitution.

***2** It is Little Mack's contention that the Township's enactment of the amended zoning ordinance violated the procedural requirements of the Michigan Township Zoning Act (MTZA), and thus, the amended zoning ordinance is void ab initio (Am.Compl.¶ 24). Accordingly, Little Mack advances its constitutional challenges under the pre-amendment restrictions, as well as under the amended version of the zoning ordinance. Likewise, Little Mack contends that Ordinance 2005-4 is void ab initio because, although it is deemed a licensing restriction, it is in fact a zoning ordinance, but was not adopted in conformity with the MTZA (Am.Compl.¶ 25).

Little Mack's complaint alleged five counts: (1) violation of 42 U.S.C. § 1983 on numerous grounds; (2) action for injunctive relief to enjoin enforcement of the ordinances at issue and compel the Township to issue permits to operate as an adult business at the current location; (3) action for declaratory relief, determining that the ordinances are unconstitutional facially or as applied; (4) state law violations under the MTZA and the Michigan Constitution; (5) action for attorney fees under 42 U.S.C. § 1988. The Township has moved for summary judgment of all counts.

## II. Summary Judgment Standard

A motion for summary judgment is properly granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."FED. R. CIV. P. 56(c). The court must view the evidence and draw all reasonable inferences in favor of the nonmoving party.*Hamilton v. Starcom Mediavest Group, Inc.,* 522 F.3d 623, 627 (6th Cir.2008); *Harbin-Bey v. Rutter,* 420 F.3d 571, 575 (6th Cir.2005).

## III. Ordinance Enactment

As a threshold matter, the Township contends that Little Mack's challenges to the enactment of Ordinance 2005-4 and the zoning ordinance amendment fail as a matter of law. The Court agrees. Plaintiff alleged in its amended complaint that both Ordinance 2005-4 and the amended zoning ordinance (AZO) were adopted in violation of the MTZA (Am. Compl. Count IV, ¶ 56). Contrary to plaintiff's assertions, the Court finds no basis for holding that the enactments are invalid.

### A. Validity of Ordinance 2005-4

With respect to Ordinance 2005-4, plaintiff's challenge is based on § 21(a), which provides:

> It shall be unlawful to establish, operate, or cause to be operated a sexually oriented business in Marengo Township, unless said sexually oriented business is at least six hundred (600) feet from any parcel that is zoned for residential purposes.

(Dkt.32-3, Ord.2005-4, § 21(a).) Little Mack asserts that this provision, despite it being clothed as part of a licensing ordinance, is clearly a zoning ordinance in that it regulates the use of land and buildings according to districts, areas, or locations. Accordingly, the Township was required to comply with the MTZA [FN2] in enacting § 21(a), including provisions for notice of adoption, public hearings, and publication. Little Mack contends that because the Township failed to comply with the MTZA in adopting § 21, it is void ab initio.

> FN2. Little Mack notes that the MTZA has since been repealed and replaced with the Michigan Zoning Enabling Act, but that the MTZA applies to the enactments at issue. The Township does not dispute the applicability of the MTZA.

***3** Little Mack's premise is correct. A local government may not avoid the substantive and procedural limitations of a zoning enabling act by merely claiming that a zoning ordinance is valid as an enactment pursuant to the general police power. *Krajenke Buick Sales v. Hamtramck City Engineer,* 322 Mich. 250, 33 N.W.2d 781 (Mich.1948). However, the Court is not persuaded that § 21(a) is a zoning ordinance as opposed to a regulation of activity, on the basis of the general authority cited by Little Mack.

"A zoning ordinance is defined as an ordinance which regulates the use of land and buildings according to districts, areas, or locations."*Square Lake Hills Condo. Ass'n v. Bloomfield Twp.,* 437 Mich. 310, 471 N.W.2d 321, 327 (Mich.1991) (Riley, J.) (citing 8

McQuillin, Municipal Corporations, § 25.53, p. 137). The question whether a particular ordinance is a zoning ordinance must be decided by considering the substance of its provisions and terms, and its relation to the general plan of zoning in the community.*Square Lake,* 471 N.W.2d at 326-327.

In *Square Lake* (cited by both parties), the court considered whether an ordinance limiting riparian property owners with a minimum of 150 feet of lake frontage, to launching and docking one motor boat, was a "zoning ordinance." The court held that the ordinance was not a zoning ordinance, noting that it did not regulate the use of land or lake frontage, but rather regulated an "activity" by limiting the number of boats that could be parked, or launched or docked in a given amount of frontage. *Id.* at 326.

In this case, the 600-foot residential buffer is not readily classified as the regulation of activity as opposed to regulation of the use of land. Nevertheless, § 21(a) does not regulate "the use of land and buildings *accord ing to districts, areas, or locations."Id.* at 326 (emphasis added). The buffer in effect regulates sexually oriented business activity. Under their police powers, townships have authority to adopt ordinances regulating local matters, including but not limited to the public health, safety, and general welfare of persons and property. *Id.* 325.Accordingly, the Court finds no basis for concluding that the ordinance is an invalidly adopted "zoning ordinance." *See People v. Strobridge,* 127 Mich.App. 705, 339 N.W.2d 531, 534 (Mich.Ct.App.1983) (contrasting zoning ordinances pertaining to land use which apply, by their own terms, to only specified zoning districts, with regulatory ordinances governing land use, but which are blind to zoning differences).

Even if the Court found the 600-foot buffer in § 21(a) to be an invalid zoning provision, the invalidity of § 21 would not be determinative of the issues in this case. The 600-foot buffer is also contained in the zoning ordinance amendment, which as discussed below, the Court finds was validly enacted.

B. Validity of the Zoning Ordinance Amendment

Little Mack alleged that the Township's adoption of the zoning amendment was invalid because it did not comply with statutory requirements under the MTZA. In particular, Little Mack contends that the Township failed to submit the proposed zoning amendment to the Calhoun County Metropolitan Planning Commission (CCMPC) as required.

***4** The Township contends that the January 31, 2006 passage of the amendment was valid despite the fact that it was not submitted to the CCMPC because there was no county zoning commission functioning in the county at the time. That is, the CCMPC had no functioning staff in December 2005 or January 2006; there was no regularly scheduled meeting for December 2005; and the January 2006 meeting of the CCMPC was cancelled. The Township contends that, moreover, any alleged deficiency concerning the CCMPC is moot because the zoning amendment was later submitted to the CCMPC and then enacted again. The Court agrees that Little Mack's procedural challenge to the zoning amendment fails.

The Township twice adopted the zoning amendment, first on January 31, 2006, and again on March 13, 2006. With regard to the January 2006 adoption, the CCMPC was not functioning in December 2005 or January 2006. That is, the CCMPC planning director position was vacant from November 30, 2005 to February 16, 2006, and no meetings were held in December 2005 or January 2006 (Def's. Ex. E, Joanna I. Johnson Aff.; Def's. Ex. H, Gregory Purcell Aff.). As the Township points out, the Michigan Supreme Court has held that a zoning ordinance is not invalid by reason of the failure to submit it to a nonexistent co-ordinating zoning committee. *Ritenour v. Dearborn Twp.,* 326 Mich. 242, 40 N.W.2d 137, 139 (Mich.1949).

But even if the Township failed to submit the ordinance to the CCMPC prior to the January adoption, the Township nevertheless complied with the requirement to submit the ordinance to the CCMPC before the March 13, 2006 adoption of the zoning amendment, and the CCMPC waived its right to comment on the matter. Although Little Mack argues that the March submission cannot cure the fatal defect in procedure, pursuant to *Davis v. Imlay Twp. Bd.,* 7 Mich.App. 231, 151 N.W.2d 370 (Mich.Ct.App.1967), Little Mack's arguments are unavailing. Little Mack is correct that in *Davis,* the court concluded that the township could not retroactively cure the failure to submit the enacted ordinance to a coordinating zoning committee. *Id.* at 372.However, *Davis* did not involve the combination

of a nonfunctioning committee at the time of adoption, *subsequent submission* of the amendment to the committee, waiver of comment by the committee, and *subsequent adoption* of the zoning amendment. Unlike in *Davis,* in this case, the zoning amendment was adopted a second time after submission to the committee. Under these circumstances, the Court finds no procedural defect in the adoption of the zoning amendment that renders the amendment void ab initio. The Township complied with the statutory requirement for submission to county zoning commission.

Little Mack provides no basis for its remaining challenges to the zoning ordinance beyond merely asserting that the record contains no evidence that the Township followed the statutory requirements for notice and a public hearing. In responding to a motion for summary judgment, the nonmoving party may not merely rely upon its allegations, but must come forward with specific facts in support of the claim. *Ciminillo v. Streicher,* 434 F.3d 461, 464 (6th Cir.2006); *Mulhall v. Ashcroft,* 287 F.3d 543, 550 (6th Cir.2002). These additional challenges fail.[FN3]

> FN3. With regard to Little Mack's contention that the operation of its business should be permitted as a lawful and valid nonconforming land use, the Court finds no ground for sanctioning the operation of Little Mack's sexually oriented business on that basis. As the Township notes, because Ordinance 2005-4 is a regulatory ordinance, there is no exemption for nonconforming use. *See King Enters., Inc. v. Thomas Twp.,* 215 F.Supp.2d 891, 916 (E.D.Mich.2002); *Casco v. E. Brame Trucking Co., Inc.,* 34 Mich.App. 466, 191 N.W.2d 506, 508 (Mich.Ct.App.1971). Moreover, since Little Mack's sexually oriented business had not been operational, it is questionable whether the business would constitute a lawful nonconforming land use even under the zoning ordinance.

IV. Constitutional Challenges

***5** Having concluded that Little Mack's procedural challenges to the enactment of the zoning amendment and Ordinance 2005-4 fail, the Court must determine whether Little Mack's challenges to the substantive provisions of the amended zoning ordinance and Ordinance 2005-4 have merit. Little Mack challenges the ordinances as unconstitutional under more than a dozen various doctrines. The Township contends that these same general challenges have been advanced in numerous other cases and rejected. The Court agrees and finds no constitutional infirmity on the grounds asserted by Little Mack.

Little Mack's amended complaint alleges that the Township's regulation of sexually oriented businesses is unconstitutional on various grounds under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and corollary provisions of the Michigan Constitution [FN4] (Am.Compl.¶ 30). The Township contends that the ordinances are constitutional in their entirety.

> FN4. The parties do not dispute that the protections afforded by the Michigan Constitution are coextensive with, and not greater than, their federal counterparts, with respect to the claims asserted in this case. Accordingly, independent consideration of the claims under the Michigan Constitution is unnecessary.

At the core of Little Mack's constitutional challenges are provisions for a 600-foot residential buffer zone, a prohibition on nudity, a six-foot rule between patrons and performers, a 24-hour no-touch rule between the same, "open-booth" requirements, and limited hours of operation for sexually oriented businesses. As the Court noted at oral argument, a majority of Little Mack's constitutional challenges have effectively been foreclosed by case law development in the two-and-a-half years that this case has been pending. During this time, the Sixth Circuit has definitively addressed and rejected challenges to the regulation of sexually oriented businesses on the same grounds raised by Little Mack in this case. *See Sensations, Inc. v. City of Grand Rapids (Sensations II),* 526 F.3d 291 (6th Cir.2008); [FN5]*729, Inc. v. Kenton County Fiscal Court,* 515 F.3d 485 (6th Cir.2008); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County (Deja Vu of Nashville III),* 466 F.3d 391 (6th Cir.2006), *cert. den.,*--- U.S. ----, 127 S.Ct. 2088, 167 L.Ed.2d 765 (2007); [FN6]*see also Sensations, Inc. v. City of Grand Rapids (Sensations I),* Nos. 1:06-cv-300 & 4:06-cv-60, 2006 U.S. Dist. LEXIS 77159, 2006 WL 5779504 (W.D.Mich. October 23,

2006).

FN5. At the time of oral argument, the Sixth Circuit had not yet decided *Sensations,* which presented constitutional challenges nearly identical to those presented in this case. However, the well-reasoned district court decision left little doubt that those challenges would withstand subsequent appellate scrutiny. *Sensations, Inc. v. City of Grand Rapids (Sensations I),* Nos. 1:06-cv-300 & 4:06-cv-60, 2006 U.S. Dist. LEXIS 77159, 2006 WL 5779504 (W.D.Mich. October 23, 2006) (Bell, C.J.). The Sixth Circuit has now definitively ruled on these issues, and has affirmed the district court's rejection of the plaintiff's constitutional challenges to the ordinances regulating sexually oriented businesses. *Sensations, Inc. v. City of Grand Rapids (Sensations II),* 526 F.3d 291 (6th Cir.2008). (The Township filed a Notice of Supplemental Authority with respect to *Sensations II;* the parties have filed no other supplemental authority in support of their arguments.)

FN6. Although this decision was referenced as *Deja Vu of Nashville II* by the district court in *Sensations I,* it is herein referenced as *Deja Vu of Nashville III* in accordance with the Sixth Circuit opinion in *Sensations II, supra* at 297 n. 4, in light of the intervening decision in *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County (Deja Vu of Nashville II),* 421 F.3d 417 (6th Cir.2005), *cert. den.,*547 U.S. 1206, 126 S.Ct. 2916, 165 L.Ed.2d 917 (2006).

Defendant moved for summary judgment on all counts alleged in Little Mack's amended complaint, categorizing Little Mack's numerous miscellaneous constitutional challenges into eight primary claims.[FN7]To the extent that the Sixth Circuit decisions or other authority provides controlling precedent for the disposition of the claims in this case, lengthy analysis is unnecessary. Where the legal or factual circumstances of this case differ or the issues have not been addressed, they are considered under the applicable governing doctrines (Def's.Br.22). Under either analysis, the Court concludes that the Township's motion for summary judgment is properly granted.

FN7. As noted *supra,* Section I, Little Mack's amended complaint alleged five general counts: Violation of 42 U.S.C. § 1983 (Count 1); Action for Injunctive Relief (Count 2); Action for Declaratory Relief (Count 3); Violation of State Law (Count 4); Action for Attorney Fees under 42 U.S.C.1988 (Count 5). However, the amended complaint contains a miscellany of constitutional claims throughout more than eighty paragraphs and subparagraphs. For purposes of its summary judgment motion, the Township filtered the claims for redundancy and classified them under appropriate legal doctrines. Little Mack does not dispute the Township's statement of the claims, and thus, the Court addresses the claims as presented by the Township.

A. *Sensations and Deja Vu of Nashville III*

The claims and issues in this case closely parallel those raised in *Sensations I,*[FN8] based on similar, if not identical, ordinance provisions. The *Sensations I* decision was guided by the Sixth Circuit's resolution of similar challenges in *Deja Vu of Nashville III.*Further, *Sensations I* has now received the imprimatur of the Sixth Circuit.[FN9]It is thus clear that the regulation of sexually oriented businesses within the parameters examined in those cases is not subject to constitutional challenge. This Court need not explore this well-charted constitutional territory. A brief examination of these decisions suffices to resolve Little Mack's challenges to the regulations at issue here.

FN8.*Sensations, Inc. v. City of Grand Rapids,* Nos. 1:06-cv-300 & 4:06-cv-60, 2006 U.S. Dist. LEXIS 77159, 2006 WL 5779504 (W.D.Mich. October 23, 2006), aff'd in part & rev'd in part, *Sensations, Inc. v. City of Grand Rapids (Sensations II* ), 526 F.3d 291 (6th Cir.2008); *see supra* n. 5.

FN9. The district court decision was reversed on the issue of attorney fees, which are not at issue here.

***6** In *Sensations I,* the court considered challenges to a City of Grand Rapids ordinance that contained regulations, language, and definitions similar to those at issue here: "(1) a prohibition on total nudity; (2) regulations on "semi-nudity" (defined in significant part as female performers wearing pasties and a G-string), including a six foot buffer zone between performers and patrons and a no-touch rule; (3) an open-booth rule for adult arcades; and (4) a restriction on the hours of operation between 2:00 a.m. and 7:00 a.m."*Sensations I,* 2006 U.S. Dist. Lexis 77159 at *5-6, 2006 WL 5779504.The Grand Rapids ordinance incorporated "a 180-day grace period for existing businesses to modify and comply, as well as a scienter requirement for any violation."*Id.* at *6. In this case, as in *Sensations I,* the local ordinance prohibits total nudity; requires a six-foot buffer zone between performers and patrons; and includes a no-touch rule (albeit a 24-hour no-touch rule), an open-booth requirement, and an hours-of-operation provision (must be closed between the hours of 12:00 midnight and 6 a.m.). Ord.2005-4, §§ 13, 14, 18(a)-(c). Additionally, the Marengo Township ordinance contains a scienter requirement, Ord.2005-4, § 19, and provides procedural protections for businesses subject to the licensing requirements, Ord.2005-4, §§ 5, 11.

In a thorough and well-reasoned opinion, the district court in *Sensations I* rejected claims that the City of Grand Rapids ordinance provisions failed to pass constitutional muster with regard to challenges under the First Amendment, the Fifth Amendment, and the Due Process Clause. This Court concludes likewise with respect to the challenged provisions of the Marengo Township ordinance.

B. First Amendment Challenges

Defendant contends that the ordinances are constitutional under the First Amendment. The Court agrees.

Applying the standards for adult entertainment regulation, the court in *Sensations I* addressed at length, under First Amendment principles, the same constitutional challenges raised in this case. That is, whether the ordinance: (1) acted as a prior restraint on constitutionally protected expression; (2) was not a content-neutral law of general applicability, but instead an impermissible content-based restriction; (3) was facially overbroad and unconstitutionally vague; (4) failed to meet the test of *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), and *City of Renton v. Playtime Theaters,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), because the ordinance was not supported by reasonable evidence of adverse secondary effects and was not narrowly tailored to serve a legitimate governmental interest; and (5) violated the First Amendment to free association. *Sensations I,* 2006 U.S. Dist. Lexis 77159 at * 14-15, 2006 WL 5779504.The district court concluded that the City of Grand Rapids ordinance was not vulnerable to constitutional attack on any of the grounds advanced.

First, despite Little Mack's lengthy briefing, there is little basis for argument concerning the applicable standards for evaluating First Amendment challenges to the regulation of sexually oriented businesses. Governmental regulation of adult theaters and adult entertainment is generally evaluated as "content neutral" since the regulation is aimed at the secondary effects on the surrounding community rather than at the content of the speech. *Sensations I,* 2006 U.S. Dist. Lexis 77159 at * 15, 2006 WL 5779504.The applicable constitutional standards have been clearly enunciated in a number of decisions and were reaffirmed in the recent Sixth Circuit decision in *Sensations II,* 526 F.3d at 298-299:

> ***7** Nude dancing is a form of expressive conduct protected by the First Amendment. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville (Deja Vu of Nashville I),* 274 F.3d 377, 391 (6th Cir.), cert. denied, 535 U.S. 1073, 122 S.Ct. 1952, 152 L.Ed.2d 855 (2002). Nevertheless, in accordance with Supreme Court precedent, the Sixth Circuit treats laws such as the Ordinance, which regulate adult-entertainment businesses, as if they were content neutral. *Richland Bookmart, Inc. v. Nichols,* 137 F.3d 435, 438-39 (6th Cir.1998). We have applied the test first set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to regulations on the operation of sexually oriented businesses. See, e.g., *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.,* 411 F.3d 777, 789-90 (6th Cir.2005) (en banc) (applying the *O'Brien* test to an hours-of-operation provision); *Deja Vu of Nashville I,* 274 F.3d at 396 (applying the *O'Brien* test to a regulation requiring a specified buffer zone between the performer and audience); *DLS, Inc. v. City of Chattanooga,* 107

F.3d 403, 410 (6th Cir.1997) (same)....

> The *O'Brien* test requires us to determine whether [the government] enacted the Ordinance "(1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an 'incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest.'"*Deja Vu of Nashville I,* 274 F.3d at 393.

Contrary to Little Mack's arguments, this Court need not decide whether Ordinance 2005-4 is a total ban on speech or simply a time, place or manner restriction to determine whether the restrictions on speech are judged under a content-neutral or content-based standard. A government's attempt to regulate the secondary effects of sexually oriented businesses is treated as content-neutral, since the regulation is aimed at the secondary effects on the surrounding community rather than the content of the speech. *Sensations I,* 2006 U.S. Dist. Lexis 77159 at *14, 2006 WL 5779504 (citing *Renton,* 475 U.S. at 47). The regulations at issue here are judged as content-neutral restrictions under the *O'Brien* test based on intermediate-scrutiny.*Sensations I,* 2006 U.S. Dist. Lexis 77159 at *14-15, 2006 WL 5779504.

1. Application of the *O'Brien* Test

Here, as in *Sensations I,* the government adopted a comprehensive licensing and regulatory ordinance to address the adverse secondary effects of sexually oriented businesses. The ordinance meets the four-part *O'Brien* test. First, there is no dispute that the Township has the authority to enact the ordinance.

Second, the ordinance serves a substantial government interest. The Supreme Court has recognized that local governments have an undeniable important interest in combating the secondary effects of sexually oriented businesses.*Sensations I,* 2006 U.S. Dist. Lexis 77159 at *16 2006 WL 5779504 (citing *City of Erie v. Pap's A.M.,* 529 U.S. 277, 296, 120 S.Ct. 1382, 146 L.Ed.2d 265 (1977). A local government is not required to conduct its own studies of secondary effects, but instead may rely on any evidence "reasonably believed to be relevant," including previous judicial opinions, land use studies, or anecdotal reports. *Sensations I,* 2006 U.S. Dist. Lexis 77159 at *16-17, 2006 WL 5779504."Secondary effects can include a diverse range of problems, including negative impacts on surrounding properties, illicit sexual behavior, litter, and urban blight."*Sensations I,* 2006 U.S. Dist. Lexis 77159 at *17, 2006 WL 5779504.

***8** Section 1 of Ordinance 2005-4 sets forth ample findings and rationale to establish that the ordinance serves a substantial government interest. The Township asserts that in adopting the ordinance, it relied on judicial opinions, land use and crime impact reports, and anecdotal reports of illicit sexual behavior and unsanitary conditions in sexually oriented businesses (Def's.Br.26). The Township relied on more than 30 court decisions and 20 reports addressing the adverse secondary effects of such businesses and the constitutionality of regulations relevant thereto. Ord.2005-4, § 1(b) (citing legislative evidence). These sources are proper and adequate evidence of secondary effects. *Sensations II,* 526 F.3d 298-299;*Sensations I,* 2006 U.S. Dist. Lexis 77159 at *17-22 2006 WL 5779504.

Based on the legislative evidence cited, Ord.2005-4, § 1(b), the Township found:

> (1) Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.
>
> (2) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.
>
> (3) Each of the foregoing negative secondary effects constitutes a harm which the Township has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the

> Township's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the Township's interest in regulating sexually oriented businesses extends to preventing future secondary effects of either current or future sexually oriented businesses that may locate in the Township. The Township finds that the cases and documentation relied on in this ordinance are reasonably believed to be relevant to said secondary effects.

The evidence and rationale meets the required standards for establishing that Ordinance 2005-4 serves a substantial government interest. In *Deja Vu of Nashville III*, 466 F.3d at 398, the Sixth Circuit observed that it had "followed the Supreme Court in deferring to local governments' conclusions regarding whether and how their ordinances address adverse secondary effects of adult-oriented establishments."The record establishes the Township's reasonable belief that the ordinance will help ameliorate the identified secondary effects. *See id.*Under the principles and analysis set forth in *Sensations I*, 2006 U.S. Dist. Lexis 77159 at 16-27, 2006 WL 5779504, there can no valid argument that the nearly identical rationale concerning secondary effects and the restrictions legislated in the Marengo Township ordinance are constitutionally infirm. Contrary to Little Mack's arguments, the affidavit of Daniel Linz, Ph.D., which concludes that the ordinances were based on shoddy data and flawed reasoning, does not undermine the legislative basis for adopting the ordinances (Pl's.Br.37-38).*See* *Sensations I*, 2006 U.S. Dist. Lexis 77159 at *22-27, 2006 WL 5779504 (rejecting efforts and evidence that would effectively challenge the findings and decisions of controlling cases with regard to secondary effects evidence).

***9** The third part of the *O'Brien* test requires a determination of whether the ordinance is unrelated to the suppression of speech. As discussed above and in *Sensations I*, 2006 U.S. Dist. Lexis 77159 at *27-29, 2006 WL 5779504 the regulations at issue are properly viewed as content-neutral. The ordinance is aimed at suppressing the secondary effects of sexually oriented businesses and not the speech communicated by those businesses. *See* *Sensations II*, 526 F.3d at 299. Nothing in the Marengo Township ordinance warrants a different conclusion from that reached in *Sensations.*

Finally, with regard to the fourth part of the *O'Brien* test, the Court is persuaded that the incidental burden on First Amendment freedoms is no greater than is essential to further the government interest. Ordinance 2005-4 contains five key prohibitions at issue (Pl's.Br.36). It prohibits performers from appearing totally nude; it requires "pasties and a G-string." Ord.2005-4 § 18(a). It requires an employee who appears semi-nude ("performers") to remain on a stage that is at least six feet from patrons and in a room of at least 1000 square feet. *Id.* at § 18(b). It requires performers to refrain from knowingly or intentionally touching patrons on the premises within 24 hours after appearing semi-nude. *Id.* at § 18(c). It has an "open-booth" requirement requiring minimum interior lighting, signage and specific configuration for sexually explicit video viewing rooms. *Id.* at § 14. And further, it prohibits business operations between the hours of 12:00 midnight and 6:00 a.m. *Id.* at § 13.

Regulations such as those above have been upheld by the courts as narrowly tailored and constitutional. *Sensations I*, 2006 U.S. Dist. Lexis 77159 at *30-32, 2006 WL 5779504.In *Sensations II*, 526 F.3d at 299, the Sixth Circuit reiterated its agreement with the district court's reasoning that such regulations meet the "narrowly tailored" requirement:

> The prohibition of full nudity has been viewed as having only a de minimis effect on the expressive character of erotic dancing. See *City of Erie*, 529 U.S. at 301;*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion). A plurality of the Supreme Court in *Pap's A.M.* rejected the argument that a ban on total nudity "enacts a complete ban on expression" and instead found that the ban "ha[d] the effect of limiting one particular means of expressing the kind of erotic message being disseminated."529 U.S. at 292-93. In addition, the Sixth Circuit has upheld every one of the other regulatory provisions contained in the Ordinance: the six-foot distance requirement between performer and audience members and the no-touching rule; the open-booth requirement; and the limitation on hours of operation. See *Deja Vu of Cincinnati*, 411 F.3d at 789-91 (upholding an hours-of-operation limitation on adult businesses); *Deja Vu of Nashville I*, 274 F.3d at 396

(upholding a three-foot buffer/no-touching regulation); *Richland Bookmart,* 137 F.3d at 440-41 (upholding limitations on the hours and days that an adult-entertainment business could operate); *DLS, Inc.,* 107 F.3d at 408-13 (upholding a six-foot buffer/no-touching regulation); *Bamon Corp. v. City of Dayton,* 923 F.2d 470, 474 (6th Cir.1991) (upholding an open-booth requirement).

***10** In this case, as in *Sensations II,* the Court inquired of counsel for plaintiff [Little Mack], the grounds for challenge in light of the clear pronouncements in *Sensations II* (Tr. 3-5, 26). Little Mack argued, in particular, that the Township's 24-hour no-touch rule is excessive and does not reasonably combat the secondary effects of sexually oriented businesses (Tr. 27-29). While no case precedent appears to sanction a 24-hour no-touch rule as opposed to a no-touch rule merely during performance, the Court is not persuaded that the 24-hour period renders the regulation unconstitutional.

In *DLS,* 107 F.3d at 412, the court specifically addressed the standards for determining whether a regulation was not substantially greater than necessary to achieve the government's interest in the prevention of crime and disease, under part four of the *O'Brien* test. The regulation of speech:

> must be narrowly tailored to serve the government's legitimate, content-neutral interests but [ ] it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

*DLS,* 107 F.3d at 412 (quoting *Ward v. Rock Against Racism,* 491 U.S. at 798-99 (1989) (internal citations and quotation omitted)).

The Township's 24-hour no-touch rule prohibits an employee who appears semi-nude in a sexually oriented business from knowingly or intentionally touching a customer or the clothing of a customer, on the premises of a sexually oriented business, within 24 hours of appearing semi-nude. Ord.2005-4, § 18(c). As the Township points out, the regulation merely limits physical contact, not expression, and then only on the premises of the sexually oriented business. Thus, the rule leaves performers and patrons free to *communicate* with one another on the premises and free to have off-premises contact.

The courts have upheld various no-touch rules in the context of sexually oriented businesses:

> we conclude that Arlington's "no touch" provision does not burden more protected expression than is essential to further substantial governmental interests. We perceive no material difference between Arlington's "no touch" provision and the "no touch" provision upheld against a similar attack in *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir.1986). In *Kitsap County,* the Ninth Circuit upheld an ordinance that, in addition to prohibiting topless dancers and customers from fondling or caressing one another, required dancers to remain at least ten feet from the customers and prohibited patrons from tipping dancers. Referring to the "no touch" provision, the court concluded that "because of the County's legitimate and substantial interest in preventing the demonstrated likelihood of prostitution occurring in erotic dance studios, the County may prevent dancers and patrons from sexually touching each other while the dancers are acting in the scope of their employment."*Id.* at 1061 n. 11.Arlington's "no touch" provision does not criminalize more conduct than *Kitsap County's.*We are persuaded that Arlington's ordinance burdens no more protected expression than is essential to further Arlington's interest in preventing prostitution, drug dealing, and assault.

***11** *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248, 1255 (5th Cir.1995).

The courts have held that physical contact between

employees of sexually oriented businesses and patrons is not "expressive conduct" falling within the strictures of the First Amendment. *See,* e.g., *id.* at 1253 (noting that "patrons have no First Amendment right to touch a nude dancer"). But even if intentional contact was considered to be protected speech, the Court is not persuaded that the 24-hour no-touch rule fails the standards set forth in *DLS,* 107 F.3d at 412. It cannot be said that a substantial portion of the burden on speech does not serve to advance the Township's goals in the ordinance. The ordinance is intended to prevent "a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking ...." Ord.2005-4, § 1(b)(1). Any burden on speech would nevertheless advance the Township's goal of preventing these adverse secondary effects.

Physical contact is the gravamen of the sexual and other illegal activity the regulations are aimed at preventing as adverse secondary effects of sexually oriented businesses. Contrary to Little Mack's arguments, the no-touch rule is precisely tailored to achieve the intended results, such as preventing the spread of disease. Although the no-touch rule is in effect for a longer period of time than a personal buffer zone of several feet generally is, the no-touch rule is narrower in application. The no-touch rule does not limit communication between performers and patrons. Accordingly, the Court is not persuaded that the 24-hour no-touch rule is substantially broader than necessary to achieve the Township's interests in addressing "personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation."Ord.2005-4, § 1(b)(1).

2. Reasonable Alternatives Avenues of Communication

Little Mack also maintains its challenge based on the number of available sites for sexually oriented businesses. Little Mack argues that the ordinance fails to meet the requirement for reasonable alternative avenues of communication because the amount of land available for adult uses is not constitutionally sufficient (Pl's.Br.40-41).*See* *Renton,* 475 U.S. at 47, 50;*Christy v. City of Ann Arbor,* 824 F.2d 489, 491 (6th Cir.1987). Contrary to Little Mack's argument, the Court finds no basis for upholding this challenge.

Under the amended zoning ordinance, sexually oriented businesses are permitted uses in the HS-Highway Service Commercial District and in the LI-Light Industrial District (Am.Compl., Ex. D). However, under the amended zoning ordinance and § 21 of Ordinance 2005-4, a building containing a sexually oriented business must be at least 600 hundred feet from any parcel that is zoned residential. The Township has presented evidence that Marengo Township contains eleven parcels of land that conform to these requirements, which are available sites for sexually oriented businesses (Def's. Ex C, Def's Ans. to Pl's. 2nd Interrs., Ex K, List of Legally Available Parcels). According to the Township's evidence, the eleven available sites comprise approximately 61.35 acres or approximately 58 percent of the commercial land in Marengo Township (Def's. Reply, Ex. 5, Wicklund Aff. ¶¶ 17-19). Further, the eleven sites constitute nearly one-half of the commercially zoned parcels in the township, since there are 24 commercial parcels in total (*id.* ¶ 19).

***12** Little Mack disputes the figures cited by the Township on the ground that some of the acreage included in the Township's figures is not actually available.[FN10]Regardless, Little Mack applies a different calculus to determine site availability. Little Mack contends that the available acreage is only .00010329 percent of the total acreage of 22,848 acres in Marengo Township, which is far less than the five percent margin found sufficient in *Renton,* 475 U.S. at 53, or the one percent margin suggested by *Dia v. City of Toledo,* 937 F.Supp. 673, 678 (N.D.Ohio 1996) (Pl's.Br.42-43).

> FN10. Little Mack also contends that it is entitled to additional discovery to determine the available acreage. The Court finds no basis for this argument given the history and length of time these proceedings have been pending. Little Mack has produced no evidence to persuade the Court that additional discovery would warrant a different result.

Although the parties dispute certain aspects of site availability, the Court cannot conclude that these

disputes create a triable issue with regard to the constitutionality of the ordinances. The Court is persuaded that the availability of sites is constitutionally sufficient. As the Township points out, there is no evidence that the available sites exceed the demand for operating sexually oriented businesses. *See N. Ave. Novelties v. City of Chicago,* 88 F.3d 441, 445 (7th Cir.1996) (considering whether an ordinance provided a "reasonable opportunity" for adult business). Given the modest size and population of Marengo Township, the number of available site provides reasonable alternative avenues for the communication of erotic expression. *Compare Executive Arts Studio, Inc. v. City of Grand Rapids,* 391 F.3d 783, 797 (6th Cir.2004) (a half dozen possible sites in a city with over 2,500 parcels of commercially useable real estate is wholly inadequate to provide for reasonable alternative avenues of communication).

C. Remaining Challenges

The Court is persuaded that any remaining bases for challenge to the Marengo Township ordinances have been sufficiently addressed and foreclosed by prior precedent. As noted above, numerous constitutional challenges raised here were rejected in *Sensations I.* The legal and decisional basis of the constitutional challenges in *Sensations I* apply in this case.

1. Freedom of Association

Little Mack has failed to allege a valid freedom of association claim. Little Mack contends that the ordinance violates the right of expressive association between the audience and entertainers. *See Sensations I,* 2006 U.S. Dist. Lexis 77159 at *35, 2006 WL 5779504.Little Mack asserts that the no-touch rule unconstitutionally prohibits the right to associate based on the message that is delivered and received solely because the message is not viewed as encouraged communications. Little Mack further asserts that the rule "prohibits verbal expression, speech and even social contact, such as shaking another's hand" (Pl's Br. 45).

This same type of argument was made and rejected in *Sensations I, id.* at 34-37. Little Mack's arguments likewise fail. The Court finds no basis for a different conclusion merely because the no-touch rule is imposed for 24 hours, rather than coupled with a buffer zone for a shorter period of time as in *Sensations I.*

2. Overbreadth

***13** Likewise, Little Mack's overbreadth claim has been considered and rejected. *Sensations I, id.* at 37-43.Contrary to Little Mack's argument, the ordinance's ban of all nude expression and the requirement to be clothed does not result in overreaching constraints on constitutionally protected speech. In *Sensations I, id.* at 41, the court found no overbreadth in the nearly identical provisions of the City of Grand Rapids ordinance, observing that the ordinance was narrowly tailored, and when read together, the provisions of the ordinance prevented any realistic chance that the prohibitions would be applied in a setting other than sexually oriented businesses or to a venue not associated with the identified secondary effects. Little Mack has failed to show any basis for a different result in this case.

3. Prior Restraint

As in *Sensations I* and *Deja Vu of Cincinnati,* 411 F.3d at 786-789, Little Mack has failed to allege an unconstitutional prior restraint. The prior restraint concept comes into play when licensing procedures exist that give unbridled discretion to authorities to grant or deny permits. *Sensations I,* 2006 U.S. Dist. Lexis 77159 at 33 2006 WL 5779504.Further, licensing schemes regulating sexually oriented businesses may constitute a prior restraint if they fail to incorporate procedural safeguards, including: (1) " 'any restraint imposed in advance of a final judicial determination on the merits must ... be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution,' " and (2) " 'the procedure must also assure a prompt final judicial decision.'"'*Deja Vu of Cincinnati,* 411 F.3d at 786 (quoting *Freedman v. Maryland,* 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)).

The Marengo Township ordinance engenders no notions of an unconstitutional prior restraint. The Township may deny a license only based upon objective criteria. Ord.2005-4, § 5. The ordinance provides for prompt decisionmaking and review. The Township must issue a license or a letter of intent to deny a license within 20 days. *Id.* § 5(a). With respect to a denial, the applicant must be provided a hearing

within 20 days, and the Township must render a decision within five days thereafter. *Id.* § 1 1(a). Moreover, a license applicant is immediately issued a Temporary License to operate until a final administrative decision is made, *id.* § 5(a), and an aggrieved party is given a Provisional License that allows continued operation or employment pending judicial review, *id.* § 11(b). Given these procedural provisions, which maintain the status quo pending a final judicial determination, Little Mack's prior restraint claims clearly fail.[FN11] *Deja Vu of Cincinnati,* 411 F.3d at 788-789.

> FN11. To the extent that Little Mack raised questions at oral argument concerning whether a proper basis exists for the license fees set under Ordinance 2005-4, pursuant to *729, Inc.,* 515 F.3d 485, these questions do not impact summary judgment (Tr. 30). Little Mack's mere belief that the fee structure is a flaw in the ordinance that must be cured is insufficient to raise an issue of triable fact. A respondent must present affirmative evidence to defeat a properly supported motion for summary judgment. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir.1989).

4. Vagueness

Little Mack's vagueness challenge also fails. Even assuming that Little Mack has standing to advance its vagueness claim, which the Township contests, the claim fails on its merits. Little Mack claims that the provision for a six-foot buffer zone and the definition of semi-nudity are vague. Similar challenges were summarily rejected in *Sensations I,* 2006 U.S. Dist. Lexis 77159 at 45-48, 2006 WL 5779504.Little Mack's bare assertion that the language defining specified sexual activities, and thus, adult entertainment, is unconstitutionally vague, is insufficient to establish a claim, and thus does not warrant a different result.

5. Taking

***14** Little Mack claims that the Township's denial of operation of a sexually oriented business at its present location is an improper taking without just compensation and due process because it temporarily denied Little Mack the lawful use of its property. In *Sensations I,* 2006 U.S. Dist. Lexis 77159 at 48-50, 2006 WL 5779504, the court considered the merit of the plaintiffs' taking claims under similar circumstances. The court found such claims devoid of merit under the tests for a taking. The same analysis and result apply in this case. Little Mack's taking claim fails.

6. Due Process

Little Mack broadly claims that enforcement of Ordinance 2005-4 violates due process. This claim is premised on Little Mack's contention that the ordinance eradicates businesses and the industry in whole without any procedural due process. Little Mack's due process challenge is essentially a reiteration of its failed secondary effects arguments. The Court finds no merit in this claim for the same reasons that the similar due process arguments were rejected in *Sensations I,* 2006 U.S. Dist. Lexis 77159 at 50-53, 2006 WL 5779504.

7. Equal Protection

Little Mack's complaint also alleged a claim under the Equal Protection Clause. This claim was not at issue in the proceedings on the motion for summary judgment. To the extent that Little Mack maintains any challenge to the ordinances on Equal Protection grounds, this claim fails. As the court stated in *DLS,* with regard to a similar challenge to the regulation of sexually oriented businesses:

> In cases such as this one, the Equal Protection Clause adds nothing to the First Amendment analysis; if a sufficient rationale exists for the ordinance under the First Amendment, then the City has demonstrated a rational basis for the alleged disparate treatment under the Equal Protection Clause. See *Renton,* 475 U.S. 41 at 55 n. 4, 106 S.Ct. 925, 89 L.Ed.2d 29;*Young v. American Mini-Theatres,* 427 U.S. 50, 63-73, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion).

*DLS,* 107 F.3d at 412 n. 7.

V. Conclusion

Given the facts of this case and the ample precedent addressing analogous legal claims concerning the

regulation of sexually oriented businesses, the Court rejects Little Mack's challenges to the Township's zoning ordinance and Ordinance 2005-4. Accordingly, the Court GRANTS the Township's motion for summary judgment of Little Mack's complaint. An Order will be entered consistent with this Opinion.

W.D.Mich.,2008.
Little Mack Entertainment II, Inc. v. Township of Marengo
Slip Copy, 2008 WL 2783252 (W.D.Mich.)

END OF DOCUMENT

Illinois One News, Inc. v. City of Marshall, IL
S.D.Ill.,2006.
Only the Westlaw citation is currently available.
United States District Court,S.D. Illinois.
ILLINOIS ONE NEWS, INC. d/b/a the Gift Spot, Plaintiff,
v.
CITY OF MARSHALL, ILLINOIS, Defendant.
**No. 04 CV 4055 JPG.**

Feb. 22, 2006.

Brett N. Olmstead, Roger B. Webber, Beckett & Webber, Urbana, IL, for Plaintiff.
Laurel A. Haskell, Jamie A. Robinson, Ronald S. Cope, Michael Best & Friedrich, Chicago, IL, Richard J. Bernardoni, Meehling & Bernardoni, Marshall, IL, for Defendant.

*FINDINGS OF FACT AND CONCLUSIONS OF LAW*

GILBERT, J.
***1** This is an action under 42 U.S.C. § 1983 for declaratory and injunctive relief to prevent the defendant City of Marshall, Illinois ("Marshall") from enforcing its zoning ordinance. Plaintiff Illinois One News, Inc. d/b/a The Gift Spot ("ION" or "The Gift Spot"), a purveyor of sexually explicit materials, alleges that Marshall will violate its free speech rights under the First Amendment and its due process rights under the Fourteenth Amendment by enforcing that ordinance. Specifically, ION alleges that Marshall's ordinance (1) is directed at suppressing protected speech and is not a reasonable time, place and manner restriction directed at reducing secondary effects, (2) is unconstitutionally vague and overbroad and (3) contains a site plan review process that amounts to an unlawful prior restraint on speech.

The Court consolidated the proceedings involving ION's motion for a preliminary injunction and the trial on the merits, and conducted a two-day bench trial in Benton, Illinois, on September 6 and 7, 2005. ION was represented by Roger B. Webber and Brett N. Olmstead, and Marshall was represented by Ronald S. Cope, Jamie A. Robinson and Laurel A. Haskell. ION called Stacy Slowiak, Owen Makoroff and Bruce C. McLaughlin as witnesses in its case in chief, and called McLaughlin as a rebuttal witness. Marshall called John Trefz, John Welborn, Steve Calhoun, Robert Morris and Leslie S. Pollack in its case in chief.

Pursuant to Federal Rule of Civil Procedure 52, the Court makes the following findings of fact and conclusions of law:

*I. FINDINGS OF FACT*

The stipulations and the evidence at trial establish the following relevant facts:

*The Ordinance*[FN1]

> FN1. Unless otherwise specified, further reference to the "Ordinance" will refer to the current version of Marshall's zoning ordinance, that is, Ordinance No.2002-O-16, Zoning No.2002-Z-2, as amended by Ordinance No.2005-O-16, Zoning No.2005-Z-4.

1. The Preamble of the Ordinance states, in pertinent part:

AN ORDINANCE to regulate the use of land, natural resources and structures; to regulate structures designed for trade, industry, residence or other specified uses; to regulate and limit the height, the area, the size and location of structures hereinafter to be erected or altered; to regulate and determine the yards, court or other open spaces; to control congestion in the streets, to secure safety in case of fire, to prevent the overcrowding of land, to bring about the gradual conformity of the uses of land and buildings and for such purposes to divide the city into districts and zones, to establish appeal procedures; to provide for the administration and enforcement of the provisions of this ordinance and to prescribe penalties for the violation thereof.

* * *

Specific Findings Concerning Adult Uses

WHEREAS, at the request of the City of Marshall, Robert Morris, AICP, of Champaign County Regional Planning Commission conducted research on the adverse impacts due to an existing Adult Use ("adult book store") in the City and the development of standards for mitigating the adverse impacts from Adult Uses under the City's zoning ordinance; and

WHEREAS, Robert Morris has presented the results of his investigation to the Plan Commission; and

***2** WHEREAS, upon review of the Minnesota Attorney General's Report entitled "Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Business," which includes summaries of studies in Minneapolis, St. Paul, Indianapolis, Phoenix and Los Angeles regarding the impact of sexually oriented businesses on the community, as well as being informed of the findings of similar studies in other communities, the corporate authorities of the City of Marshall find that sexually oriented businesses are associated with:

(1) high crime rate areas;

(2) deteriorated commercial and residential areas;

(3) depreciation of property values in the area;

(4) dramatic changes in the character of the neighborhood when more than one sexually oriented business is operating in a given area; and

(5) Sales tax revenues are extremely important to the economic well-being of the City of Marshall. Persons who use the regional shopping areas within the City of Marshall will shop elsewhere if these shopping areas are identified with adult uses; and

WHEREAS, the intent of the adult use regulations is to protect the public health, safety and welfare by limiting the deleterious effects of sexually oriented businesses on the use and enjoyment of property in adjacent areas and to protect the property tax and sales tax base of the City; and

WHEREAS, the City recognizes that the First Amendment to the United States Constitution requires that the City of Marshall "refrain from effectively denying" expressive adult use operations a reasonable opportunity to open and operate within the City. Adult use regulations are meant as a narrow means to eliminate, or at least limit, the deleterious effects of adult uses on the health, safety and welfare of the residents, business owners and property owners in the City of Marshall. The Adult use regulations leave approximately 256.75 acres available for adult uses constituting approximately 11.66% of the entire City of Marshall and 46.16% of industrial areas in said territory; and

WHEREAS, the Adult use regulations limiting the areas available for adult uses have been narrowly drafted to separate adult uses from residential areas and from each other. Further, the regulations have been drafted to keep such uses from defining the character of the commercial areas within the City of Marshall. It is the intent of the corporate authorities that these regulations be as strict as constitutionally permissible and that they shall be severable, where necessary, to insure their constitutionality[.]

2. The first paragraph of the Ordinance sets forth its purpose as:

"promoting and protecting the public health, safety, peace, comforts, convenience and general welfare of the inhabitants of the City of Marshall by protecting and conserving the character and social and economic stability of the residential, commercial, industrial, and other use areas, by securing the most appropriate use of land; preventing over-crowding; and facilitating adequate and economical provision of transportation, water, sewers, schools, recreation, and other public requirements."

***3** 3. Article II, § 1 of the Ordinance provides the following definitions:

(3) *Adult bookstore:* An establishment having as a substantial or significant portion of its sales or stock in trade, books, magazines, films for sale or for viewing on premises by use of motion picture devices or by coin operated means, and periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities," or "specified anatomical areas;" or an establishment that holds itself out to the public as a purveyors [*sic* ] of such materials based upon its signage, advertising, displays, actual sales, presence

of video preview or coin operated booths, or exclusion of minors from the established's premises or any other factors showing the establishment's primary purpose is to purvey such material.

* * *

(7) *Adult use:* Adult bookstores, adult motion picture theaters, adult entertainment cabarets, adult novelty stores and other similar uses.

* * *

(34) *Incompatible use:* The transfer over a property line of negative economic or environmental effects, including but not limited to, traffic, noise, vibration, odor, dust, glare, smoke, pollution, mismatched land uses or density, height or mass, mismatched layout of adjacent uses, loss of privacy, and/or unsightly views.

4. Article VII, § 8 of the Ordinance states:

Adult Uses are permitted uses in I-1 Light Industrial District and I-2 Heavy Industrial District and subject to the conditions set out below:

1. Prior to the issuance of any permit for the construction or occupancy of an adult use, the applicant for said permit(s) must first proceed through a site plan review at a public meeting before the zoning commission and city council.

2. No adult use shall be located within 1,000 feet of any property which is zoned or used for a school, day care center, cemetery, public park, forest preserve, public housing, place of religious worship, other adult use or any property which is zoned B-3 [regional shopping center district]. Said distance shall be measured from the property line of the property upon which the adult use is located or proposed to be located to the property line of the other zoned or used properties described herein.

* * *

4. The zoning commission may recommend and the city council may place conditions on the development and operation of the adult use related to site plan floor plan, construction materials, lighting, parking, and circulation, ingress and egress, landscaping and screening, and signage in order to assure that the design is compatible with surrounding uses and the operation of the adult use is in conformance with all city ordinances. No adult use shall be conducted in any manner that permits the observation of any material depicting, describing or relating to "specified sexual activities" or "specified anatomical areas", as defined in this zoning ordinance from any public way or from any property not registered as an adult use. This provision shall apply to any display, decoration, sign, show window or other opening.

***4** 5. Article XV, § 8 of the Ordinance provides businesses that become non-conforming as a result of the Ordinance are entitled to an amortization period of one year if it applies for a certificate of non-conformance and of six months if it does not apply for such a certificate.

6. Article XVIII-A of the Ordinance states:

Section 1. Purpose.

The site plan review process promotes orderly development and redevelopment in the city, and ensures such development or redevelopment occurs in a manner that is harmonious with surrounding properties, is consistent with the comprehensive plan, and promotes the general welfare of the city. This section provides standards by which to determine and control the physical layout and design to achieve the following purposes:

(1) Compatibility of land uses, buildings, and structures.

(2) Protection and enhancement of community property values.

(3) Efficient use of land.

(4) Minimization of traffic, safety hazards, and overcrowding problems.

(5) Minimization of environmental problems.

Section 2. Applicability.

Certain uses and certain areas designated for more intensive use require additional regulation to protect

the public health, safety and welfare. A site plan review shall be required for every application for a building permit as required by this ordinance as a condition for approval of a use located in [an] ... I-1 or I-2 zoned district....

Section 3. Procedure.

(1) Applications for site plan review shall be submitted to the zoning officer and forwarded to the zoning commission for review.

(2) After an application for a site plan review has been submitted to the zoning commission, the zoning commission shall hold a duly advertised public hearing as prescribed by statute and made [*sic* ] a recommendation to grant or deny the site plan within sixty (60) days of filing of the complete application. The zoning commission recommendation must be based on the standards listed in section 4 below and compliance with any additional standards of this ordinance. In making its recommendation, the zoning commission may also recommend such additional conditions and requirements as are appropriate or necessary to protect the public health, safety, and welfare and to carry out the purpose of this ordinance.

(3) The city council shall make the decision to grant or deny a site plan within sixty (60) days of receiving the zoning commission recommendation, based on the standards listed in section 4 below and any additional standards of this ordinance. The city council may impose any conditions or requirements, including but not limited to, those recommended by the zoning commission, which it deems appropriate or necessary in order to accomplish the purpose of the ordinance. If the city council approves a site plan, a building permit may then be issued, provided that all other requirements of all other applicable city codes and ordinances are satisfied.

***5** Section 4. Standards for site plan review.

The scope of the site plan review includes the location of principal and accessory structures, infrastructure, open space, landscaping, exterior lighting, traffic movement and flow, number of parking spaces, design of parking lots, location of landscaping and screening, and compliance with the provisions of this ordinance. In reviewing site plans, the relationship of the site plan to adopted land use policies, and the goals and objectives of the comprehensive plan shall be evaluated. In addition to any other requirements of this ordinance, the following characteristics shall also be considered:

(1) The arrangement of the structures and building on the site to:

(a) Respond to off-site utility and service conditions, and minimize potential impacts on existing or planned municipal services, utilities, and infrastructure.

(b) Conform to the requirements of this ordinance and other applicable regulations.

(2) The arrangement of open space or natural features on the site to:

(a) Provide adequate measures to preserve existing healthy, mature trees wherever practically feasible.

(b) Break up large expanses of asphalt with plant material.

(c) Buffer adjacent incompatible uses.

(d) Screen unsightly activities from public view.

(e) Create a logical transition to adjoining lots and developments.

(f) Avoid unnecessary or unreasonable alterations to existing topography.

(g) Minimize the visual impact of the development on adjacent sites and roadways.

(h) Provide plant materials and landscaping designs that can withstand the city's climate, and the microclimate on the property.

(3) The organization of circulation systems to:

(a) Provide adequate and safe access to the site.

(b) Minimize potentially dangerous traffic movements.

(c) Achieve efficient traffic flow in accordance with

standards in the "Institute of Traffic Engineers Transportation and Traffic Engineering Handbook."

(d) Provide the required number of parking spaces.

(e) Separate pedestrian and auto circulation.

(f) Minimize curb cuts.

(4) The design and location of site illumination to minimize adverse impacts on adjacent properties.

(5) Conformance of the proposed development with the goals and policies of the comprehensive plan and all city codes and regulations.

* * *

Section 6. Site Plan Requirements.

Submission requirements for site plan review shall be as follows:

* * *

(5) Any other supporting documents to indicate intentions and/or any other items required by the zoning officer.

7. Article III, § 1 provides that the Ordinance only applies within Marshall's city limits.

*The Parties*

8. Marshall is an Illinois municipality located in Clark County, Illinois, with a population of approximately 3,771 people.

9. Marshall is a rural community that is located approximately 15 miles from Terre Haute, Indiana.

***6** 10. Clark County does not have any zoning regulations that regulate adult uses at the present time.

11. ION is an Illinois corporation duly formed and incorporated on September 14, 2001.

12. Since November 1, 2002, ION has leased the property at 1802 North Illinois, Highway One, in Marshall, from 1002 North Illinois One, L.L.C..

*The Passage of the Ordinance*

13. On November 1, 2002, Marshall published notice of a public hearing on the recodification of the Marshall zoning ordinance in the *Marshall Advocate.*Prior to enacting Ordinance No.2002-0-16 and Zoning No.2002-Z-2 ("2002 Ordinance"), Marshall obtained a report authored by Robert Morris ("Morris"), of the Champaign County Regional Planning Commission ("Morris Report").

14. On November 18, 2002, Marshall's Plan Commission held a public hearing on the 2002 Ordinance, the recodification of Marshall's zoning ordinance ("Plan Commission hearing").

15. The following exhibits were introduced into evidence at the Plan Commission hearing:

a. City Ex. 1-Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses ("Minnesota Attorney General's Report")

b. City Ex. 2-Report of Robert Morris-6/27/02

c. City Ex. 3-Proposed Zoning Ordinance 2002-Z-2

d. City Ex. 4-Proposed Zoning Ordinance 2002-Z-3

e. City Ex. 5-Proposed Zoning Ordinance 2002-Z-4

f. City Ex. 6-Affidavit of Service of Notice of Hearing on 1002 North Illinois One, L.L.C.

g. City Ex. 7-Affidavit of Service of Notice of Hearing on 1002 North Illinois One, L.L.C.

h. City Ex. 8-Affidavit of service of Notice of Hearing on Communications Sites of America, Inc.

i. City Ex. 9-Strohm Newspapers, Inc.'s Affidavit of Publication

j. City Ex. 10-Strohm Newspapers, Inc.'s Affidavit of Publication

k. Gift Spot Ex. 11-Letter from Webber to Zoning Commission dated 11/18/02

l. Glosser Ex. 12-"Fighting Sex Oriented Businesses Through Regulation, Zoning and Licensing"

16. At the November 18 Plan Commission meeting, the Plan Commission was informed by James Schwartz, who served on the committee that drafted the 2002 Ordinance, that there were approximately 256.75 acres, approximately 11.66% of the land in Marshall, available for adult uses under the Ordinance.

17. At the November 18 Plan Commission meeting, the Plan Commission heard testimony from Morris. In his testimony, he acknowledged that sexually-oriented businesses are protected by the First Amendment and that studies have found that negative secondary effects result from adult uses such as adult bookstores. Morris gave specific examples of such negative effects in Marshall, namely,

i. the fact that TRW, Inc., a local manufacturing company, had refused to locate a plant in the vicinity of Hy Way News in 1993 because of the store,

ii. anecdotal evidence that the incidence of police reports involving drunken and disorderly conduct was considerably higher around Hy Way News than other local business districts, leading to the inference that the resulting nuisance would discourage shoppers from patronizing the nearby retail shops and hotels, and

***7** iii. the incompatibility of adult bookstores with the planned development of a regional shopping center district in that area.

Morris indicated that the Ordinance would make it more difficult for impulse patrons of adult bookstores to act on those impulses and actually visit the adult bookstores. He also acknowledged that the Ordinance would offer ION the options of changing the content of its stock in trade or moving. He testified that the Plan Commission considered the amount of land that would be available for an adult bookstore if it was restricted to industrial zones (I-1 or I-2) and was subject to a 1,000 foot barrier or a 1,500 foot barrier from certain sensitive uses such as schools, day care centers, cemeteries, pubic parks, forest preserves, public housing units, places of religious worship, other adult uses and property zoned as regional shopping center districts. He testified that the Plan Commission found that a 1,500 foot barrier did not leave sufficient alternate space available for the bookstore but that a 1,000 foot barrier did because it left approximately 12% of Marshall open to an adult bookstore. Morris testified that he had consulted the Minnesota Attorney General's Report and a 1996 report by Len Munsil entitled "Protecting Communities from Sexually Oriented Businesses" ("Munsil Report") in preparing the Morris Report and his testimony.

18. In addition to Morris's testimony at the November 18 hearing, the Plan Commission considered the Morris Report. The Morris Report echoes Morris's testimony and includes a description of one other incident: the 1990 kidnaping and rape of a young girl by a truck driver who had viewed and been excited by sexually oriented material from Hy Way News prior to abducting the girl from a nearby residential neighborhood. The Morris Report contains no first-hand, scientific studies relating to adult uses in Marshall.

19. The Plan Commission considered the Minnesota Attorney General's Report. That report describes efforts in Minnesota "to assist public officials and private citizens in finding legal ways to reduce the impacts of sexually oriented businesses."Minnesota Attorney General's Report, Introduction. The report "discusses evidence that sexually oriented businesses, and the materials from which they profit, have an adverse impact on the surrounding communities" and suggests ways of decreasing those adverse impacts. *Id.* The report authors reviewed evidence from other studies conducted in Minneapolis (1980), St. Paul (1978) and other studies and concluded that "sexually oriented businesses are associated with high crime rates and depression of property values."Minnesota Attorney General's Report, Impacts of Sexually Oriented Businesses. The report authors also heard testimony and concluded therefrom that "the character of a neighborhood can dramatically change when there is a concentration of sexually oriented businesses adjacent to residential property."*Id.*

***8** 20. Other witnesses testified at the November 18

Plan Commission hearing in favor of the Ordinance. Some complained that adult bookstores produced sexually oriented litter (including novelties, lingerie and blow-up dolls) in areas where children could find it, facilitated sexual predators, discouraged businesses and retail shoppers from coming to the area, discouraged people from moving to Marshall, and caused negative secondary effects as documented in studies of other communities. Some speakers urged passage of the Ordinance to suppress the speech purveyed by ION.

21. ION's attorney testified and presented a letter at the November 18 Plan Commission hearing against passage of the Ordinance. He asserted that the Ordinance was targeting the content of the speech Hy Way News and The Gift Spot provide. He also informed the Plan Commission that the studies cited in the Morris Report were faulty and unreliable.

22. At the conclusion of the hearing, the Plan Commission recommended that Marshall Council pass the Ordinance. The recommendation cited Morris's research, the Minnesota Attorney General's Report, and other studies in other communities. It also made findings that sexually oriented businesses are associated with certain negative phenomena, yet recognized the First Amendment protections due to such businesses.

23. On November 25, 2002, Marshall passed the 2002 Ordinance, which, among other things, regulates adult uses.

24. Prior to November 25, 2002, Marshall did not have any adult use regulations either in its zoning ordinance or otherwise.

25. On July 11, 2005, Marshall amended its Zoning Ordinance, including those sections which relate to adult uses, by passing Ordinance No.2005-O-16, Zoning No.2005-Z-4.

*The Gift Spot*

26. On or about November 22, 2002, ION opened its doors doing business as The Gift Spot. At this location, The Gift Spot offers various items for sale or rent, including adult magazines, adult video tapes, adult DVDs and adult novelty items.

27. The Gift Spot also has fifteen (15) private booths in which a customer may view adult videos and/or DVDs.

28. The Gift Spot is located on a two-acre site.

29. Under the Ordinance, The Gift Spot, as currently operated, is an adult bookstore because "a substantial or significant portion of its sales or stock in trade" is made up of "books, magazines, films for sale or for viewing on premises by use of motion picture devices or by coin operated means, and periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities,' or 'specified anatomical areas." '

30. Under the Ordinance, The Gift Spot, as currently operated, is a nonconforming use as it is in an area that is not zoned where adult uses are permitted.

31. On March 17, 2003, Marshall notified The Gift Spot that it was a non-conforming use subject to amortization and that it would have to file for a certificate of non-compliance.

***9** 32. On May 12, 2003, The Gift Spot applied for an adult use license and continued to operate.

33. The amortization period defined in the Ordinance has elapsed.

34. The Gift Spot is not in compliance with the Ordinance and has not applied for a certificate of non-compliance.

35. The Gift Spot is presently open and operating pursuant to an informal agreement between the parties that Marshall would not enforce the Ordinance pending resolution of the pending legal action.

36. If the Ordinance is enforced against The Gift Spot it will change the content of its inventory so that it is no longer an adult bookstore as opposed to moving to another location within Marshall where an adult bookstore would be permitted.

*Hy Way News*

37. Hy Way News was an adult bookstore that was also located at the interchange of Interstate 70 and Illinois Highway One, but it was not located within Marshall.

38. The property on which Hy Way News was located was annexed by Marshall at the landlord/property owner's request on March 10, 2003.

39. On May 12, 2003, Hy Way News applied for an adult use license and continued to operate.

40. Hy Way News was owned and operated by the same owners as The Gift Spot.

41. Hy Way News ceased operations within one year after The Gift Spot opened and has not sought to reopen in Marshall.

42. Hy Way News was in business for eighteen years, from approximately 1985 to 2004.

*Secondary Effects*

43. When Hy Way News opened in the mid-1980s, calls to the Marshall Police Department about the area where Hy Way News was located increased to a daily or weekly basis and exceeded the calls from other areas of town. The calls reported such things as batteries, assaults, traffic accidents, and thefts of motor vehicles. There was somewhat conflicting evidence on this point. John Trefz ("Trefz"), a former Marshall police officer, police chief and mayor, testified to the foregoing primarily based on his memories of his experience in the police department from 1977 to 1997, both before and after Hy Way News opened. On the other hand, Robert Bruce McLaughlin ("McLaughlin"), ION's expert witness, testified that from July 21, 2001, to October 6, 2004, there were only twenty calls to the police department from the vicinity of Hy Way News or The Gift Spot. Based on his demeanor while testifying, his intelligence, his basis for knowledge and the reasonableness of his testimony in light of all the evidence in the case, the Court finds Trefz to be credible. The Court further finds that McLaughlin's testimony, even if true, does not cast serious doubt on Trefz's testimony because it does not cover the time period about which Trefz testified.

44. Litter of sexually oriented material was plentiful in a field near Hy Way News and has been found in a children's soccer field near The Gift Spot.

45. In October, 1991, David Thompson abducted and sexually assaulted a little girl from Marshall after viewing sexually oriented material from Hy Way News.

***10** 46. When TRW was considering expanding its Marshall facility in the early 1990s, its preferred expansion site was in the vicinity of Hy Way News. TRW officials rejected that site because it did not want directions to the plant to include, "Turn left at the adult bookstore sign."TRW selected another site in Marshall. There was somewhat conflicting testimony on this issue. John Welborn ("Welborn"), a former facilities maintenance manager at TRW, testified to the foregoing. McLaughlin testified that by examining newspaper reports and talking to librarians he was unable to verify that TRW was considering a site near Hy Way News but rejected the site because of the adult bookstore. Based on his demeanor while testifying, his intelligence, his basis for knowledge and the reasonableness of his testimony in light of all the evidence in the case, the Court finds Welborn to be credible on this point. On the other hand, McLaughlin's basis for knowledge-newspaper reports, librarians and a brief conversation with a City employee-was not as reliable as Welborn's direct knowledge of TRW's decisionmaking process. McLaughlin's testimony is therefore not sufficient to call into question Welborn's credible testimony.

47. TRW's current site requires truck traffic to pass through the center of Marshall and residential areas.

48. Between 1998 and 2003, the assessed values of the properties on the block containing Hy Way News and, for at least a year, The Gift Spot increased an average of approximately 28%. This number reflected the average of one new construction property that increased in assessed value by approximately 90% and seven other properties that increased in assessed value by approximately 7%. In the same time period, the assessed values of the properties on a similar block without an adult use in a similar community in Clark County increased by approximately 17%. This number reflects the average of thirteen assessed property values ranging from approximately 58% to approximately -26.

49. The presence of an adult use would deter approximately 10 to 15% of commercial investors or retail stores from locating in the vicinity of the adult use and would deter 10 to 15% of potential shoppers from visiting retail stores in the vicinity of the adult use.

50. McDonald's opened a new restaurant in the immediate vicinity of Hy Way News while Hy Way News was in operation.

*Expert Evidence*

51. In making its decision to regulate adult uses through zoning and in drafting and enacting the Ordinance, Marshall used materials, research findings, zoning and planning principles and standards that are generally acceptable in the field of urban planning. One of those materials, the Minnesota Attorney General's Report, is a good, but not perfect, summary of prior studies and, under generally acceptable planning standards, a community could use and rely on the report in establishing adult use zoning criteria. There was considerable conflicting testimony on these points. Leslie S. Pollock ("Pollock"), a city planner and zoning consultant, testified to the foregoing at trial as an expert witness for Marshall. McLaughlin testified to the contrary and noted numerous flaws in the studies relied on by Marshall in enacting the Ordinance. The Court finds Pollock's opinion more persuasive than McLaughlin's. Pollock's testimony was reasonable and consistent with the record and with other judicial decisions. McLaughlin's analysis was not as complete as Pollock's. For example, McLaughlin did not examine as thoroughly all the information used by Marshall, did not cast serious doubt on a major thrust of the Minnesota Attorney General's Report as a whole-the correlation between predominantly sexually oriented businesses and negative secondary effects-and did not acknowledge the judicially recognized value generally of non-empirical, non-scientific studies and specifically of the Minnesota Attorney General's Report to urban planning for adult uses. It did not therefore significantly detract from Pollock's opinion. In addition, Pollock's demeanor while testifying was more convincing.

***11** 52. Under the Ordinance, 94.1 acres, or 4.1% of Marshall, is available for adult uses. This figure considers a 1,000-foot buffer zone from residential zones in addition to other sensitive uses specifically listed in the Ordinance. Three areas containing a total of 33 sites are available to accommodate an adult use occupying two acres, as The Gift Spot currently does. Sewer and water is available at all the sites. Some of those sites would require road construction and all would require subdivision to meet the 1,000-foot property-line-to-property-line buffer zone requirement. Pollock testified credibly to the foregoing. McLaughlin's estimate of acreage outside the 1,000-foot buffer zone was lower, but he admitted that his map and calculations omitted one area of land zoned for industrial use that contained three two-acre sites. His estimate was in all relevant aspects substantially consistent with Pollock's estimate.

53. Under the Ordinance, Marshall has received no other applications for adult uses or requests for sites other than ION's.

54. The Ordinance's site plan review process reflects the procedures and standards commonly accepted and regularly applied in urban planning.

*II. CONCLUSIONS OF LAW*

The Court has jurisdiction over this case under 28 U.S.C. § 1331.

ION brought this action pursuant to 42 U.S.C. § 1983 alleging that Marshall violated ION's First Amendment rights. The First Amendment to the United States Constitution provides "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble...."U.S. Const. amend. 1. The Due Process Clause of the Fourteenth Amendment makes First Amendment free speech and assembly guarantees applicable to states and their municipal subdivisions as well as the federal government. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 707 (7th Cir.2003). ION also alleges direct violations of its Fourteenth Amendment due process rights.

A. *Restraint of Speech: Enactment of Ordinance*

ION"s first theory-that the enactment of the Ordinance was an unconstitutional restrain on speech-is governed

by a three-step, sequential inquiry set forth by the Supreme Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). The Seventh Circuit has recently applied this inquiry in *RVS, L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir.2004).

1. *Total Ban or Time, Place and Manner Regulation*

The threshold issue is whether the regulation amounts to a total ban on speech or a time, place and manner restriction. *See* *Alameda Books*, 535 U.S. at 434 (plurality); *Renton*, 475 U.S. at 46;*RVS*, 361 F.3d at 407. A total ban calls for the Court to apply strict scrutiny, that is, to ask whether the regulation is necessary to serve a compelling state interest. A time, place and manner regulation, on the other hand, may call for the Court to apply intermediate instead of strict scrutiny, that is, to ask whether the regulation is designed to serve a substantial state interest without unreasonably limiting alternative avenues of communication. *Alameda Books*, 535 U.S. at 434 (plurality); *Renton*, 475 U.S. at 47;*RVS*, 361 F.3d at 408. A regulation that appears on its face to be a time place and manner restriction but that in practice is effectively a total ban will receive strict scrutiny. *See* *Alameda Books*, 535 U.S. at 443 (plurality).

***12** All parties in this case agree that the Ordinance is a time, place and manner restriction as opposed to a total ban on sexually oriented establishments. Rather than limiting the speech itself, the Ordinance restricts the location in which the speech can occur. The Court therefore moves to the next step in the three-part inquiry to determine whether strict or intermediate scrutiny applies.

2. *Predominant Concern Motivating the Regulation*

The second stage of the inquiry asks what Marshall's predominant concern was when it passed the Ordinance. If the predominant purpose of a zoning regulation is to decrease speech, the Court applies strict scrutiny. *RVS*, 361 F.3d at 407. However, if the predominant purpose is to decrease the secondary effects of the speech, but not the speech itself, the Court applies intermediate scrutiny. *RVS*, 361 F.3d at 407-08;*Ben's Bar*, 316 F.3d at 723;*see* *Alameda Books*, 535 U.S. at 440-41 (plurality); *Alameda Books*, 535 U.S. at 448-49 (Kennedy, J., concurring); *Renton*, 475 U.S. at 47. In making the decision about the predominant purpose of the regulation, the Court can consider "a wide variety of materials including, but not limited to, the text of the regulation or ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware."*RVS*, 361 F.3d at 410 n. 5 (internal quotations and citations omitted).

The predominant purpose of the Ordinance was to decrease the secondary effects of sexually oriented businesses in order to protect the public health, safety and welfare of Marshall's citizens and to protect the property tax and sales tax base of Marshall. The Preamble clearly reflects this intention. It demonstrates that Marshall officials believed, based on the Morris Report and the Minnesota Attorney General's Report, that there was a connection between negative secondary effects and speech purveyed by adult bookstores and that zoning was an appropriate and effective means to reduce those negative secondary effects. The connection between negative secondary effects and speech was reinforced by testimony at the Plan Commission hearing relating specifically to Marshall and to negative secondary effects connected to Hy Way News and The Gift Spot, including but not limited to the rape and abduction of a young girl by an individual who had viewed sexually oriented materials at Hy Way News prior to the incident, litter of a sexually oriented nature (novelties, lingerie) on children's soccer fields adjacent to The Gift Spot, TRW's refusal to locate near an adult bookstore and a higher rate of police reports from the vicinity of Hy Way News compared to other business districts. The Preamble further reflects that Marshall officials were aware that the speech purveyed by adult bookstores is protected by the First Amendment and that Marshall was attempting to provide adequate alternative sites for that speech by ensuring that approximately 12% of the land within Marshall was available for adult uses. This effort to provide adequate alternative channels belies ION's allegation that the Ordinance was a mere pretext for suppression of protected speech, although whether the alternative channels provided were, in fact, adequate is a matter discussed later in this order.

***13** It is true that some testimony presented to the Plan Commission reflected a desire on the speakers' part to suppress speech, and one part of the Morris Report

expressed an intent to decrease speech by making it more difficult for impulse patrons driving by on the interstate to access the adult bookstore. However, the Court finds that neither the Plan Commission nor the City Council relied on those desires or goals in any substantial way in recommending or enacting the Ordinance but instead relied predominantly on the other aspects of the Morris Report, the Minnesota Attorney General's Report and the references cited therein to address the deleterious secondary effects of protected speech, as stated in the Preamble.

There was also testimony at the Plan Commission meeting that the Morris Report, the Minnesota Attorney General's Report and the studies they cite are flawed and unreliable. That testimony, however, was not presented to the Plan Commission or the City Council in sufficient detail or with enough support to cause a reasonable person to seriously doubt the validity of those studies and reports. Furthermore, although the Minnesota Attorney General's Report may have contained some errors in summarizing prior studies connecting adult uses with negative secondary effects, the Court accepts Pollock's testimony that the report is generally accepted in the urban planning community as a valid basis for making zoning decisions. It is clear, in fact, that Marshall officials were not convinced by the representation that the reports were flawed and unreliable and that they continued to reasonably rely on those reports for the purpose of combating the negative secondary effects of protected speech, not censoring speech itself. Therefore, intermediate scrutiny applies.

3. *Intermediate scrutiny*

When the Court applies intermediate scrutiny, it asks whether the regulation is narrowly tailored to serve a substantial government interest while not unreasonably limiting alternative avenues of communication. *Renton,* 475 U.S. at 47, 50;*RVS,* 361 F.3d at 408-09.

a. *Substantial Government Interest: Connection Between Secondary Effects and Speech*

Substantial government interests can include preserving the quality of urban life and reducing crime. *See Alameda Books,* 535 U.S. at 435 (plurality) and 444 (Kennedy, J., concurring). It also includes the types of interests for which the Ordinance were passed in this case. However, in order to withstand intermediate scrutiny, there must be a connection between the negative secondary effects and the regulated speech. *Alameda Books,* 535 U.S. at 441 (plurality); *RVS,* 361 F.3d at 408. A sufficient connection is established "if the evidence upon which the municipality enacted the regulation 'is reasonably believed to be relevant for demonstrating a connection between [secondary effects producing] speech and a substantial, independent government interest." ' *RVS,* 361 F.3d at 408 (quoting *Alameda Books,* 535 U.S. at 438 (plurality) (internal quotations omitted)).

***14** In *Alameda Books,* Justice Kennedy's concurrence breaks this inquiry into two separate questions: (1) What is the proposition that a city needs to advance in order to sustain a secondary effects ordinance? and (2) How much evidence is required to support the proposition? *Alameda Books,* 535 U.S. at 449-50 (Kennedy, J., concurring); *RVS,* 361 F.3d at 408-09.

i. *The Proposition that Must Be Advanced*

The proposition must be that the regulation of the speech will significantly reduce the secondary effects without substantially reducing the speech or causing it to cease. *Alameda Books,* 535 U .S. at 449 (Kennedy, J., concurring) ("[A] city may not assert that it will reduce secondary effects by reducing speech in the same proportion."); *RVS,* 361 F.3d at 411-12. Fundamental to this proposition is that the regulated aspect of the speech (e.g., the location or the concentration of the speech) causes, or is reasonably believed to cause, the secondary effects. *See, e.g., RVS,* 361 F.3d at 411 (noting that the ordinance's premise must be that locating the speech in certain areas will significantly reduce secondary effects without diminishing the availability of the speech).

In this case, the proposition is that the proximity of adult uses such as The Gift Spot to schools, day care centers, cemeteries, public parks, forest preserves, public housing units, places of religious worship, other "adult uses" or property zoned as a regional shopping center district causes negative secondary effects and that relegation of adult uses to industrial zones that are more than 1,000 feet from those sensitive uses will reduce those secondary effects without unreasonably limiting the protected speech.

ii. *The Evidence to Support the Proposition*

A municipality "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest."*Alameda Books,* 535 U.S. at 438 (plurality) (citing *Renton,* 475 U.S. at 51-52). This standard is not particularly demanding; the municipality need produce "very little" evidence to satisfy its burden. *Alameda Books,* 535 U.S. at 451 (Kennedy, J., concurring); *RVS,* 361 F.3d at 411. "The Supreme Court has consistently held, 'a city must have latitude to experiment, at least at the outset, and ... very little evidence is required [to support an ordinance's proposition]." ' *RVS,* 361 F.3d at 411 (quoting *Alameda Books,* 535 U.S. at 451 (Kennedy, J., concurring)); *accord Alameda Books,* 535 U.S. at 439 (plurality); *Renton,* 475 U.S. at 52. If a city's conclusions appear reasonable, the Court should not find that they are unsupported. *Alameda Books,* 535 U.S. at 452 (Kennedy, J., concurring)).

The evidence can include, among other things, studies, judicial opinions and experience-based testimony. *RVS,* 361 F.3d at 411. Furthermore, it is not necessary that the rule-makers actually have considered the evidence when they passed the subject regulation so long as it supports the necessary proposition. *RVS,* 361 F.3d at 411 n. 6;*compare Alameda Books,* 535 U.S. at 442 (plurality) (leaving question open).

***15** Shoddy data or reasoning, however, is insufficient, and a party opposing the regulation can cast doubt on the rationale for the ordinance "either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings."*Alameda Books,* 535 U.S. at 438-39 (plurality). If the party opposing the regulation is able to cast doubt on the rationale, the burden shifts back to the municipality to supplement the record with further evidence. *Id.* at 439.

In this case, Marshall relied on evidence that it reasonably believed to be relevant to demonstrate a connection between adult uses and negative secondary effects on public health, safety and welfare, including preserving the quality of life, increasing the economic welfare and reducing crime in Marshall. The reports and anecdotal evidence relied on by Marshall in enacting the Ordinance provide sufficient evidence to support the necessary proposition. While the Minnesota Attorney General's Report may not be a study carried out with scientific precision and may contain some inaccuracies or misstatements, it and the studies upon which it relies clearly establish some connection between adult uses and negative secondary effects. That connection is sufficiently strong for the urban planning community to regard the Minnesota Attorney General's Report as a reliable basis for planning to regulate adult uses.

That connection was bolstered in this case by anecdotal evidence that in Marshall itself, the existing adult uses contribute to litter of a sexual nature in areas that are frequented by numerous children, have discouraged industrial development in the vicinity, have played a role in the abduction and rape of a small girl and, at a minimum, appear to correlate generally to increased police reports. It is further a reasonable inference from the Minnesota Attorney General's Report and the anecdotal evidence presented to Marshall that residential and commercial values around adult uses would decline; people are unlikely to want to live or establish retail businesses in relatively high crime areas or where litter of a sexual nature is regularly found. That McDonald's chose to open a restaurant near Hy Way News after it opened does not negate this reasonable inference relating to peoples' preferences in general. In fact, ION's expert witness admitted that 10 to 15% of commercial investors would be deterred from locating near adult uses. The material considered by Marshall provided sufficient evidence upon which a reasonable municipal governing body could find a connection between adult uses and negative secondary effects and could experiment with restricting the location of adult uses to industrial zones at least 1,000 feet from sensitive uses in an effort to significantly reduce or avoid those secondary effects.

ION argues that Marshall used shoddy data and reasoning in enacting the Ordinance. First, McLaughlin alleged inaccuracies and unscientific methods in the Minnesota Attorney General's Report and asserts that it is therefore unreliable as a basis for Marshall's zoning decisions. Those inaccuracies, however, even if they exist, only weaken the strength of the report and may have allowed Marshall to reach an opposite and equally reasonable conclusion. They do not, however, totally negate the report's general conclusion that adult uses are connected to negative

secondary effects. Furthermore, Pollock acknowledged that the report may contain some inaccuracies but testified that it was still the type of report generally accepted in the urban planning community to guide zoning decisions. As noted earlier, the Court has found Pollack's assessment of what is generally acceptable to urban planners to be more credible than McLaughlin's. Thus, any flaws or lack of scientific certainty in the report do not destroy its relevance as a reasonably reliable planning document that a municipality can use to experiment with ways to curb negative secondary effects. *G.M. Enters. v. Town of St. Joseph,* 350 F.3d 631, 640 (7th Cir.2003) (rejecting the "suggestion that the municipality be required to present empirical data in support of its contention"), *cert. denied,* 543 U.S. 812, 125 S.Ct. 49, 160 L.Ed.2d 16 (2004).

***16** ION and McLaughlin also fault Marshall for failing to consider other studies that found no evidence of any negative secondary effects correlating with adult uses. However, especially in the absence of any glaring red flags in the reports it considered, Marshall was not required to scour the nation to find reports that contradict the reliable documentary and testimonial evidence before it. The evidence it considered was reasonably reliable and supported a connection between adult uses and negative secondary effects.

ION further argues that the locations available for adult uses are on either on the extreme southern end of town or farther from the Interstate 70 exit, from which most of ION's customers come, than the current location of The Gift Spot. ION argues that these locations would create more traffic in residential and downtown areas where children are, a result contrary to the Ordinance's stated purpose. Marshall counters that the locations selected are served by major roads, which would not necessarily cause an increase in traffic on smaller downtown or residential streets, where children are most likely to be. The Court finds no logical inconsistency in Marshall's rationale and the Ordinance. It is clear that Marshall has chosen the available locations primarily to reduce negative secondary effects other than increased traffic on main roads. If Marshall has chosen to address those other effects at the expense of creating more traffic on its main roads, it is free to do so as a part of its experiment with addressing those secondary effects. Again, Marshall must be given wide latitude to experiment with ways of combating negative secondary effects, and the Court will not find their experiment unsupported because it does not address all of those effects equally.

ION also points to McLaughlin's study of assessed land values to show that adult uses do not decrease property values in the vicinity of the adult use. McLaughlin's studies are not persuasive. First, assessed property values are not as accurate indicators of land value as appraised property values, which McLaughlin did not study. Second, and more importantly, McLaughlin's study only compared two areas and, in Marshall, contained an outlier value based on new construction that tended to skew the results away from the median assessed value. The small size of the study and the outlier make the study less reliable as a basis to draw general conclusions. As a consequence, the Court does not find the study significantly probative of property values.

The Court also notes that ION did not negate the connection between adult uses and all the negative secondary effects recognized by Marshall. For example, there was no credible evidence to contradict that sexually oriented businesses correlate with increased litter of a sexual nature in areas frequented by children or with increased crime. The connection between adult uses and these negative effects alone is sufficient to support the proposition upon which Marshall's Ordinance was based.

***17** Finally, ION notes that the reports and studies relied on by Marshall were based on adult use establishments that were comprised of nearly 100% adult uses. These studies, it argues, cannot provide the connection between negative secondary effects and adult use establishments that are comprised of less than 100% adult uses, that is, that those establishments that have only a "substantial or significant" but not 100% adult use business. First, the Court notes that ION does not have standing to raise such an argument as it admits that its business is virtually 100% adult use. Second, the *Alameda Books'* evidentiary test is not so demanding. It does not demand perfect scientific studies of the exact path a municipal body chooses to take, but only demands evidence that is reasonably believed to be relevant. It is reasonable to believe that studies of 100% adult use establishments would be relevant to "substantial or significant" adult use establishments, even if they do not perfectly correlate. Thus, it was reasonable in this case for

Marshall to make the inference that the studies were relevant to regulating "substantial or significant" adult use establishments.

In sum, the Court finds that Marshall relied on evidence reasonably believed to be relevant to demonstrate a connection between adult uses and negative secondary effects, and ION has not cast doubt on Marshall's rationale for the ordinance such that the burden is shifted to Marshall to supplement the record with further evidence. Even if ION had shifted the burden, the evidence submitted at trial from Pollack and other witnesses was sufficient to establish a connection between adult uses and negative secondary effects.

The Court now turns to the question of whether the Ordinance leaves the " 'quantity and accessibility of speech substantially intact." ' *RVS,* 361 F.3d at 408 (quoting *Alameda Books,* 535 U.S. at 449 (Kennedy, J., concurring)), that is, whether it is narrowly tailored and whether it leaves adequate alternative avenues of communication.

b. *Narrow Tailoring*

An ordinance is narrowly tailored if it "advance[s] a substantial interest that would be achieved less effectively absent the restrictions, and the restrictions do not 'burden substantially more speech than is necessary' for such advancement."*Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 1002 (7th Cir.2002) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)); *see, e.g., RVS,* 361 F.3d at 413 (holding that regulation is not narrowly tailored because it could be applied to cover mainstream speech). Narrow tailoring does not require the least restrictive means of serving the interest at issue. *Pleasureland,* 288 F.3d at 1002. The Court should also consider whether the regulation targets the expressive conduct itself or the non-expressive aspects of the speech such as location or signage. *See, e.g., G.M. Enterps. v. Town of St. Joseph,* 350 F.3d 631, 638 (7th Cir.2003) (ordinance aimed at minimizing non-expressive factors that heightened the probability of adverse secondary effects, not the speech itself).

***18** In this case, the Ordinance is narrowly tailored. It does not prohibit adult uses but instead targets the non-expressive aspects of adult use establishment-the proximity to areas where children, families and retail businesses are. Furthermore, the prohibitions advance the substantial government interest of curtailing negative secondary effects by certain adult businesses. That the Ordinance may not be the least restrictive means of serving that interest is immaterial.

To the extent that ION argues the ordinance is overbroad in its coverage, the Court addresses those arguments in a later section of this order.

The Court turns now to the question of whether adequate alternative avenues of communication are available.

c. *Alternative Avenues of Communication*

The Court must consider whether the Ordinance allows ION reasonable adequate alternative avenues of communication. *Alameda Books,* 535 U.S. at 434 (plurality) (citing *Renton,* 475 U.S. at 50). A regulation cannot effectively deny an adult bookstore a reasonable opportunity to operate. *Id.* at 54.

The Court finds that the Ordinance provides adequate alternative avenues of communication to Marshall's population. Under the Ordinance, 94.1 acres, or 4.1% of the land in Marshall, is available for ION to open an adult bookstore. Assuming ION cannot operate its business on a lot smaller than its current two-acre lot, those 94.1 acres provide three possible areas of land divisible into 33 possible sites for ION to locate an adult bookstore; if it can operate on a lot smaller than two acres, even more sights would be available. That ION may have to subdivide the property or have roads built to some of the new sites does not render the land unavailable for constitutional purposes. *See Renton,* 475 U.S. at 54 (noting that the First Amendment does not require a city to relieve adult use establishments of ordinary hurdles presented by the real estate market). The Court further notes that ION is the only adult use entity showing any interest in locating in Marshall, so no lots would be unavailable because of the location of another adult use.

ION does not really contest that the sites available in Marshall are inadequate to communicate *to Marshall's population.*Instead, it argues that the sites are inadequate to enable it to communicate *to ION's main source of patrons*-Interstate 70 travelers-who ION believes will not want to drive through town or far

distances from the interstate highway exit to visit an adult bookstore. In this context, however, there are certainly numerous alternative avenues of communication to interstate highway travelers. There is a multitude of available sites outside Marshall's city limits, not subject to the Ordinance, and close to interstate highway exits. These sites must be considered as alternative avenues of communication because they would be equally, if not more, effective than the sites available in Marshall at communicating ION's speech to its target audience. In this specific situation-a rural community with substantial amounts of undeveloped land in the surrounding area and a target audience located in an extreme end of the community near that undeveloped land-it would serve no purpose to limit the universe of available land to those parcels within Marshall's city limits. While the Constitution may entitle ION to alternative avenues of communication, it does not require that the Court disregard the reality that land is indeed available in areas that meet ION's main criterion for development-proximity to an Interstate 70 exit.

***19** In light of the available avenues of communication in and outside Marshall, the Court finds that ION has adequate alternative avenues of communication. The impact of the site plan review process on whether these alternative avenues are truly available is discussed later in this order.

B. *Vagueness and Overbreadth*

ION makes a facial challenge to the vagueness and overbreadth of the definition of "adult bookstore. Specifically, ION argues that the first part of the definition of an adult bookstore violates the due process clause of the Fourteenth Amendment because the phrase "substantial or significant" does not specify how or what to measure in order to determine if it is "substantial or significant" and therefore does not give fair notice of what is permitted and proscribed. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-98, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("an enactment is void for vagueness if its prohibitions are not clearly defined"). ION further argues that the definition of "adult bookstore" is overbroad because it could apply to mainstream bookstores and undoubtedly would apply to some businesses for which there is no evidence to show that they produce negative secondary effects. *Grayned,* 408 U.S. at 114 ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."). For example, the second part of the definition would apply to a mainstream bookstore that mentions in an advertisement that it has an adult section, even the adult section is minuscule and actually has no sales.

ION does not seriously contest that it does not have standing to raise a challenge on its own behalf. It admits that it qualifies as an adult bookstore, so it is unable to complain that the Ordinance's allegedly vague or overbroad definition of "adult bookstore" is causing it any harm that would be redressed by favorable decision in this litigation. *See Hoffman Estates,* 455 U.S. at 495;*Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 59, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) (holding that where ordinance is unquestionably applicable to a litigant, any vagueness has not affected them and does not violate due process); *Harp Advertising Ill., Inc. v. Village of Chicago Ridge,* 9 F.3d 1290, 1292 (7th Cir.1993); *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1210 (5th Cir.1982). ION's challenge, then, must be on behalf of third parties not before the Court who may be deterred from engaging in protected speech by the Ordinance's alleged vagueness or overbreadth. This exception to traditional rules of standing "is justified by the overriding importance of maintaining a free and open market for the interchange of ideas."*Young,* 427 U.S. at 60.

1. *Vagueness*

A plaintiff may raise a vagueness due process challenge on behalf of third parties "when the effect of a vague ordinance on legitimate expression is real and substantial and the language of the ordinance is not readily subject to a narrowing construction by state courts."*Basiardanes,* 682 F.2d at 1210 (citing *Young,* 427 U.S. at 60 (plurality opinion)).

***20** In this case, the Court finds that any vagueness in the Ordinance's definition of "adult bookstore" is not so real and substantial as to have a significant deterrent effect on others wanting to engage in the type of protected speech purveyed by adult bookstores. First, there is no real ambiguity in the phrase "substantial or significant" that cannot be readily cured by a narrowing construction provided by

state courts. In fact, many federal statutes use terms like substantial or significant without terrible problems. *See* *15192 Thirteen Mile Rd., Inc. v. Warren,* 626 F.Supp. 803, 820-21 (E.D.Mich.1985). Furthermore, the evidence established that Marshall was prepared to give further guidance to businesses seeking to determine how to construe the Ordinance. The same is true for other words and phrases in the "adult bookstore" definition that ION believes are vague. Second, the Supreme Court has recognized a less vital interest in sexually oriented speech than in speech conveying ideas of social and political significance. *Young,* 427 U.S. at 61 (plurality opinion). Third, the alleged vagueness in the Ordinance is not a qualitative restriction. It does not have the potential of misleading anyone about the speech that is allowed or not allowed. Instead, it addresses the *amount* of speech that will bring one under the Ordinance's restrictions. Such a definition is unlikely to totally suppress any specific type of communication, although it may have an impact on the quantity someone chooses to purvey. In combination, these factors convince the Court that the Ordinance's definition of "adult bookstore" does not threaten the free market in ideas and expression in such a way that justifies hearing a vagueness challenge on behalf of third parties.

Even if the Court were to entertain such a challenge, it would find that the ordinance is not unconstitutionally vague. The Seventh Circuit Court of Appeals has decided that ordinances defining businesses by whether a "substantial portion of its stock and trade" is devoted to the certain activities are not unconstitutional. *See* *Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 997 n. 4 (7th Cir.2002) (citing *Young,* 427 U.S. at 53 n. 5);*see also* *15192 Thirteen Mile Rd.,* 626 F.Supp. at 820-821.

2. *Overbreadth*

A plaintiff may raise a First Amendment overbreadth challenge on behalf of third parties if he can "establish 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." ' *Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 996 (7th Cir.2002) (quoting *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)); *Genusa v. City of Peoria,* 619 F.2d 1203, 1210 (7th Cir.1980). If the challenged ordinance does not reach a substantial amount of protected conduct, it is not overbroad. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Vincent,* 466 U.S. at 800.

***21** In this case, the Court finds that any conceivable impermissible application of the definition of "adult bookstore"-specifically, applying to mainstream bookstores the second part of the definition regarding establishments that "hold themselves out" as purveying adult material-is not likely to inhibit free expression so as to justify entertaining a facial challenge on behalf of third parties not before the Court. First, the Court finds it unlikely that there would be a substantial number of establishments in Marshall that would be encompassed by the "holding out" category that would not also be encompassed by the first part of the definition. Second, the Court notes that the "holding out" phraseology would tend not to effect the content or the quality of the actual speech purveyed by an establishment as much as the way it represents itself to the public, that is, its commercial speech. Commercial speech does not demand the same level of protection from overbreadth as speech of social or political significance. *See* *Hoffman Estates,* 455 U.S. at 497 ("[T]he overbreadth doctrine does not apply to commercial speech.") In sum, the Court finds that the "holding out" portion of the Ordinance's definition of "adult bookstore" poses no real threat to the free market in ideas and expression and is unlikely to significantly effect the protected speech of third parties not before the Court. Therefore, it is inappropriate for this Court to entertain a facial challenge from ION. To the extent that a third party believes that the Ordinance is impermissibly applied to it, the Court will entertain an "as applied" overbreadth challenge at that time.

C. *Restraint of Speech: Site Plan Review Process*

ION argues that the Ordinance's site plan review provisions operate as an impermissible prior restraint and therefore violate its due process rights in two specific ways. First, ION argues that city officials have unbridled discretion when deciding whether a site plan conforms with the "goals and policies of the comprehensive plan," Art. XVIII-A, § 4, ¶ 5, and

whether to impose conditions that "it deems appropriate or necessary in order to accomplish the purpose of the ordinance," Art. XVIII-A, § 3, ¶ 3. Second, ION notes that the deadlines for prompt decision and review of an application are triggered by a completed application but that the Ordinance allows a zoning officer to indefinitely delay the completion of an application by demanding unlimited "other items," Art. XVIII-A, § 6, ¶ 5.

Marshall contends, on the other hand, that the Ordinance sufficiently restrains city officials' discretion and that Illinois law provides adequate due process because it allows for judicial review if a zoning decision is unduly delayed. Alternatively, Marshall argues that if any of the site plan review provisions are unconstitutional, they should be severed from the Ordinance, which should remain in force.

"Prior restraints provide public officials with the power to deny the use of a forum in advance of actual expression."*Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 999 (7th Cir.2002). While not *per se* unconstitutional, prior restraints are highly disfavored and presumed invalid. *Weinberg v. City of Chicago,* 310 F.3d 1029, 1045 (7th Cir.2002) (citing *New York Times Co. v. United States,* 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)); *see Freedman v. Maryland,* 380 U.S. 51, 57, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). For this reason, a prior restraint is presumed to be constitutionally invalid, and the proponent of a prior restraint bears a heavy burden to show the restraint is justified. *Schultz v. City of Cumberland,* 228 F.3d 831, 851 (7th Cir.2000).

***22** Both parties agree that the licensure framework is the appropriate context to analyze the site plan review process. Licensing prior restraints come in two forms: (1) the placement of "unbridled discretion in the hands of a government official" that might result in censorship and (2) a licensing procedure that does not place time limits on the decision-making process.*Weinberg,* 310 F.3d at 1045. Both types are raised in ION's objection to the site plan review process.

1. *Unbridled Discretion*

"An ordinance that gives public officials the power to decide whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is invalid."*Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1361 (11th Cir.1999) (citing *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)); *Weinberg v. City of Chicago,* 310 F.3d 1029, 1044 (7th Cir.2002) (prior restraints on speech must have narrow, objective, and definite standards to guide the licensing authority). A regulation or law simply may not give public officials "unbridled discretion" to deny permission to engage in constitutionally protected expression. *Lady J.,* 176 F.3d at 1361;*see Shuttlesworth,* 394 U.S. at 150-51. However, regulations need not have "perfect clarity and precise guidance," *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), as long as they "provide principled limits to guide the decisions of government officials."*DeBoer v. Village of Oak Park,* 267 F.3d 558, 573 (7th Cir.2001).

Exactly how much guidance on an official's discretion is required to avoid unconstitutionality is not crystal clear. The extreme presents an easy case. For example, it is clear that a regulation that is devoid of any standards governing whether an officials should issue peddling permits is too broad.*Weinberg,* 310 F.3d at 1046. It has also been long-established that a parade permit regulation that allows the issuing official to decide whether to issue the permit based on his judgment of whether the "public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused" is an unconstitutional prior restraint. *Shuttlesworth,* 394 U.S. at 149-50. Similarly, an ordinance allowing a mayor to determine whether newsracks on public property were "in the public interest" and allowing the official to impose "necessary and reasonable" conditions on the permits to place such newsracks provides insufficient limitations on the official's discretion and raises the threat of self-censorship. *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750 769-73, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).*See, generally, DeBoer,* 267 F.3d at 573 (policy allowing municipality to limit activities in city building to those that "benefit[ ] the public as a whole" granted impermissible unfettered discretion); *Lady J.,* 176 F.3d at 1362 (noting that zoning ordinance allowing a city to place unspecified "more restrictive requirements" than those specifically listed in the zoning ordinance allows too much discretion).

***23** On the other hand, the Seventh Circuit Court of Appeals upheld a parade permit ordinance requiring a city to issue a permit unless it determined that the parade would "unnecessarily interfere with traffic in the area contiguous to the route," that there was not "a sufficient number of peace officers" available for the event, or that the activity would "prevent proper fire and police protection or ambulance service."*MacDonald v. City of Chicago,* 243 F.3d 1021, 1024, 1028 (7th Cir.2001). In *McDonald,* the Court of Appeals held that, even though the ordinance allowed some flexibility to officials, it specified "legitimate safety concerns in as precise a manner as such concerns can reasonably be articulated."*Id.* (quoting *McDonald v. City of Chicago,* 1998 WL 673652, at *7 (N.D.Ill. Sep.23, 1998)).

*McDonald* relied heavily on *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir.1993) (*en banc* ), which also upheld an ordinance against a challenge alleging unbridled discretion. In that case, an ordinance contained six criteria to guide an official's discretion whether to issue a newstand permit:

(1) Whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses; (2) Whether the newspaper stand complies with this code; (3) Whether the applicant has previously operated a newspaper stand at that location; (4) The extent to which services that would be offered by the newspaper stand are already available in the area; (5) The number of daily publications proposed to be sold from the newspaper stand; and (6) The size of the stand relative to the number of days the stand will be open and operating.

*Id.* at 1317-18.The *Graff* court, hearing the case *en banc,* held that these factors adequately limited the city official's discretion because they gave "adequate and specific guidance to the [official] as well as reasons for the applicant to anticipate the basis for granting or denying a particular permit" and were sufficient to allow meaningful review of the official's decision. *Id.* at 1318.The *Graff* court further found that the ordinance did not have a sufficient nexus to expression to pose a real or substantial threat of censorship. *Id.*

Courts also differ on whether zoning standards that allow a city to require a site plan, for example, to be consistent with a city's comprehensive plan or the character of the neighborhood pass constitutional muster. *See Lady J.,* 176 F.3d at 1362;*Casanova Entm't Group, Inc. v. City of New Rochelle,* 375 F.Supp.2d 321, 336-37 (S.D.N.Y.2005), *aff'd,*2006 WL 238434 (2d Cir. Jan.31, 2006). The *Lady J.* court held that such requirements "empower the zoning board to covertly discriminate against adult entertainment establishments under the guise of general 'compatibility' or 'environmental' considerations."*Lady J.,* 176 F.3d at 1362. The *Casanova* court, on the other hand, in deciding to deny a preliminary injunction, held that an ordinance requiring the exterior appearance of a building to be consistent with the character of the neighborhood and allowing the municipality to impose additional terms and conditions on the site plan that furthered the aims of the ordinance imposed reasonably objective, nondiscretionary criteria. *Casanova,* 375 F.Supp.2d at 336-37. The *Casanova* court noted that such regulations addressed concrete topics that are well known to be within local governments' traditional land use authority and did not " 'allow[ ] the decisionmaking body to manipulate such malleable concepts as welfare, decency, and good order." ' *Id.* at 337 (quoting *Steakhouse, Inc. v. City of Raleigh,* 166 F.3d 634, 639 (4th Cir.1999)).

***24** The Court finds that the site plan review process in the Ordinance does not give impermissible unbridled discretion to Marshall officials by referring to the standards set forth in § 4, including comformance with the "goals and policies of the comprehensive plan", Art. XVIII-A, § 4, ¶ 5, and by allowing the officials to impose conditions that "it deems appropriate or necessary in order to accomplish the purpose of the ordinance," Art. XVIII-A, § 3, ¶ 3. First, to the extent that ION is challenging the standards in § 4, ¶¶ 1-4, the Court finds that those standards are the same type of standards as those approved in *McDonald* and *Graff.*They do not contain "malleable concepts" like welfare, decency and good order, but instead focus officials' attention on concrete, content-neutral matters that are legitimate municipal planning concerns and that provide sufficient guidance to put applicants on notice of the requirements and provide for meaningful review of Marshall's decisions. Despite inconsistent findings in *Lady J.* regarding similar types of provisions, the law in this circuit holds that such criteria are

constitutionally acceptable.

As for § 4, ¶ 5 and § 3, ¶¶ 2 and 3, all three sections reference the goals, policies and purposes of the Ordinance. Therefore, they must be considered in the context of the Ordinance's purposes as stated in the first paragraph of the Ordinance's Preamble, the first paragraph of the body of the Ordinance as well as the purposes of the site plan review process as stated in Article XVIII-A, § 1. In this context, the Court finds that the subject provisions do not provide unconstitutionally broad discretion to Marshall officials. Had the purposes of the Ordinance as a whole merely been "promoting and protecting the public health, safety, peace, comforts, convenience and general welfare of the inhabitants of the City of Marshall," Ordinance, ¶ 1, or had officials simply been given discretion to impose any additional conditions, the Court might have found city officials' discretion to be unbridled. However, the Ordinance lists the specific ways in which the "public health, safety, peace, comforts, convenience and general welfare" are to be served by the Ordinance. Furthermore, Article XVIII-A, § 1 and Article VII, § 8, ¶ 4 clarify that the site plan review process is limited to governing the physical layout and design aspects of establishments subject to those provisions and, by implication, that any condition imposed by city officials are limited to physical layout and design aspects to achieve the specific purposes listed in those provisions. To the extent that Marshall officials possess flexibility in imposing additional conditions on site plans, that flexibility is limited by the purposes of Ordinance. Similarly, the determination of whether a proposed site plan conforms to those goals cannot realistically be said to be subject to the whim of a city official. Furthermore, whether a plan conforms to those purposes or whether additional conditions imposed by city officials are necessary or appropriate to achieve those purposes can be readily reviewed by a court. Therefore, the Court finds that these provisions provide sufficient guidance to render the site plan review provisions constitutional.

2. *Opportunity for Delay*

***25** "Licensing ordinances must also require prompt decisions. An ordinance that permits public officials to effectively deny an application by sitting on it indefinitely is also invalid."*Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1361 (11th Cir.1999) (citing *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)); *see FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223-24, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion).

ION's only gripe with the Ordinance is that its time limits are triggered by a completed application, but an application is only complete once it has provided any "other items" requested by a zoning officer.

The Court finds that this part of the Ordinance is not sufficiently precise and therefore provides an intolerable opportunity for delay. This situation differs from the case where there is a defined list of items that must be submitted to complete an application, and the time limits for decision-making are not triggered until the application is complete, which is acceptable. *See Casanova Entertainment Group, Inc. v. City of New Rochelle,* 375 F.Supp.2d 321, 336-37 (S.D.N.Y.2005), *aff'd,*2006 WL 238434 (2d Cir. Jan.31, 2006). In this case, there is no defined list of items that must be submitted precisely because of the last, open-ended requirement that an applicant submit "any other items required by the zoning officer."There are simply no limits to the zoning officer's discretion about what else he can demand before an application is complete. The Court can imagine a situation where never-ending requests for further documents would mean an application would never be complete and would amount therefore to an indefinite delay in a site plan review decision. For this reason, the Court finds that Article XVIII-A, § 6, ¶ 5 confers too much discretion on city officials and cannot be constitutionally applied to applicants who purvey speech protected by the First Amendment.

This flaw, however, will not by itself invalidate the entire Ordinance. The Ordinance contains a severability clause declaring that if any clause or provision of the Ordinance is declared invalid by a court, the remainder of the ordinance remains in full force and effect. A severability clause can save the constitutionally viable portions of an ordinance if the invalid portions are not "an integral part of the statutory enactment viewed in its entirety."*Zbaraz v. Hartigan,* 763 F.2d 1532, 1545 (7th Cir.1985), *quoted in Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, 1005 (7th Cir.2002). The Court finds that the second part of Article XVIII-A, § 6, ¶ 5-"and/or any other items required by the zoning officer"-is not integral to the Ordinance as a whole and can be

severed workably from the remainder of the Ordinance. It simply defines another category of material to be submitted with an application and will not impact in any way on the continued application of the remainder of Article XVIII-A or the Ordinance as a whole. The Court further finds that Marshall's intent was to review all relevant items in the site plan review process and merely left this open-ended category in case an item of an unanticipated type appeared to be relevant in a particular situation. The Court believes that Marshall would rather have the Ordinance and its site plan review provision in place without the second part of Article XVIII-A, § 6, ¶ 5 than to have the entire Ordinance stricken. Accordingly, the Court will declare invalid, strike and enjoin the enforcement of the following language from Article XVIII-A, § 6, ¶ 5 of the Ordinance: "and/or any other items required by the zoning officer."

***26** In the absence of this provision, the Court finds that the site plan review process does not amount to an unconstitutional prior restraint that renders unavailable the otherwise available alternative sites for an adult bookstore in and around Marshall.

*III. CONCLUSION*

For the foregoing reasons, the Court DECLARES that the following language from Article XVIII-A, § 6, ¶ 5 of the Ordinance violates the First and Fourteenth Amendments: "and/or any other items required by the zoning officer."The Court ENJOINS Marshall from enforcing that provision of the Ordinance. The remainder of the ordinance is constitutionally sound, and the Court DIRECTS the Clerk of Court to enter judgment accordingly. ION's motion for a preliminary injunction (Doc. 6) is rendered MOOT by this order.

IT IS SO ORDERED.

S.D.Ill.,2006.
Illinois One News, Inc. v. City of Marshall, IL
Not Reported in F.Supp.2d, 2006 WL 449018 (S.D.Ill.)

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©D.G. Restaurant Corp. v. City of Myrtle Beach C.A.4 (S.C.),1991.

United States Court of Appeals,Fourth Circuit.
D.G. RESTAURANT CORPORATION, d/b/a PT's Show Club, a South Carolina Corporation, Plaintiff-Appellee,
v.
The CITY OF MYRTLE BEACH; Francis M. Sauvageau, as Acting Director for Construction Services Department for the City of Myrtle Beach; Thomas E. Leath, as City Manager for the City of Myrtle Beach; J. Stanley Bird, as Chief of Police for the City of Myrtle Beach, Defendants-Appellants.
**No. 90-1509.**

Argued May 9, 1991.
Decided Dec. 30, 1991.
As Amended Jan. 7, 1992.

Restaurant brought challenge to city's enactment of ordinance prohibiting business from offering nudity within 500 feet of residential areas, other regulated adult businesses, churches, schools and public parks. The United States District Court for the District of South Carolina, C. Weston Houck, J., found that the ordinance suppressed protected speech, and city appealed. The Court of Appeals, Niemeyer, Circuit Judge, held that: (1) ordinance was narrowly tailored so as not to unnecessarily impinge upon conduct's communicative element; (2) ordinance was valid content-neutral time, place and manner of restriction; and (3) ordinance did not zone nude dancing out of existence.

Reversed and remanded.

West Headnotes

**[1] Constitutional Law 92 1497**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1497 k. Conduct, Protection Of. Most Cited Cases
(Formerly 92k90.1(1))
While conduct may contain inherent expressive elements or may be undertaken for particular communicative purpose, important governmental interest in regulating the activity itself, without regard to the expressive element, can justify a necessary incidental restriction on expressive aspects of conduct. U.S.C.A. Const.Amend. 1.

**[2] Constitutional Law 92 1497**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1497 k. Conduct, Protection Of. Most Cited Cases
(Formerly 92k90.1(1))
First Amendment does not require that otherwise unacceptable conduct become immunized from regulation when it is wrapped in claim that the conduct was intended to convey a message. U.S.C.A. Const.Amend. 1.

**[3] Constitutional Law 92 1504**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1504 k. Exercise of Police Power; Relationship to Governmental Interest or Public Welfare. Most Cited Cases
(Formerly 92k90.1(1))

**Constitutional Law 92 1497**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1497 k. Conduct, Protection Of. Most Cited Cases

(Formerly 92k90.1(1))
When government legally adopts regulation of physical conduct to serve a substantial governmental interest, it will not be found to violate First Amendment, despite incidental intrusion upon expressive aspect of that conduct, if regulation is not aimed at conduct's expressive element, and regulation is narrowly tailored so as not to impinge unnecessarily on expressive element, but if governmental regulation is focused upon message sought to be communicated by conduct, then the regulation succumbs to overriding interest in protecting freedom of speech. U.S.C.A. Const.Amend. 1.

**[4] Constitutional Law 92 1497**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1497 k. Conduct, Protection Of. Most Cited Cases
(Formerly 92k90.1(1))
When governmental regulation of conduct is challenged on First Amendment grounds, the court analysis must resolve whether the regulation is in fact the regulation of an intended message of the actor rather than a legitimate attempt to regulate physical conduct for some other important governmental purpose. U.S.C.A. Const.Amend. 1.

**[5] Constitutional Law 92 1497**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1497 k. Conduct, Protection Of. Most Cited Cases
(Formerly 92k90.1(1))
An otherwise constitutional restriction on conduct will not be invalidated if the conduct is normally regulated but has been turned from its ordinary course to be performed for a communicative purpose. U.S.C.A. Const.Amend. 1.

**[6] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in General. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
It is within constitutional power of municipality to adopt zoning regulations that omit areas in which adult entertainment enterprises may operate. U.S.C.A. Const.Amend. 1.

**[7] Constitutional Law 92 2187**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2187 k. Public Nudity or Indecency. Most Cited Cases
(Formerly 92k90.4(2))
Regulation of nudity in public places advances substantial governmental interest in maintaining order and morality. U.S.C.A. Const.Amend. 1.

**[8] Constitutional Law 92 2209**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2209 k. Geographic Restrictions in General. Most Cited Cases
(Formerly 92k90.4(2))

**Obscenity 281 2.5**

281 Obscenity
281k2 Power to Regulate; Statutory and Local

Regulations
281k2.5 k. Particular Regulations. Most Cited Cases
Ordinance prohibiting business from offering nudity within 500 feet of residential areas, other regulated adult businesses, churches, schools and public parks was narrowly tailored so as not to unnecessarily impinge upon conduct's communicative element, despite contention that circumstances of enactment of ordinance indicated true intent to restrict message conveyed by nude dancing; ordinance prohibited public nudity in specified locations out of concern for otherwise deleterious effect that such establishments would have on city's neighborhoods, and ordinance limited only exposure of most private parts of body. U.S.C.A. Const.Amend. 1.

**[9] Constitutional Law 92 2209**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2209 k. Geographic Restrictions in General. Most Cited Cases
(Formerly 92k90.4(2))

**Obscenity 281 2.5**

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations. Most Cited Cases
Ordinance prohibiting business from offering nudity within 500 feet of residential areas, other regulated adult businesses, churches, schools and public parks allowed for reasonable alternatives to any asserted regulation of speech, and thus was not unconstitutional; ordinance appeared to leave room for any form of erotic dancing in which dancers wore the minimum of G-string and pasties to cover specified anatomical areas. U.S.C.A. Const.Amend. 1.

**[10] Constitutional Law 92 2209**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2209 k. Geographic Restrictions in General. Most Cited Cases
(Formerly 92k90.4(2))

**Obscenity 281 2.5**

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations. Most Cited Cases
Ordinance prohibiting business from offering nudity within 500 feet of residential areas, other regulated adult businesses, churches, schools and public parks was valid content-neutral time, place and manner restriction. U.S.C.A. Const.Amend. 1.

**[11] Constitutional Law 92 2242**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2242 k. Restaurants and Other Eating Establishments. Most Cited Cases
(Formerly 92k90.4(3))

**Obscenity 281 2.5**

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations. Most Cited Cases
Ordinance prohibiting business from offering nudity within 500 feet of residential areas, other regulated adult businesses, churches, schools and public parks did not effectively zone topless dancing out of existence, even if it did limit topless dancing to locations which were not commercially desirable; there was no evidence that the restriction would impede restaurant's ability to convey its message to those listeners who desired to be enlightened by it. U.S.C.A. Const.Amend. 1.

***141** James Barr Van Osdell, Cynthia Graham Howe,

Van Osdell, Lester, Howe & Rice, P.A., Myrtle Beach, S.C., argued (Michael W. Battle, Lovelace & Battle, P.A., Conway, S.C., on brief), for defendants-appellants.
Howell V. Bellamy, Jr., Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., Myrtle Beach, S.C., argued (Henrietta U. Golding, Myrtle Beach, S.C., Lawrence R. Goldberg, Lawrence R. Goldberg, P.C., St. Louis, Mo., on brief), for plaintiff-appellee.

Before WIDENER and NIEMEYER, Circuit Judges, and MURRAY, Senior U.S. District Judge for the District of Maryland, sitting by designation.

OPINION

NIEMEYER, Circuit Judge:
In response to the anticipated establishment of an adult entertainment business offering topless dancing in Myrtle Beach, South Carolina, the city council adopted an ordinance that prohibits a business from offering nudity within 500 feet of residential areas, other regulated adult businesses, churches, schools and public parks. An affected business filed suit to challenge the ordinance on the ground that it improperly regulates free speech as secured by the First and Fourteenth Amendments. ***142** The district court agreed and enjoined Myrtle Beach from enforcing the ordinance, concluding that the ordinance is not "content neutral," but rather was enacted "to restrict the message purveyed by topless dancing."

We reverse because the ordinance is narrowly tailored to serve the sufficiently important governmental interest of regulating the location of businesses offering nudity and therefore justifies the incidental limitation on First Amendment freedoms.

I

Myrtle Beach is a coastal resort city located along the Atlantic Ocean in South Carolina. D.G. Restaurant Corporation operates a nightclub in Myrtle Beach at 1008 South King's Highway. When the drinking age in South Carolina was raised from 18 to 21 and business at the nightclub declined, the principals of D.G. Restaurant decided to convert their relatively old bar known as Dixie Electric to a "Las Vegas-style" nightclub offering topless dancing, to be known as PT's Show Club.

In May 1989, D.G. Restaurant applied to the city for a building permit to make the necessary renovations and advised city officials of its plans to provide adult entertainment on the premises. These officials brought the plans to the attention of the city manager who, four days later, announced them at a city council meeting. On receipt of the information, the city council hurriedly scheduled a special council meeting, to be held three days later on May 26, 1989, for a first reading of a proposed ordinance that would regulate the location of adult entertainment businesses. Because of the short notice of this meeting, no studies or reports were presented to the city council about the effects that adult entertainment would have on the community, and the required recommendation of the planning and zoning commission was not obtained. Nonetheless, within the next month a staff report supporting the ordinance was reviewed and recommended by the planning and zoning commission and was presented to the council for its review in connection with the second reading of the ordinance. The report explained the justifications for and the legality of the proposed ordinance. It stated that "topless or otherwise nude entertainment in several large areas of the City ... would be incompatible with residential or family-oriented tourist uses." The report added:

> Like the Renton ordinance and similar code requirements adopted in Dallas, Boston, Seattle, Indianapolis, Los Angeles, Chicago, Kansas City, Oakland, and Detroit, among others, the Myrtle Beach proposal is intended to protect the quality of life in its neighborhoods without violating first amendment concerns; not unlike numerous other existing land use and development restrictions.

The same evening, on June 27, 1989, the city council passed the measure as Ordinance 89-20.

The preamble to Ordinance 89-20 recites the city council's concerns with adult entertainment businesses:

> [T]he Council is concerned that the location of such establishments within the City of Myrtle Beach without adequate time, place and manner regulations could have a deleterious effect on the quality of city neighborhoods; and ... the Council finds in particular that the use of property for adult

> entertainment establishments is not compatible with residential, religious, and educational uses of property in the City of Myrtle Beach.

The ordinance provides that any business which permits nudity shall not be established within 500 feet of residential uses, other regulated adult businesses, churches or other houses of worship, schools, and public playgrounds, swimming pools and parks. Nudity is defined to be the exposure of "human genitals, pubic regions, buttocks and female breasts below a point immediately above the top of the areola."

D.G. Restaurant's application for a building permit to renovate the nightclub was approved in June 1989 and construction was completed the following January. When, however, it applied for a business license as PT's Show Club on February 8, 1990, the city denied the application because***143** the proposed use would violate Ordinance 89-20.

II

D.G. Restaurant contends that Ordinance 89-20 is directed specifically at topless dancing, which it claims is an expressive and communicative activity protected by the free speech clause of the First Amendment. In support of the argument that the public nudity statute was specifically intended to frustrate D.G. Restaurant's plans to establish a club which featured topless dancing, D.G. Restaurant notes that Myrtle Beach never took action to regulate adult entertainment until after its plans to open a topless club were announced, and that once the city became aware of the plans, it rushed the enactment process to adopt a responsive ordinance. D.G. Restaurant does not, however, allege that the hurried enactment process rendered the ordinance illegal. Instead, it urges the simple point that topless dancing conveys a message with which the City of Myrtle Beach disagreed, and when confronted with D.G. Restaurant's plans, the city quickly enacted a law with the narrow purpose of regulating D.G. Restaurant's proposed establishment of a forum for that message, thereby restraining D.G. Restaurant's right to free speech in violation of the First and Fourteenth Amendments.

The district court conducted a trial on the First Amendment issues and concluded that the timing of the enactment of Ordinance 89-20, combined with the ultimate effect of the ban on public displays of nudity, created a strong inference that Myrtle Beach's primary concern was "to restrict the message purveyed by topless dancing." The court found that the city went to great lengths to prevent the opening of even one club offering adult entertainment in the city, and that such conduct established that the city's predominant concern was the "suppress[ion] of the plaintiff's protected speech." Finally, the court concluded:

> Ordinance 89-20 was directed specifically against the plaintiff and was intended to prevent the plaintiff from opening and operating its place of business as planned because the City disagreed with the plaintiff's message.... Because the city of Myrtle Beach was attempting to restrict the message purveyed by topless entertainment by preventing D.G.'s from opening, Ordinance 89-20 as applied to the plaintiff is a content-based rather than content-neutral regulation of speech. As such, it presumptively violates the First Amendment.

[1][2] While it has long been held that the protection afforded by the free speech provision of the First Amendment extends, to some extent, beyond the written or spoken word to the communication of ideas through conduct, the courts have not applied the same First Amendment protections to physical conduct as is afforded to purer modes of communicative speech. *Compare* Cohen v. California, 403 U.S. 15, 26, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) (holding that display of invective is speech, not conduct, and may not be made criminal without a "particularized and compelling reason"), *with* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 2461, 115 L.Ed.2d 504 (1991) (plurality opinion) (according less than full First Amendment protection to the expressive aspect of nude dancing). Although conduct may contain inherent expressive elements or may be undertaken for a particular communicative purpose, an important governmental interest in regulating the activity itself, without regard to the expressive element, can justify a necessary incidental restriction on the expressive aspects of the conduct. *See* United States v. O'Brien, 391 U.S. 367, 376-77, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 (1968). The Constitution does not require that otherwise unacceptable conduct become immunized from regulation when it is wrapped in a claim that the conduct was intended to convey a message.

[3][4] The tension between society's two diverging interests, one in regulating otherwise unacceptable conduct and the other in protecting speech, is resolved by application of the analysis provided in *O'Brien.* There the Court instructed that when a government legally adopts a regulation of ***144** physical conduct to serve a substantial governmental interest, it will not be found to violate the First Amendment, despite an incidental intrusion upon an expressive aspect of that conduct, if (1) the regulation is not aimed at the conduct's expressive element, and (2) the regulation is narrowly tailored so as not to impinge unnecessarily on the expressive element. *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679. If, on the other hand, the governmental regulation is focused upon the message sought to be communicated by the conduct, then the regulation must succumb to the overriding interest in protecting the freedom to speak. *See, e.g., Texas v. Johnson,* 491 U.S. 397, 420, 109 S.Ct. 2533, 2547, 105 L.Ed.2d 342 (1989) (prohibition of flag burning held to aim at protest message rather than at maintenance of peace or protection of public symbols); *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 509-10, 89 S.Ct. 733, 737-38, 21 L.Ed.2d 731 (1969) (prohibition of wearing arm bands held to aim at squelching protest rather than at prevention of school disruption); *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931) (prohibition of red flag display held to aim at protest message rather than at maintenance of public order). In the end, the core analysis must resolve whether the governmental regulation of conduct is in fact the unconstitutional regulation of an intended message of the actor rather than a legitimate attempt to regulate physical conduct for some other important governmental purpose.

[5] A variation on the *O'Brien* inquiry into whether a governmental regulation targets the expressive element of a particular type of conduct is the degree to which the First Amendment protects normally regulated conduct which has been turned from its ordinary course to be performed for a communicative purpose. When this is the case, the courts will not invalidate an otherwise constitutional restriction on conduct. For example, a statutory prohibition against the destruction of draft cards, which was adopted to serve an important governmental interest, is not rendered violative of the First Amendment when applied to defendants who burned their draft cards for the expressed purpose of protesting a war. *See O'Brien,* 391 U.S. at 376-78, 88 S.Ct. at 1678-80. The mere existence of a potential for expression through conduct simply does not result in a wholesale immunization of what would otherwise be a legitimately regulated activity. As Justice Scalia summarized in his concurring opinion in *Barnes:*

> But virtually *every* law restricts conduct, and virtually *any* prohibitive conduct can be performed for an expressive purpose-if only expressive of a fact that the actor disagrees with the prohibition.... [W]e have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.

*Barnes,* 111 S.Ct. at 2466 (Scalia, J., concurring).

Before attempting to apply the *O'Brien* analysis to the conduct in this case, we must determine whether the performance of nude or topless dancing contains an expressive element at all, as opposed to pure conduct to which the First Amendment offers no protection.

The nature and degree to which dancing communicates a message has been frequently debated. *See, e.g., Glen Theatre, Inc. v. Pearson,* 802 F.2d 287, 290-91 (7th Cir.1986) (discussing various opinions on whether nude dancing is a form of expression protected by the First Amendment). It has been held that recreational dancing, although containing a "kernel" of expression, is not conduct which is sufficiently communicative to bring it within the protection of the First Amendment. *Dallas v. Stanglin,* 490 U.S. 19, 25, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989). And the message of nude dancing has been said to lie only marginally "within the outer perimeters of the First Amendment." *Barnes,* 111 S.Ct. at 2460 (plurality opinion). In this particular case, when pressed at oral argument to articulate the content of the message that topless dancing conveys,***145** counsel could advance none. It would seem quite difficult for D.G. Restaurant to demonstrate that the city's focus in enacting Ordinance 89-20 was the eradication of the message conveyed by nude dancing, when the proponent of the dancing, itself, is unable to describe the nature of the message which the city's regulation is alleged to have targeted.

In considering an Indiana statute which generally prohibited nudity (the term "nudity" being defined in the Indiana statute in a manner similar to that in the Myrtle Beach ordinance), a plurality of the Supreme Court stated that nude dancing may convey an "erotic message." *See* Barnes, 111 S.Ct. at 2463 (plurality opinion). As Justice Scalia noted in his concurring opinion, however, the Indiana law was "regulating conduct, not expression, and those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden." *Id.* at 2468 (Scalia, J., concurring). Undoubtedly, topless dancing in a bar, which is designed to entertain and promote other products and services of the bar, can convey an erotic *stimulus,* but, as such, that "message" would appear to be more analogous to a physical stimulus than to the communication of ideas through speech.

Nevertheless, if we assume that the Myrtle Beach ordinance does incidentally restrict the so-called "erotic message" purveyed by the act of dancing in the nude, we must proceed with application of the test enunciated in *O'Brien,* i.e., to pass constitutional muster, an ordinance must be lawfully enacted to serve an important non-speech related governmental interest and be narrowly tailored to minimize the incidental intrusion on the message conveyed. *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679.

[6][7] The threshold inquiries under *O'Brien,* whether Myrtle Beach had the authority to adopt a zoning ordinance and whether it did so to address a substantial government interest, are not in controversy. It is well within the constitutional power of a municipality to adopt zoning regulations that limit the areas in which adult entertainment enterprises may operate. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). It is also well-established that the regulation of nudity in public places advances a substantial governmental interest in maintaining order and morality. With regard to the regulation of public nudity, the Court in *Barnes* stated:

> [T]he statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin, and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law and this Court recognized the common-law roots of the offense of "gross and open indecency" in *Winters v. New York,* 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). Public nudity was considered an act *malum en se. Le Roy v. Sidley,* 1 Sid. 168, 82 Eng.Rep. 1036 (K.B. 1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.

*Barnes,* 111 S.Ct. at 2461 (plurality opinion). *See also Renton,* 475 U.S. at 50, 106 S.Ct. at 930 ("[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect' "). (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 2453, 49 L.Ed.2d 310 (1976)). As Justice Souter noted in his concurring opinion in *Barnes,* a government can legitimately act on the belief that adult entertainment establishments may encourage prostitution and lead to increases in sexual assault and other criminal activity. *See Barnes,* 111 S.Ct. at 2469 (Souter, J., concurring). The state's interest in combatting these secondary effects is substantial. *See id.* Thus, the dispute in this case does not focus upon whether the interest in morality and order underlying the city's regulation of public nudity is a sufficiently compelling governmental interest to override some incidental effects of the communicative aspects of topless dancing. Instead, this case centers on the question of whether the Myrtle Beach ordinance actually serves these well ***146** established substantial interests or is merely a pretext for getting at the communicative element of nude dancing.

Given the difficulty we have expressed in finding a message purveyed by the performance of topless dancing, the argument that Myrtle Beach enacted a statute which was aimed at that message is dubious. Nevertheless, our examination of the record discloses no evidence to support a conclusion that that message was the target of the Myrtle Beach ordinance. In contrast to D.G. Restaurant's unsupported assertions that Ordinance 89-20 was aimed at the expressive element conveyed by nude dancing, the ordinance, *by its terms,* states that adult entertainment businesses could have a "deleterious effect on the quality of city neighborhoods" and that "the use of property for adult entertainment establishments is not compatible with residential, religious, and educational uses of property in the City of Myrtle Beach." The testimony of

council members and the report considered by the city council confirm the stated purposes. They cite the incompatibility of adult entertainment with "residential or family-oriented tourist uses." Nowhere in the ordinance is there any suggestion that the city had an interest in regulating dancing or, more importantly, that any message conveyed by dancing was intended to be regulated. This is the most telling signal that Myrtle Beach was not concerned with the communicative aspects of nude dancing. Indeed, adult entertainment businesses are defined by the ordinance as those which offer nudity, not erotic dancing.

[8] The interest of D.G. Restaurant in the conveyance of a message through the performance of dance remains open for fulfillment anywhere in Myrtle Beach so long as nudity is not involved within 500 feet of other specified land uses, and presumably even in those areas if the dancers don pasties and G-strings. We fail to see how the message that D.G. Restaurant intends to impart, assuming a message exists at all, is frustrated by the ordinance.

D.G. Restaurant contends that the real purpose of the statute is not obvious from its terms and that *the circumstances* of the enactment of the ordinance reveal the true intent to restrict the message conveyed by topless dancing. The record does fairly support the conclusion that the city enacted Ordinance 89-20 in response to the announced plans of D.G. Restaurant to bring topless dancing to Myrtle Beach. That conclusion, however, does not establish the eradication of any erotic message as a motive for the enactment of the city's regulation of public nudity. Indeed, the only evidence offered with respect to the legislative purpose demonstrates the city council's concern over the secondary effects on family-oriented uses that adult entertainment establishments, including D.G. Restaurant, might have. That it took D.G. Restaurant's announced plans to spur the city to this realization does not in any way impute illicit or unconstitutional motives to the Myrtle Beach city council.

Moreover, the individual motives of legislators, even if those motives are demonstrated to conflict with the expressed purpose of the enacted legislation, are rarely relevant to a court's consideration of the legitimacy of the legislation. For good reason, courts have not as a general rule found legislation unconstitutional based on the motive of the voting legislators when the legislation is facially constitutional. As stated in *O'Brien,* this principle is of long standing:

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.
>
> * * * * * *
>
> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

*O'Brien,* 391 U.S. at 383-84, 88 S.Ct. at 1682-83. *See also Renton,* 475 U.S. at 47-48, 106 S.Ct. at 928-929 (focusing on the clear terms of the statute rather than the alleged legislative motives). The courts will sometimes look to statements by legislators when the issue before the court is ***147** the interpretation of an otherwise ambiguous statute. *See generally United Steelworkers of America v. Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). And even where a statutory purpose is facially explicit, the courts will look behind the express language of the law in a few rare circumstances. *See O'Brien,* 391 U.S. at 383 & n. 30, 88 S.Ct. at 1682 & n. 30 (recognizing that courts should look at legislators' actual motives in determining whether a statute is a bill of attainder); *South Carolina Educ. Ass'n v. Campbell,* 883 F.2d 1251, 1259 (4th Cir.1989) (recognizing that courts must look to actual motive where such an inspection is a substantive element of the very constitutional test being applied), *cert. denied,* 493 U.S. 1077, 110 S.Ct. 1129, 107 L.Ed.2d 1035 (1990).

Such rare circumstances are not present in this case. By its plain language Ordinance 89-20 unambiguously regulates adult entertainment businesses through the prohibition of public nudity in specified locations out of a concern for the otherwise deleterious effect that such establishments would have on the city's neighborhoods. Presumably the courts and law enforcement officials will read the ordinance in light of this plain language and the statute's effect will reach no further than its expressed prohibitions and concerns will dictate.

Finally, in completing our *O'Brien* analysis we also note that Myrtle Beach's public nudity law is narrowly

tailored so as to avoid impinging upon the expressive elements of the regulated conduct, nude dancing. The ordinance prohibits nudity by limiting only the exposure of the most private anatomical parts of the male and female body. D.G. Restaurant makes no argument that this particular degree of nudity prohibited by the law is the communicative aspect of the message that it is seeking to convey.

III

[9][10] Myrtle Beach's ordinance survives constitutional scrutiny also because it expressly allows for reasonable alternatives to any asserted regulation of speech. Not only does the ordinance appear to leave room for any form of erotic dancing in which the dancers wear the minimum of a G-string and pasties to cover the specified anatomical areas, but also it should be noted that if the restaurant feels compelled to spread its erotic message through total nudity it can do that without violating the ordinance. D.G. Restaurant simply cannot, in compliance with the ordinance, make its "statement" with nudity within a limited distance from other specified land uses. The ordinance is thus a valid time, place, and manner restriction. *See* *Renton,* 475 U.S. at 50, 106 S.Ct. at 930 (The appropriate inquiry about a regulation confining adult theaters to specified locations within the city is whether it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.").

[11] D.G. Restaurant claims that the ordinance effectively "zones" topless dancing out of existence in Myrtle Beach. It is argued that this restriction leaves an opportunity to operate adult businesses only in the C-9 zone, which is limited to a few poorly lit sites in industrial areas, far from the tourist-oriented businesses. While D.G. Restaurant may not find it as commercially desirable to operate in such locations, it has not been demonstrated that the restriction to the C-9 zone will impede the restaurant's ability to convey its message to those listeners who desire to be enlightened by it. The decision to restrict adult businesses to a specific area does not oblige the city to provide commercially desirable land. *See* *Renton,* 475 U.S. at 54, 106 S.Ct. at 932.

IV

Thus we conclude that Myrtle Beach's ordinance serves a substantial governmental interest and does not by its terms regulate dancing or any communicative element alleged to have been conveyed by nude or topless dancing, and that any incidental restriction on erotic dancing is permitted since the regulation by the ordinance is narrowly tailored so as not unnecessarily to impinge upon the conduct's communicative ***148** element. Furthermore, we determine that the decision to limit displays of nudity in public to certain designated areas of the city is a content-neutral time, place, and manner restriction which also supports the conclusion that Ordinance 89-20 passes constitutional muster. Accordingly, we reverse and remand with instructions to dissolve the injunction entered by the district court prohibiting enforcement of the ordinance.

REVERSED AND REMANDED.

C.A.4 (S.C.),1991.
D.G. Restaurant Corp. v. City of Myrtle Beach
953 F.2d 140, 60 USLW 2440

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Bronco's Entertainment, Ltd. v. Charter Tp. of Van Buren
C.A.6 (Mich.),2005.
2005 FED. APP. 0752N.

United States Court of Appeals,Sixth Circuit.

BRONCO'S ENTERTAINMENT, LTD., and Rawsonville Land Co., Inc., Plaintiffs-Appellants,
v.
CHARTER TOWNSHIP OF VAN BUREN, Michigan Liquor Control Commission, and Jacqueline Stewart, Defendants-Appellees.

**No. 03-2242.**

Aug. 25, 2005.
As Amended on Rehearing Sept. 23, 2005.

**Background:** Prospective operators of topless bar brought civil rights action against township and state liquor-control agency, alleging that certain licensing and zoning ordinances violated First and Fourteenth Amendments. Following remand, 29 Fed.Appx. 310, the United States District Court for the Eastern District of Michigan entered judgment for defendants, and prospective operators appealed.

**Holdings:** The Court of Appeals, David A. Nelson, Circuit Judge, held that:
(1) township's site plan approval procedure was not a prior restraint;
(2) requirement for "special" approval for sexually oriented businesses comported with First Amendment; but
(3) ordinance governing licensing of sexually oriented businesses violated First Amendment by authorizing discretionary denial of license application without providing for accelerated judicial review;
(4) invalid portions of ordinance would be severed;
(5) prospective operators lacked standing to assert First Amendment challenge to state "topless activity permit" statute;
(6) zoning ordinance that placed geographic restrictions on permissible locations for sexually oriented business comported with First Amendment; and
(7) township's 182-day moratorium on submission of rezoning petitions, special approval uses and the like did not violate prospective operators' due process and First Amendment rights.

Affirmed in part, reversed in part, and remanded.

West Headnotes

**[1] Constitutional Law 92 1527**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1525 Prior Restraints
92k1527 k. Presumption of Invalidity. Most Cited Cases
(Formerly 92k90(3))
Prior restraints on speech are presumptively invalid under First Amendment. U.S.C.A. Const.Amend. 1.

**[2] Constitutional Law 92 2208**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases
(Formerly 92k90.4(1))
Scheme for licensing sexually oriented businesses must incorporate two procedural safeguards in order to overcome presumptive invalidity of prior restraint: (1) decision whether to issue license must be made within specified, brief time period, and status quo must be maintained during that period and during course of any judicial review, and (2) there must be assurance that judicial decision, if sought by applicant, can be obtained seasonably. U.S.C.A. Const.Amends. 1, 14.

**[3] Constitutional Law 92 2208**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression

92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases
(Formerly 92k90.4(1))
No special rules for accelerated judicial review are required in order to satisfy judicial-review safeguard required of scheme for licensing sexually oriented businesses; rather, scheme must apply reasonably objective, nondiscretionary criteria, and must not seek to censor content. U.S.C.A. Const.Amends. 1, 14.

**[4] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in General. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 86**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k86 k. Permits and Certificates. Most Cited Cases
Township's site plan approval procedure, as applied to prospective operators of sexually oriented business, was not a prior restraint on speech and did not require safeguards applicable to schemes carrying risk of censorship; procedure applied to all new land uses other than detached family dwellings, and was routine, nondiscretionary function concerned with traffic circulation and essential services. U.S.C.A. Const.Amends. 1, 14.

**[5] Constitutional Law 92 2208**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 86**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k86 k. Permits and Certificates. Most Cited Cases
Township's requirement for "special" approval for sexually oriented businesses comported with First Amendment; maximum time of 135 days from township's receipt of completed application and its decision was not unduly lengthy, status quo was preserved during special approval process and any subsequent judicial proceedings, and zoning requirements that had to be satisfied for special approval to be granted were objective and nondiscretionary. U.S.C.A. Const.Amends. 1, 14.

**[6] Constitutional Law 92 2208**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases
(Formerly 92k90.4(1))

**Public Amusement and Entertainment 315T 9(1)**

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) k. In General. Most Cited Cases
Township ordinance governing licensing of sexually oriented businesses violated First Amendment by authorizing discretionary denial of license application without providing for accelerated judicial review; specific provisions permitted denial of application if applicant had "demonstrated an inability to operate or manage [sexually oriented business] in a peaceful and

law-abiding manner," and also required assessment of applicant's "fitness" by chief of police, both of which called for subjective assessments, but ordinance did not provide accompanying special rules guaranteeing speedy judicial decision. U.S.C.A. Const.Amends. 1, 14.

**[7] Municipal Corporations 268 111(4)**

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k111 Validity in General
268k111(4) k. Effect of Partial Invalidity. Most Cited Cases
Invalid portions of township ordinance governing licensing of sexually oriented businesses, which violated First Amendment by authorizing discretionary denial of license application without providing for accelerated judicial review, would be severed, leaving remainder of ordinance intact; ordinance contained severability clause, invalid portions were easily severable, and remainder of ordinance after severance satisfied requirements of First Amendment. U.S.C.A. Const.Amends. 1, 14.

**[8] Constitutional Law 92 874**

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)9 Freedom of Speech, Expression, and Press
92k873 Licenses
92k874 k. In General. Most Cited Cases
(Formerly 92k42.2(1))
Prospective operators of topless bar lacked standing to assert First Amendment challenge to state "topless activity permit" statute that, by its terms, did not apply to them; prospective operators were asserting challenge based on lack of procedural safeguards, not vagueness and overbreadth claim. U.S.C.A. Const.Amends. 1, 14; M.C.L.A. § 436.1916(3).

**[9] Constitutional Law 92 2209**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2209 k. Geographic Restrictions in General. Most Cited Cases
(Formerly 92k90.4(1))

**Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(1))

**Constitutional Law 92 2215**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2215 k. Availability of Other Sites. Most Cited Cases
(Formerly 92k90.4(1))
Ordinance that imposes geographic restrictions on sexually oriented businesses comports with First Amendment if: (1) restrictions are aimed at secondary effects of such businesses rather than content of expression occurring there; (2) restrictions are narrowly tailored to serve substantial government interest; and (3) alternative channels of expression remain available. U.S.C.A. Const.Amend. 1.

**[10] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in

General. Most Cited Cases
(Formerly 92k90.4(1))

**Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Township zoning ordinance that placed geographic restrictions on permissible locations for sexually oriented businesses comported with First Amendment; township relied on relevant evidence of secondary harms from such businesses, and had important interest in combating those secondary harms, ordinance was narrowly tailored, and ordinance preserved substantial number of channels for expression including 48 sites available for sexually oriented businesses, 27 of which were "easily developed." U.S.C.A. Const.Amends. 1, 14.

**[11] Constitutional Law 92 2237**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2237 k. In General. Most Cited Cases
(Formerly 92k90.4(5))

**Constitutional Law 92 4093**

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4091 Zoning and Land Use
92k4093 k. Particular Issues and Applications. Most Cited Cases
(Formerly 92k278.2(1))

**Zoning and Planning 414 86**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k86 k. Permits and Certificates. Most Cited Cases
Township's 182-day moratorium on submission of rezoning petitions, special approval uses, and the like did not violate due process and First Amendment rights of prospective operators of topless bar, who were prevented by moratorium from submitting application for bar's license prior to effective date of more restrictive licensing requirements; moratorium, instituted to allow township to revise its master plan and zoning regulations, was generally applicable, was not intended to suppress speech, and was of reasonably short duration, and township was unaware of prospective operators' plans at outset of moratorium. U.S.C.A. Const.Amends. 1, 14.

***442 ARGUED:** Robert D. Horvath, Troy, MI, for Plaintiffs-Appellants.David J. Szymanski, Sommers, Schwartz, Silver & Schwartz, Southfield, MI, Linda P. McDowell, Department of Attorney General, Farmington, MI, for Defendants-Appellees. **ON BRIEF**: Robert D. Horvath, Troy, MI, for Plaintiffs-Appellants. David J. Szymanski, Sommers, Schwartz, Silver & Schwartz, Southfield, MI, Linda P. McDowell, Department of Attorney General, Farmington, MI, for Defendants-Appellees.

Before: NELSON and COOK, Circuit Judges; WEBER, District Judge.[FN*]

FN* The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

DAVID A. NELSON, Circuit Judge.
This appeal represents the latest round in a long-running dispute over the regulation of sexually oriented businesses in the Charter Township of Van Buren, Michigan. The plaintiffs sued the township and the Michigan Liquor Control Commission on the

theory that certain licensing and zoning regulations adopted by these governmental bodies violate the First and Fourteenth Amendments to the United States Constitution. The district court initially dismissed the action for lack of standing, but our court reversed the dismissal. On remand the district court entered judgment for the defendants; again the plaintiffs have appealed. We shall affirm***443** the district court's judgment in part and reverse it in part.

We are not persuaded that the township's site plan and "special" approval requirements operate as prior restraints that violate the First Amendment. Site plan approval is a generally applicable requirement that does not seek to limit speech, and the "special" approval process is subject to procedural safeguards that adequately protect against censorship. Nor are we persuaded that the Liquor Control Commission's requirement of a "topless activity permit" affects this case.

We are satisfied, moreover, that the township's geographic restrictions on sexually oriented businesses are aimed at the secondary effects of such businesses, are narrowly tailored to serve a substantial government interest, and leave open alternative channels for erotic expression. And we see nothing unconstitutional about a 182-day land use moratorium adopted by the township; the moratorium was put in place for a proper purpose and not for suppression of the plaintiffs' speech.

We conclude, however, that the township's system of licensing sexually oriented businesses is unconstitutional insofar as it authorizes discretionary denial of a license without providing for accelerated judicial review. Absent an appropriate judicial review procedure, we are compelled to sever and invalidate the discretionary-denial feature of the licensing ordinance. The rest of the ordinance will be left intact.

I

The pertinent factual background is outlined in our earlier opinion. See *Bronco's Entertainment, Ltd. v. Charter Township of Van Buren*, 29 Fed.Appx. 310, 311-12 (6th Cir.2002). In brief, the plaintiffs want to open a topless bar on a site that is ineligible for such use under the township's current zoning regulations. The plaintiffs sued the township, the Liquor Control Commission and the Chair of the Commission on the theory that the township's zoning regulations and the state and local procedures for licensing sexually oriented businesses are unconstitutional. The plaintiffs also challenged the constitutionality of the township's 182-day moratorium on the acceptance of new site plans-a moratorium that prevented the plaintiffs from seeking approval under a more favorable zoning scheme.

After this court's reversal of the ruling on standing, the district court entered judgment on the merits in favor of the defendants.[FN1] The court held (1) that the township's zoning regulations allow operation of sexually oriented businesses at an adequate number of alternative sites within the township; (2) that the township's zoning and licensing regulations are narrowly tailored to protect the public from harmful secondary effects of sexually oriented businesses; (3) that the township's licensing requirements (including requirements for site plan approval and "special" approval) do not constitute unlawful prior restraints on protected speech; (4) that the state's procedure for issuing a "topless activity permit" is constitutional; and (5) that the township's moratorium on consideration of new site plans did not violate the First or the Fourteenth Amendment. The plaintiffs perfected a timely appeal.

> FN1. The plaintiffs refer to the district court's decision as a summary judgment, but the court did not in fact act under Rule 56, Fed.R.Civ.P. The court declined to hold an evidentiary hearing only because the parties agreed that the existing record was sufficient. The court ordered the parties to file proposed findings of fact, and it resolved disputed issues by making its own factual findings.

II

The challenged regulations can be grouped into three categories: (a) licensing***444** and approval regulations at the state and local levels; (b) geographic zoning regulations; and (c) the township's moratorium on consideration of new site plans. We shall address these categories seriatim.

A

[1] The plaintiffs maintain that the challenged licensing and approval regulations constitute unlawful

prior restraints on protected speech.[FN2] "A 'prior restraint' exists when the exercise of a First Amendment right depends on the prior approval of public officials." *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville,* 274 F.3d 377, 400 (6th Cir.2001), *cert. denied,*535 U.S. 1073, 122 S.Ct. 1952, 152 L.Ed.2d 855 (2002). Prior restraints are presumptively invalid because of "the risk of censorship associated with the vesting of unbridled discretion in government officials" and "the risk of indefinitely suppressing permissible speech when a licensing law fails to provide for the prompt issuance of a license." *Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 889 (6th Cir.2000) (internal quotation marks omitted).

FN2. The defendants have not challenged the proposition that the commercial display of bare-breasted women involves constitutionally protected "speech." Such a challenge, as reasonable as it might otherwise seem, would fly in the face of binding precedent. See *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) ("nude dancing ... is expressive conduct within the outer perimeters of the First Amendment").

[2] To overcome the presumption of invalidity, a scheme for licensing sexually oriented businesses must incorporate two procedural safeguards. See *Deja Vu of Nashville,* 274 F.3d at 400-01; *Nightclubs, Inc.,* 202 F.3d at 890. First, the decision whether to issue a license must be made within a specified-and brief-time period, and the status quo must be maintained during that period and during the course of any judicial review. See *Deja Vu of Nashville,* 274 F.3d at 400-01. Second, there must be an assurance that a judicial decision, if sought by the applicant, can be obtained seasonably. See *City of Littleton v. Z.J. Gifts D-4, L.L.C.,* 541 U.S. 774, 124 S.Ct. 2219, 2224, 159 L.Ed.2d 84 (2004); *Deja Vu of Nashville,* 274 F.3d at 400-01.

[3] The latter safeguard does not require special rules for accelerated review if the licensing scheme "applies reasonably objective, nondiscretionary criteria" and "does not seek to censor content." *Littleton,* 124 S.Ct. at 2225-26; see *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees,* 411 F.3d 777, 787-88 (6th Cir.2005). In those circumstances, "ordinary court procedural rules and practices ... provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm." *Littleton,* 124 S.Ct. at 2224-25, 2226; *Deja Vu of Cincinnati,* 411 F.3d at 787.

If a licensing scheme involves the application of subjective standards, rules requiring a speedy judicial decision may be necessary. See *Freedman v. Maryland,* 380 U.S. 51, 59-60, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). In *Freedman* the Supreme Court "considered a [motion picture permitting] scheme with rather subjective standards ... where a denial [of a permit] likely meant complete censorship." *Littleton,* 124 S.Ct. at 2225. The characteristics of that scheme "necessitated that strict time limits be placed on judicial review." *Deja Vu of Cincinnati,* 411 F.3d at 787.

With these principles in mind, we turn to the licensing and approval regulations that are challenged in the case at bar. The local regulations require site plan approval, "special" approval, and issuance of ***445** a sexually oriented business license. The state regulation requires issuance of a "topless activity permit" under certain circumstances.

1

[4] Except for detached one- and two-family dwellings, site plan approval is required for all new land uses in the township. See Zoning Ordinance, Charter Township of Van Buren, Michigan § 20.341. After an administrative review to ensure completeness and consistency with zoning requirements, site plans are placed "on the Planning Commission agenda for review and action at the earliest available meeting." *Id.* Section 20.343 of the township's zoning ordinance gives a detailed list of the data that must be included in a site plan, and § 20.347 sets forth factors that "the Planning Commission shall consider" when reviewing a plan. The factors enumerated in § 20.347 include such matters as "[t]he location and design of driveways,""traffic circulation features within the site and location of parking areas," and "[t]he installation, erection, and construction of transmission systems for essential services." *Id.* § 20.347.

The record contains uncontroverted evidence that

review and approval of a site plan is a routine, nondiscretionary function. Gary Wilson, a member of the Planning Commission's staff, testified as follows:

"[O]nce a completed application is received and reviewed, it has to appear before the planning commission. We have to, by state statute, grant or deny approval, and if the site plan meets the requirements of the ordinance we must grant approval. We have no discretion in that. It's essentially an administrative function.

* * * * * *

As stated in the ordinance, the ordinance requirements for site plan review are very specific, very, it's laid out in a section, a clear section in the ordinance. The information is normal and common. It's factual information that has to be in a plan and if it's on there and it meets the ordinance, it has to be approved."

The township's requirement of site plan approval does not, in our view, constitute a prior restraint on speech, and it need not incorporate the procedural safeguards described above. The ordinance is applicable to all commercial uses, not just those that involve protected speech, and it does not grant government officials discretion to allow or forbid expressive activity. As the Supreme Court has explained,

"laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as a means of censorship.... [S]uch laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760-61, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

Given Mr. Wilson's testimony, we are satisfied that the township's procedure for site plan approval poses little, if any, risk of censorship. It does not, therefore, warrant the protections that must accompany a scheme directly regulating speech.

[5] "Special" approval is required for sexually oriented businesses and other uses that are enumerated in the township's zoning ordinance. See Zoning Ordinance, ***446** Charter Township of Van Buren, Michigan §§ 20.653, 20.763, 20.792a. An application for "special" approval must accompany the applicant's site plan. See *id.* §§ 20.390(C), 20.878(c). The Planning Commission is required to publish notice, hold a public hearing on the application, and then recommend denial, approval, or approval with conditions. See *id.* § 20.390(D), (E). Ordinarily, a special use must satisfy nine enumerated criteria before the Commission may recommend its approval. See *id.* § 20.390(F).

The Planning Commission's recommendation is forwarded to the township's Board of Trustees. See *id.* § 20.390(E). At least five but no more than 15 days before the Board considers the matter, it must publish notice of the application. See *id.* § 20.878(d). Notice must also be sent by mail or delivered in person to the owner of the property under consideration and to owners and occupants of property located within 300 feet of that property. See *id.* At the request of any of these persons, or upon the Board's own initiative, a public hearing will be held. See *id.* § 20.878(e). The Board is forbidden to approve the special use unless the nine enumerated criteria are met. See *id.* §§ 20.390(F), 20.878(f).

These special approval procedures are modified in two ways when the proposed use is a sexually oriented business. First, more restrictive time limits apply. The Planning Commission must conduct its public hearing within 60 days of receiving the completed application, and it must make a recommendation at its next regularly scheduled meeting after the hearing. See *id.* § 20.420(1)(d). (The record reflects that the Planning Commission meets twice each month.) The Commission must forward its recommendation to the Board of Trustees within 60 days, and the Board must grant or deny special approval "at this meeting." See *id.* It seems to us that the phrase "this meeting" refers to a Board meeting at which the Planning Commission's recommendation is considered, and we interpret the ordinance as requiring such a meeting to occur within 60 days of the Commission's making its recommendation. Failure of the township to comply with any of these time limits "shall be deemed to constitute granting of special approval." *Id.*

Second, the nine criteria that must normally be met for special approval do not apply to sexually oriented businesses. See *id.* §§ 20.763(h), 20.792a(a), 20.878(g). Instead, the Board may only consider whether the proposed sexually oriented business complies with geographic requirements set forth in the zoning ordinance. See *id.* §§ 20.878(g), 20.420(3).[FN3]

> FN3. These modifications of the township's special approval procedures were made after a Michigan appellate court determined that the ordinary procedures were unconstitutional when applied to sexually oriented businesses. See *BRK, Inc. v. Charter Township of Van Buren,* Nos. 163835, 170704 (Mich.Ct.App. Mar. 15, 1996) (unpublished). The principal defects in the unmodified procedures were the lack of specified time limits and the subjectivity of the criteria for granting approval. See *id.,* slip op. at 9-11.

As we have said, special approval is not required for all commercial uses. Insofar as it directly regulates expressive activity, the township's special approval requirement poses a risk of censorship. The procedural safeguards described above-a brief time limit for the administrative determination, preservation of the status quo, and a mechanism to assure availability of a prompt judicial decision-must therefore be in place.

We think that the time limits for special approval of a sexually oriented business are short enough to pass constitutional ***447** muster. The maximum allowable time between the township's receipt of a completed application and the Board's decision is 135 days (assuming a maximum of 15 days between the hearing before the Planning Commission and the Commission's making a recommendation). This strikes us as a reasonable length of time, given the nature of the decision to be made and the type of speech that is at issue. Special approval depends on compliance with zoning regulations, as mentioned above, and surveying or other fieldwork might therefore be necessary before the Board can approve a proposed site. Moreover, public hearings must be held. The resulting delays do not, in our view, impose an undue hardship on the "speakers" who are awaiting approval. The "speech" that is being temporarily silenced, after all, is a type of expression in which "society's interest ... is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 294, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion) (internal quotation marks omitted).

The status quo is preserved during the special approval process and any subsequent judicial proceedings. See *East Brooks Books, Inc. v. City of Memphis,* 48 F.3d 220, 225 (6th Cir.) ("The status quo for a business seeking a permit to begin operating a sexually oriented business ... is non-operation."), *cert. denied*516 U.S. 909, 116 S.Ct. 277, 133 L.Ed.2d 198 (1995).

The ordinance does not establish special rules for an accelerated judicial decision, but such rules are unnecessary under *Littleton.* As we shall see in section II.B, the zoning requirements that must be satisfied for special approval to be granted are objective and nondiscretionary. Ordinary court rules are constitutionally sufficient, therefore, "as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly." *Littleton,* 124 S.Ct. at 2224. Michigan has rules that provide for expeditious granting of injunctive relief, M.C.R. 3.310, "speedy hearing[s]" in actions seeking declaratory relief, M.C.R. 2.605(D), expedited trials, M.C.R. 2.501(B), and accelerated appellate review, M.C.R. 7.101(N)(4). The plaintiffs have not shown that Michigan courts fail to apply these procedures when necessary to protect First Amendment rights. Accordingly, we are not persuaded that the township's special approval requirement is constitutionally deficient.

3

[6] In addition to the requirements for site plan approval and special approval, the township requires the owner or operator of a sexually oriented business to obtain a license before commencing operations. See Code of Ordinances, Charter Township of Van Buren, Michigan § 22-402. To obtain a license, the owner/operator must submit an application to the township clerk. See *id.* § 22-403. The clerk has 10 business days to determine whether the application is complete. See *id.* If it is, the clerk has four business days to forward the application to any two of the three elected township officials. See *id.* These officials must decide within 30 business days whether to

approve a license. See *id.* Within that 30-day period, "written reviews shall be prepared by the chief of police, fire department, and building department." See *id.*

Subsection 22-403(i) of the township's code of ordinances identifies nine bases on which a license to operate a sexually oriented business may be denied. These bases are as follows:

"(1) An applicant is under 18 years of age.

***448** (2) An applicant is overdue in his or her payment to the Township of taxes, fees, fines, or penalties assessed against or imposed in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for the issuance of the license or has falsely answered a question or request for information on the application forms.

(4) An applicant has been convicted of a violation of a provision of this section, other than the offense of operating a sexually oriented business without a license, within 2 years immediately preceding the filing of the application....

(5) The premises to be used for the sexually oriented business has not been approved by the health department, fire department, or building official; or the premises is not in compliance with applicable laws and ordinances.

(6) The license fee required by this section has not been paid.

(7) An applicant has owned, operated, or been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.

(8) An applicant has a record of conviction for an offense involving gambling, narcotics, prostitution, pandering, pornography, public indecency, sexual assault, or any violation of any provision of this article within the preceding 2 years....

(9) The applicant is not in compliance with applicable zoning ordinances." *Id.* § 22-403(i).

In addition, subsection 22-403(j) authorizes denial of a license if "the chief of police determines that the applicant is presently unfit to operate a sexually oriented business due to the applicant's overall criminal record, regardless of the date of any criminal conviction." *Id.* § 22-403(j). In making this determination, "the chief of police shall consider the following factors:
"(1) The extent and nature of past criminal activities;

(2) The age at the time of the commission of the crime;

(3) The amount of time that has elapsed since the last illegal activity;

(4) The conduct and work activity prior to and following the illegal activity;

(5) Evidence of any rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) Other evidence of present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for that person, the sheriff and chief of police in the community where the applicant resides, and any other persons in contact with the applicant." *Id.*

If the township denies an application for a license, the township has 30 business days within which to seek a declaratory judgment approving the denial. See *id.* § 22-406. The applicant "may, at any time, seek prompt judicial review of any act or failure to act by the Township" in connection with an application for a license. *Id.*

We believe that the time period within which the township must grant or deny an application for a license-a total of 44 business days, if the clerk uses the maximum allowable time to review and forward the application-is sufficiently brief. As with ***449** special approval, the status quo is preserved for an applicant seeking to open a new sexually oriented business.[FN4]

FN4. The licensing ordinance might not preserve the status quo for some other

> applicants. We can find no provision allowing sexually oriented businesses that were in operation at the time the ordinance became effective to continue operating while applying for a license. Nor is there a provision allowing continued operation during judicial review of a decision to suspend or revoke, or not to renew, a license. These issues are not before us here, obviously.

We are not satisfied, however, that the licensing ordinance assures the requisite availability of a prompt judicial decision. Although most of the bases for denial of an application are objective, two of them call for an exercise of discretion by government officials. First, § 22-403(i)(7) requires a judgment as to whether an applicant who has been connected with a sexually oriented business during the past year "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner." (In the case at bar the plaintiffs' principal has operated other sexually oriented businesses.) In *East Brooks Books, Inc. v. City of Memphis,* 48 F.3d 220 (6th Cir.1995), we held that an almost identical provision "vest[ed] unbridled discretion in the hands of" the official making that judgment. See *id.* at 227. Second, § 22-403(j) requires an assessment of the applicant's "fitness" by the chief of police. The ordinance lists factors that the police chief must consider; but the assessment is ultimately a subjective one.

It follows from this that ordinary court rules are not sufficient "to prevent undue delay resulting in the unconstitutional suppression of protected speech." *Deja Vu of Cincinnati,* 411 F.3d at 787 (internal quotation marks omitted). Because of the discretion it grants to governmental officials, the township's licensing scheme requires special rules that guarantee an "unusually speedy judicial decision." *Littleton,* 124 S.Ct. at 2226; see *Freedman,* 380 U.S. at 59-60, 85 S.Ct. 734; *Deja Vu of Cincinnati,* 411 F.3d at 787. No such rules are provided in the ordinance or by state law.

[7] But this does not mean that the township's licensing ordinance should be struck down in its entirety. The ordinance contains a severability clause, under which "[e]very word, sentence, clause and provision ... is hereby declared to be severable, and if any word, sentence, clause, provision or part thereof is declared to be invalid by a court of competent jurisdiction, the remaining provisions shall not be affected." Code of Ordinances, Charter Township of Van Buren, Michigan § 22-408. If it is possible to do so, we must "give effect to the ... severability clause so as not to invalidate the entire [ordinance]." *Deja Vu of Nashville,* 274 F.3d at 389. We see no reason not to give effect to the severability clause here. See *Jott, Inc. v. Charter Township of Clinton,* 224 Mich.App. 513, 569 N.W.2d 841, 855 (1997) (holding that invalid portions of an ordinance should be severed when "the remaining, valid portions are sufficiently independent and complete" and consistent with the intent of the ordinance). With §§ 22-403(i)(7) and 22-403(j) removed, the ordinance satisfies the requirements of the First Amendment.

4

[8] Section 916 of Michigan's Liquor Control Code prohibits certain licensees from allowing "topless activity" on licensed premises without a "topless activity permit" issued by the Liquor Control Commission.***450** See Mich. Comp. Laws § 436.1916. A permit will not be issued without the approval of the Liquor Control Commission, "the local legislative body of the jurisdiction within which the premises are located," [FN5] and "[t]he chief law enforcement officer of the jurisdiction within which the premises are located or the entity contractually designated to enforce the law in that jurisdiction." *Id.*

> FN5. Approval by the local legislative body is not required in cities with a population of 1,000,000 or more. See Mich. Comp. Laws § 436.1916(6)(b).

The plaintiffs correctly point out that § 916 sets forth no standards or time limits for the approval and issuance of a topless activity permit. In circumstances other than those presented here, the absence of standards and time limits might warrant a judicial determination that the statute is an unconstitutional prior restraint.

But Van Buren Township has an ordinance prohibiting persons from appearing in a state of nudity (which is defined to include toplessness) "in any establishment licensed or subject to licensing by the

Michigan Liquor Control Commission." Code of Ordinances, Charter Township of Van Buren, Michigan § 6-69. This ordinance was held to be constitutional in *Charter Township of Van Buren v. Garter Belt, Inc.*, 258 Mich.App. 594, 673 N.W.2d 111 (2003), *appeal denied*, 470 Mich. 880, 682 N.W.2d 86 (2004), *cert. denied*, 543 U.S. 1002, 125 S.Ct. 620, 160 L.Ed.2d 462 (2004), and it has not been challenged here. Accordingly, the plaintiffs would be prohibited from offering topless entertainment on licensed premises in the township regardless of whether they could obtain a topless activity permit from the Liquor Control Commission. We see no reason to adjudicate the constitutionality of § 916 in these circumstances.

B

The plaintiffs' next contention is that the township's zoning ordinance violates the First Amendment by unduly restricting expressive activity. The ordinance prohibits operation of a sexually oriented business within 1,000 feet of a church, a school, a residential zoning district, a lot or parcel in residential use, a public park, a child care facility, or another sexually oriented business. It also prohibits sexually oriented businesses from being located within 500 feet of designated highways and thoroughfares. Finally, the ordinance allows sexually oriented businesses only in districts zoned for "general industrial" or "airport" uses, and not in "general business" districts.

[9] An ordinance that imposes geographic restrictions on sexually oriented businesses is constitutional if (1) the restrictions are aimed at secondary effects of such businesses rather than the content of the expression occurring there, (2) the restrictions are narrowly tailored to serve a substantial government interest, and (3) alternative channels of expression remain available. See *Executive Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 796 (6th Cir.2004) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)).

***451** [10] The district court found that the township adopted the challenged ordinance to combat the secondary effects of sexually oriented businesses rather than to suppress erotic expression. The township relied on memoranda prepared by McKenna Associates, Inc., a community planning and urban design firm, which cited studies showing that sexually oriented businesses are associated with increased crime rates and reduced property values, among other societal harms. A municipality is not required to "conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Erie*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (citation and internal quotation marks omitted); see also *Executive Arts Studio*, 391 F.3d at 796. The McKenna memoranda were therefore sufficient to support the township's adoption of the ordinance, and we see no error in the district court's finding on this score.

It seems clear, moreover, that the challenged ordinance is narrowly tailored to serve a substantial government interest. The importance of the township's interest in combating the secondary effects of sexually oriented businesses is "not debatable." *Wojcik v. City of Romulus*, 257 F.3d 600, 614 (6th Cir.2001); see also *Erie*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) ("The asserted interest[ ] ... of combating the harmful secondary effects associated with nude dancing [is] undeniably important."). And the ordinance applies only to "that category of establishments shown to produce the unwanted secondary effects," *i.e.*, sexually oriented businesses. *Executive Arts Studio*, 391 F.3d at 796 (internal quotation marks and brackets omitted). The covered businesses are delineated in the ordinance, and the plaintiffs have never argued that the ordinance's reach extends to mainstream bookstores or other establishments that are unlikely to create harmful secondary effects.

The plaintiffs suggest that the ordinance is not narrowly tailored because its geographic restrictions are more stringent than those that were applied to sexually oriented businesses under a previous ordinance. The suggestion misapprehends the nature of the "narrowly tailored" test in this context. A content-neutral regulation, such as the township's ordinance, need not be less restrictive than other possible regulations; it need only refrain from "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). That test is met in the case at bar, given that the

ordinance applies only to expression occurring in sexually oriented businesses and, as we are about to explain, preserves a substantial number of channels for such expression.

The record supports the district court's finding that numerous channels of expression are available to sexually oriented businesses in the township. The township presented detailed maps and other evidence demonstrating that 48 sites could be used for sexually oriented businesses under the current geographic restrictions and that 27 of these sites are "easily developed." (An "easily developed" site, according to a township witness, is one that is predominantly vacant, is not a wetland, has road access, and has utilities in place or reasonable access to utilities.) The township presented additional evidence, in the form of an affidavit executed by a real estate appraiser and broker, that the physical characteristics of these sites and their proximity to existing utility lines put them within the relevant real estate market. There ***452** was evidence, moreover, that an owner/operator of sexually oriented businesses has expressed interest in developing such a business in the township's airport district.

The plaintiffs presented countervailing evidence, but we see nothing in it that should have compelled the district court to reject the township's position. To the contrary, significant portions of the plaintiffs' evidence seem to have been based on misapprehensions of fact or law. One of the plaintiffs' witnesses assumed, for example, that parcels situated within 500 feet of a major thoroughfare would be disqualified in their entirety from use by sexually oriented businesses. But the township showed that a parcel can be divided to create a "flag lot" that is set back 500 feet from an adjacent road. The zoning ordinance expressly excludes access easements and access strips from its separation requirements so as to allow for such division. See Zoning Ordinance, Charter Township of Van Buren, Michigan § 20.420(3)(d)(7).

Another witness assumed that alternative sites for sexually oriented businesses must be suitable for "generic commercial" development rather than industrial uses. But the Supreme Court has made it clear that alternative sites need not be viable commercial properties. See *Renton,* 475 U.S. at 53-54, 106 S.Ct. 925. As the Eleventh Circuit observed, "the land deemed available for adult businesses in *Renton* included acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space."*David Vincent, Inc. v. Broward County,* 200 F.3d 1325, 1334 (11th Cir.2000) (internal quotation marks omitted). See also *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683, 688 (10th Cir.) (upholding an ordinance that allowed sexually oriented businesses in industrial zones only), *cert. denied,*525 U.S. 868, 119 S.Ct. 162, 142 L.Ed.2d 133 (1998).

The plaintiffs' witnesses also discounted certain sites because the sites are occupied or because the current owners might be unwilling to sell to a sexually oriented business. Under *Renton,* these factors are irrelevant. See *David Vincent, Inc.,* 200 F.3d at 1335; *Woodall v. City of El Paso,* 49 F.3d 1120, 1125-26 (5th Cir.1995), *cert. denied,*516 U.S. 988, 116 S.Ct. 516, 133 L.Ed.2d 425 (1995).

Considering the entire record in the light of the applicable legal principles, we cannot say that the district court committed clear error in accepting, as it did, the township's evidence that 27 "easily developed" sites are available to sexually oriented businesses. And we agree with the district court's conclusion that 27 sites-roughly one for every 900 residents of the township-provide adequate alternative channels for expression of the sort proposed by the plaintiffs. The plaintiffs have offered no persuasive argument to the contrary.

C

[11] The plaintiffs' final challenge is to the township's resolution suspending for 182 days "the submission or receipt of projects which would require site plan review, rezoning petitions, housing developments ..., special approval uses, and the like." Those 182 days were to be used for updating the township's master plan, revising its zoning regulations, and otherwise "pursu [ing] the township strategy to create a premier community." The resolution prevented the plaintiffs from seeking site plan review and special approval before the township adopted the licensing scheme and zoning regulations that are at issue here. It is undisputed, however, that the township did not know about the plaintiffs' plans to open a topless bar when it adopted the resolution.

***453** The plaintiffs contend that the 182-day moratorium violated their due process and First Amendment rights. We disagree. The moratorium was generally applicable, was not intended to suppress speech, and was of a reasonably short duration. Such "interim development controls" are "used widely among land-use planners." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 337-38, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). They do not constitute prior restraints on speech, nor do they violate the Due Process Clause so long as they are undertaken in good faith. See *Phillips v. Borough of Keyport,* 107 F.3d 164, 181 (3d Cir.), *cert. denied,*522 U.S. 932, 118 S.Ct. 336, 139 L.Ed.2d 261 (1997). We have no basis on which to question the township's good faith here.

At oral argument, the plaintiffs' attorney suggested that the moratorium was adopted in violation of state law. "A violation of state law," however, "is not a denial of due process ...."*Pro-Eco, Inc. v. Board of Commissioners of Jay County, Indiana,* 57 F.3d 505, 514 (7th Cir.) (citation and internal quotation marks omitted), *cert. denied,*516 U.S. 1028, 116 S.Ct. 672, 133 L.Ed.2d 522 (1995).

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part, and the case is **REMANDED** for entry of an order consistent with this opinion.

C.A.6 (Mich.),2005.
Bronco's Entertainment, Ltd. v. Charter Tp. of Van Buren
421 F.3d 440, 2005 Fed.App. 0752N

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Tollis, Inc. v. County of San Diego
C.A.9 (Cal.),2007.

United States Court of Appeals,Ninth Circuit.
TOLLIS INC.; 1560 N. Magnolia Avenue, LLC, Plaintiffs-Appellants,
v.
COUNTY OF SAN DIEGO, Defendant-Appellee.
**No. 05-56300.**

Argued and Submitted July 11, 2007.
Submission Withdrawn Aug. 8, 2007.
Resubmitted Oct. 2, 2007.
Filed Oct. 10, 2007.

**Background:** Adult entertainment business operators sued county, seeking declaratory and injunctive relief, alleging that zoning ordinances, covering unincorporated portions of county in which businesses operated, violated their rights under federal and state constitutions by requiring relocation to industrial areas, and asserting state law claims. The United States District Court for the Southern District of California, Larry A. Burns, J., 373 F.Supp.2d 1094, granted in part and denied in part cross-motions for summary judgment.

**Holdings:** The Court of Appeals, Silverman, Circuit Judge, held that:
(1) ordinances had purpose and effect of suppressing secondary effects while leaving quantity and accessibility of speech substantially intact;
(2) relocation sites were available as alternative channels of communication for adult businesses;
(3) industrial area sites were sufficient to allow opportunity to relocate;
(4) county was not given fair notice of operators' state law claim; and
(5) ordinance required severance of provisions not moored to reasonable time restraints on acquiring adult business permits.

Affirmed in part, reversed in part, and remanded.

West Headnotes

**[1] Evidence 157 32**

157 Evidence
157I Judicial Notice
157k27 Laws of the State
157k32 k. Municipal Ordinances. Most Cited Cases
Municipal ordinances are proper subjects for judicial notice.

**[2] Federal Courts 170B 776**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

**Federal Courts 170B 802**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk802 k. Summary Judgment. Most Cited Cases
Court of Appeals reviews de novo the district court's grant of summary judgment and, viewing the evidence in a light most favorable to the non-moving party, determines whether there are any genuine issues of material fact for trial.

**[3] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in General. Most Cited Cases
The *Renton* inquiry into whether a zoning ordinance regulating a sexually oriented business has violated the First Amendment proceeds in three distinct steps: (1) the ordinance cannot be a complete ban on the protected expression, (2) the ordinance must be

content-neutral or, if content-based with respect to sexual and pornographic speech, its predominate concern must be the secondary effects of such speech in the community, and (3) the regulation must pass intermediate scrutiny by serving a substantial government interest, being narrowly tailored to serve that interest, and allowing for reasonable alternative avenues of communication. U.S.C.A. Const.Amend. 1.

**[4] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
County zoning ordinance requiring adult entertainment businesses to locate only in industrial zones had purpose and effect of suppressing secondary effects, while leaving quantity and accessibility of speech substantially intact, as required to justify content-based zoning restriction of sexual and pornographic speech, where county cited to numerous sources to connect adult businesses to secondary effects of crime, disorderly conduct, property depreciation, noise, and traffic, adult businesses failed to cast doubt on reduction of noise and traffic by relocation to industrial sites, and patrons would be undeterred by inconvenience of traveling to industrial zone if there were sufficient number of suitable relocation sites available, given draw of pornographic and sexually explicit speech. U.S.C.A. Const.Amend. 1.

**[5] Constitutional Law 92 2215**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2215 k. Availability of Other Sites. Most Cited Cases
To satisfy its burden of allowing for alternative avenues of communication, under the *Renton* inquiry into whether zoning ordinances regulating sexually oriented businesses violate First Amendment speech protections, the government must propose a sufficient number of potential relocation sites to allow a reasonable opportunity to operate the adult businesses, including: (1) the site must be considered part of an actual business real estate market for commercial enterprises generally, (2) if in an industrial or manufacturing zone, the site must be reasonably accessible to the general public, have a proper infrastructure, and be suitable for some generic commercial enterprise, and (3) the list must account for other relevant zoning restrictions, such as separation requirements, that might affect a site's availability. U.S.C.A. Const.Amend. 1.

**[6] Constitutional Law 92 1038**

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1038 k. Freedom of Speech, Expression, and Press. Most Cited Cases

**Constitutional Law 92 2215**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2215 k. Availability of Other Sites. Most Cited Cases
If the government's list of potential relocation sites for adult entertainment businesses reasonably allows for alternative avenues of communication, under the *Renton* inquiry into whether zoning ordinances for sexually oriented businesses have violated First Amendment speech protections, the burden shifts to

the adult business to demonstrate that the proposed sites are inadequate or unlikely to ever become available. U.S.C.A. Const.Amend. 1.

**[7] Constitutional Law 92 2215**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2215 k. Availability of Other Sites. Most Cited Cases

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
County's proposed 68 parcels of relocation sites suitable for generic commercial enterprise were "available" to provide adult entertainment establishments with reasonable opportunity to operate business, under *Renton* requirements of providing alternative channels of communication for adult businesses to comport with First Amendment speech protections, where industrial site was reasonably accessible and had sufficient infrastructure, and adult business did not challenge suitability of parcels for generic commercial enterprise. U.S.C.A. Const.Amend. 1.

**[8] Constitutional Law 92 2215**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2215 k. Availability of Other Sites. Most Cited Cases

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Relocation sites for adult entertainment businesses were sufficient in number, percentage of acreage available, and ratio of potential business sites to population to meet existing demand for sexual or pornographic speech, under *Renton* requirements of providing alternative channels of communication under First Amendment protections to allow adult businesses reasonable opportunity to conduct trade, absent evidence that different acreage or population ratios for other municipalities requiring relocation were comparable to size, population, or demographics of county. U.S.C.A. Const.Amend. 1.

**[9] Federal Civil Procedure 170A 673**

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(B) Complaint
170AVII(B)1 In General
170Ak673 k. Claim for Relief in General. Most Cited Cases
The statement in a complaint need only give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

**[10] Zoning and Planning 414 590**

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k589 Pleading
414k590 k. Petition, Complaint, or Application. Most Cited Cases
County was not given fair notice of adult entertainment business operator's claim that zoning ordinance violated California statute providing that zoning ordinances must be consistent with general plan of county, as necessary under notice pleading requirements for stating a claim, where complaint failed did not refer to relevant state statute and did not assert conflict between ordinance and county's general plan. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.; West's Ann.Cal.Gov.Code § 65860.

**[11] Constitutional Law 92 1593**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and

Press
92XVIII(B) Licenses and Permits in General
92k1593 k. Time Limits for Grant or Denial. Most Cited Cases
A licensing requirement for protected expression is patently unconstitutional if it imposes no time limits on the licensing body. U.S.C.A. Const.Amend. 1.

**[12] Statutes 361 64(1)**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(1) k. In General. Most Cited Cases
A severance of provisions of a statute is inappropriate if the remainder of the statute would still be unconstitutional.

**[13] Public Amusement and Entertainment 315T 9(1)**

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) k. In General. Most Cited Cases
County ordinance requiring adult entertainment businesses to obtain permit, but imposing unconstitutional time restraints on First Amendment protected speech by unreasonably long time period for county to consider permit request, required severance of all provisions setting forth permit requirement that were not moored to reasonable time limit. U.S.C.A. Const.Amend. 1.

***937** A. Dale Manicom, San Diego, CA; Bradley J. Shafer, Shafer & Associates, Lansing, MI, for the plaintiffs-appellants.
Thomas D. Bunton and John J. Sansone, County Counsel, San Diego, CA, for the defendant-appellee.

Appeal from the United States District Court for the Southern District of California; Larry A. Burns, District Judge, Presiding. D.C. No. CV-02-02023-LAB/RBB.

Before: BARRY G. SILVERMAN, W. FLETCHER, and RICHARD R. CLIFTON, Circuit Judges.

SILVERMAN, Circuit Judge:
In June 2002, the San Diego County Board of Supervisors adopted a comprehensive zoning ordinance to govern the operation of adult entertainment businesses within its jurisdiction, which covers the unincorporated portions of the county. The ordinance restricts the hours in which such businesses can operate, requires the removal of doors on peep show booths, and mandates that the businesses disperse to industrial areas of the county. The County's purported rationale for the ordinance was to combat negative secondary effects-crime, disorderly conduct, blight, noise, traffic, property value depreciation, and unsanitary behavior-that concentrate in and around adult businesses.

***938** The two adult entertainment establishments presently operating in the unincorporated portions of San Diego County filed suit. In this appeal, the operators of one of the establishments, Déjà Vu, appeal the district court's decision to uphold the ordinance's dispersal requirements. They also appeal the district court's dismissal of their state law claim under California Government Code § 65860, which requires zoning laws to conform to the municipality's general plan, and the district court's decision to sever a provision of the ordinance setting forth the amount of time in which the County had to approve an operating permit for adult establishments.

[1] We hold that the district court's manner of severance was in error and reverse on that ground. We affirm in all other respects.[FN1]

FN1. All pending requests for judicial notice are unopposed, and are hereby granted. Municipal ordinances are proper subjects for judicial notice. *See Santa Monica Food Not Bombs v. City of Santa Monica,* 450 F.3d 1022, 1025 n. 2 (9th Cir.2006).

**I. Background**

In June 2002, citing to concerns about the surrounding neighborhood, the San Diego County Board of Supervisors adopted a comprehensive set of regulations and licensing procedures governing adult entertainment establishments within its jurisdiction. The ordinances took effect the following month.

1560 N. Magnolia Ave., LLC, using property leased from Tollis, Inc., operates an adult bookstore in the Bostonia neighborhood of the county under the name "Déjà Vu." These businesses (hereinafter, "Déjà Vu") initiated federal and state constitutional challenges against the new ordinances, seeking declaratory and injunctive relief.

The district court granted summary judgment to the County, upholding the ordinance's requirement that adult establishments locate only in industrial zones.[FN2] *See* *Fantasyland Video, Inc. v. County of San Diego,* 373 F.Supp.2d 1094, 1130-43 (S.D.Cal.2005). The court also dismissed Déjà Vu's state law claim under California Government Code § 65860, regarding conformance to the County's general plan. *Id.* at 1129-30. Finally, the district court held that the County's permitting regime for adult establishments was unconstitutional because it granted the licensing body an unreasonably long period of time to consider a permit request. *Id.* at 1143-46. The court opted to sever the offending time limits from the ordinance. *Id.* at 1146-47.

> FN2. The other adult establishment in the unincorporated portion of San Diego County, Fantasyland Video, Inc., has appealed the district court's judgment on other grounds not relevant to the disposition of this appeal.

This timely appeal followed.

**II. Jurisdiction**

The district court had subject matter jurisdiction over Déjà Vu's constitutional claims under 28 U.S.C. §§ 1331, 1343(a), and over its state claim under 28 U.S.C. § 1367(a). We have jurisdiction under 28 U.S.C. § 1291.

**III. Standard of Review**

[2] We review de novo the district court's grant of summary judgment and, viewing the evidence in a light most favorable to the non-moving party, determine whether there are any genuine issues of material fact for trial. *See* *Gammoh v. City of La Habra,* 395 F.3d 1114, 1122 (9th Cir.2005).

***939 IV. Discussion**

**A. Industrial Zone Restriction**

[3] The constitutionality of the challenged provision is governed by the framework announced in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). As recounted by *Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153 (9th Cir.2003), this familiar inquiry proceeds in three distinct steps: First, the ordinance cannot be a complete ban on the protected expression. *Id.* at 1159. Second, the ordinance must be content-neutral or, if content-based with respect to sexual and pornographic speech, its predominate concern must be the secondary effects of such speech in the community. *Id.* at 1159, 1161. Third, the regulation must pass intermediate scrutiny. It must serve a substantial government interest, be narrowly tailored to serve that interest, and allow for reasonable alternative avenues of communication. *Id.* at 1159.

Déjà Vu raises two arguments on appeal both relating to the third step. It first contends that a concurrence by Justice Kennedy in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 444-53, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), radically altered the traditional *Renton* framework by imposing an additional burden on the County to show "how speech would fare" under the new ordinance.[FN3] Alternatively, Déjà Vu argues that the ordinance is unconstitutional under the traditional *Renton* framework because all the potential relocation sites are located within the County's industrial zones. We address each in turn.

> FN3. Justice Kennedy did not join the plurality opinion in *Alameda Books.* As "his concurrence is the narrowest opinion joining the judgment of the Court," it is the controlling opinion. *Ctr. for Fair Pub. Policy,* 336 F.3d at 1161.

**1. Justice Kennedy's Alameda Books Concurrence**

To justify a content-based zoning ordinance that restricts sexual and pornographic speech, Justice Kennedy wrote that "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially

intact." 535 U.S. at 449, 122 S.Ct. 1728. By adding the last clause, Justice Kennedy said he was expressing an interest in "how speech will fare" after the ordinance is enacted. *Id.* at 450, 122 S.Ct. 1728. The city must have some basis to think that its ordinance will suppress secondary effects, but not also the speech associated with those effects. *Id.* at 449-50, 122 S.Ct. 1728.

In *Alameda Books,* the disputed ordinance prohibited multiple adult businesses from operating under the same roof. Under Justice Kennedy's construct, the City of Los Angeles must have had some basis to assume three propositions: "[1] that this ordinance will cause two businesses to split rather than one to close, [2] that the quantity of speech will be substantially undiminished, and [3] that total secondary effects will be significantly reduced." 535 U.S. at 451, 122 S.Ct. 1728.

The first proposition mirrors the "alternative avenues of communication" requirement under intermediate scrutiny, which requires that the displaced business be given "a reasonable opportunity to open and operate." *See Renton,* 475 U.S. at 53-54, 106 S.Ct. 925. The third proposition restates the requisite "substantial governmental interest" for regulating adult establishments based on their secondary effects. *See id.* at 50, 106 S.Ct. 925.

***940** *But what of the second proposition?* Justice Kennedy's reference to whether the "quantity of speech will be [left] substantially undiminished" is shorthand for asking whether the ordinance will impose a significant or material inconvenience on the consumer of the speech. At the time of enactment, the city must have some reasonable basis to believe that interested patrons would, for the most part, be undeterred by the geographic dispersal of the adult establishments. *See Alameda Books,* 535 U.S. at 450, 122 S.Ct. 1728 ("[I]t does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects.").

Justice Kennedy then noted that the evidentiary burden to establish these propositions was minimal. *See id.* at 451-52, 122 S.Ct. 1728. He found that the City of Los Angeles had met its initial burden. It had relied on one study and "common experience" to find a correlation between adult establishments and crime, and could reasonably infer that geographic dispersal of the adult establishments would not necessarily decrease the quantity or accessibility of the speech. *Id.* at 452-53, 122 S.Ct. 1728. The burden then shifted to the plaintiffs to disprove the City's assumptions. *Id.* at 453, 122 S.Ct. 1728.

[4] We reach the same conclusion here. The County's legislative record cites to a number of sources-studies and reports from other jurisdictions, relevant judicial decisions, and public testimony-to assert a connection between the adult establishments and negative secondary effects. A municipality may rely on these types of sources. *See Ctr. for Fair Pub. Policy,* 336 F.3d at 1168. The County could then reasonably infer that isolating of adult businesses to industrial zones would have the purpose and effect of reducing crime, disorderly conduct, and property depreciation, as such zones are located away from residential areas and have little other commercial appeal at night. Déjà Vu's attempt to cast doubt on the County's conclusions fails as a matter of law because its expert, Daniel Linz, Ph.D., a professor in the Department of Communication's Law and Society Program at the University of California Santa Barbara, did not rebut the County's evidence with regard to noise and traffic. The evidence presented by Dr. Linz addressed only late night crime and property values. The County considered these factors, but its purported rationale for isolating adult businesses to industrial zones also included combating increased noise and traffic. Déjà Vu's failure to address these considerations is fatal under the second step of the *Renton* intermediate scrutiny analysis. *See Alameda Books, Inc.,* 535 U.S. at 438-39, 122 S.Ct. 1728. With regard to noise and traffic, Déjà Vu failed as a matter of law "to cast direct doubt on [the County's] rationale ... by demonstrating that the [County's] evidence does not support its rationale or by furnishing evidence that disputes [its] factual findings." *Id.*

We reject Déjà Vu's contention that *Alameda Books* imposed a heightened evidentiary burden on the County to show "how speech would fare" under the ordinance. So long as there are a sufficient number of suitable relocation sites, the County could reasonably assume that, given the draw of pornographic and sexually explicit speech, willing patrons would not be measurably discouraged by the inconvenience of having to travel to an industrial zone. *See Alameda Books,* 535 U.S. at 452, 122 S.Ct. 1728 (Kennedy, J., concurring in judgment); *see also World Wide Video,*

368 F.3d at 1195 (noting that Justice Kennedy's "how speech will fare" language "[c]onceptually ... dovetails with ***941** the requirement that an ordinance must leave open adequate alternative avenues of communication"). Under this scenario, the quantity and accessibility of the speech would not be substantially diminished.

**2. Alternative channels of communication under Renton**

[5] To satisfy its burden under *Renton,* the County must propose a sufficient number of potential relocation sites to allow Déjà Vu "a reasonable opportunity" to operate its business. 475 U.S. at 54, 106 S.Ct. 925. For a site to qualify, it "must be considered part of an actual business real estate market for commercial enterprises generally." *Lim v. City of Long Beach,* 217 F.3d 1050, 1054 (9th Cir.2000). If in an industrial or manufacturing zone, the site must be "reasonably accessible to the general public," "have a proper infra-structure," and be suitable for "some generic commercial enterprise." *Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1531 (9th Cir.1993). Finally, the list must account for other relevant zoning restrictions, such as separation requirements, that might affect a site's availability. *Isbell v. City of San Diego,* 258 F.3d 1108, 1113 (9th Cir.2001).

[6] If the County's list is reasonable, the burden shifts to Déjà Vu to demonstrate that the proposed sites are inadequate or unlikely to ever become available. *Lim,* 217 F.3d at 1055. Once "the relevant market has been properly defined," the factfinder must determine "whether the market contains a sufficient number of potential relocation sites for [p]laintiffs' adult businesses." *Id.* at 1056.

**a. Availability of relocation sites**

[7] The County proposed 76 potentially available parcels for Déjà Vu's relocation. Déjà Vu submitted the declaration of a land use expert contesting the availability and suitability of each site. After an exhaustive survey, the district court excluded eight sites for summary judgment purposes. *Fantasyland,* 373 F.Supp.2d at 1132-40. In its briefs and at oral argument, Déjà Vu did not contest any of the district court's individual determinations with respect to these remaining 68 parcels.[FN4]

FN4. We therefore express no opinion on the district court's mode of analysis, nor on any of its conclusions.

Déjà Vu's argument on appeal draws on the County's restriction of adult establishments to industrial zoning districts. All adult establishments must relocate to four industrial districts: M50, M52, M54, and M58. Although presumably available for adult establishments, none of these zones allows for general commercial use. "Non-manufacturing uses are restricted to those providing essential support services to manufacturing plants and their personnel." San Diego County Zoning Ordinance § 2500; *see also* §§ 2520, 2540, 2580. According to Déjà Vu, this total exclusion from commercial zones suggests that it has not "been afforded a reasonable opportunity to relocate." *See Topanga Press,* 989 F.3d at 1531 n. 5 (avoiding the question of whether "under *Renton,* a business has been afforded a reasonable opportunity to relocate if all relocation sites are within an industrial zone and no commercial zones are offered.").

We disagree. Déjà Vu's position confuses two distinct questions. Whether or not an industrial zone *permits* generic commercial business within its borders rests on a legislative policy judgment. Asking whether an industrial zone *is suitable for****942** generic commercial activity examines the physical characteristics and infrastructure of the land within the zone. The *Topanga Press* analysis is concerned only with the latter. *See*989 F.3d at 1531; *see also Diamond v. City of Taft,* 215 F.3d 1052, 1056 (9th Cir.2000). In *Topanga Press,* we held that manufacturing or industrial zones may comprise part of the relevant market if they "are reasonably accessible to the general public" and "have a proper infra-structure." 989 F.3d at 1531. We did not hold that industrial sites are potentially available for relocations only so long as they may be used for commercial purposes generally. If an industrial site is reasonably accessible and has sufficient infrastructure to be "available" under *Topanga,* it remains available even if its use for other commercial purposes may be restricted by the zoning law.

In any case, the ordinance at issue here requires that adult businesses be located within industrial zones. Any other interpretation of the zoning scheme would zone adult businesses out of the county. As Déjà Vu

does not challenge any of the district court's holdings with respect to the suitability of any one of the 68 parcels for generic commercial use, its argument fails.

**b. Sufficiency of alternative sites**

The district court determined that the remaining 68 sites, on which eight to 10 adult entertainment businesses could operate simultaneously, were sufficient to allow Déj à Vu-the only affected adult entertainment business in the county-an opportunity to relocate. *Fantasyland,* 373 F.Supp.2d at 1140-43. Déjà Vu does not challenge this holding, but argues that the district court should have relied on other secondary measurements to assess sufficiency.

[8] We agree that measuring whether the number of proposed sites is sufficient to meet existing demand for sexual or pornographic speech is one of several tools to assess whether a municipality has afforded an adult business a reasonable opportunity to conduct their trade. *See Young v. City of Simi Valley,* 216 F.3d 807, 822 (9th Cir.2000). Nevertheless, we cannot identify any error in the district court's other calculations to justify reversal.

Déjà Vu contends that the percentage of available acreage theoretically available to adult businesses in unincorporated San Diego County is drastically less than the amount approved in *Renton. See* 475 U.S. at 53, 106 S.Ct. 925. Furthermore, it asserts that the ratio of potential adult business sites to population in San Diego County is much lower than in *Renton* and eight Florida municipalities engaged in similar litigation. Yet, Déjà Vu offers no argument or evidence showing that these communities are comparable to unincorporated San Diego County in size, population, or demographics. Absent such a connection, its calculations are meaningless.

It also must be borne in mind that the City of San Diego and the other incorporated municipalities in the county are not governed by this ordinance. The unincorporated portions of the county take up the substantial majority of the land area but only a small fraction of the population of the county as a whole. It may fairly be presumed that most of the commercial property in the county, including property suitable for adult businesses, is located within municipal boundaries and thus outside the territory governed by the ordinance in question. At least where we are dealing with "unincorporated" areas, it is appropriate to recognize the likely availability of other locations within the same economic market in neighboring municipalities.

***943 B. Violation of County's General Plan**

Déjà Vu also claims the zoning ordinance violates California Government Code § 65860, which requires that "zoning ordinances ... be consistent with the general plan of the county."The district court granted the County's motion for summary judgment because Déjà Vu failed to raise the claim in its complaint. *Fantasyland,* 373 F.Supp.2d at 1129.

[9] A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). The plaintiff need not detail all the supporting facts. The statement need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

[10] On appeal, Déjà Vu refers to its allegation that "the legislative record [fails to] establish that this statute significantly advances any 'important' governmental interest." The state law claim is purportedly encompassed within this statement.

Déjà Vu's argument is not persuasive. The above allegation was made in support of the following proposition:

> Defendant's Zoning Amendment violates Plaintiffs' and the public's right to freedom of speech, press and expression protected under the First and Fourteenth Amendments to the United States Constitution and Article I, § 2 of the California Constitution ....

There is no accompanying reference to the relevant state statute and no assertion of a conflict between the ordinance and the County's General Plan. As a result, the County did not have fair notice that Déjà Vu was asserting a claim under California Government Code § 65860. The district court's grant of summary judgment on this issue was therefore correct.

**C. District Court Severance of Unconstitutional**

**Time Restraints**

Under San Diego County Ordinance § 6930(b), any person seeking to operate, enlarge, or transfer control of an adult establishment must first obtain a permit from the County. The district court found that the County's permitting regime was unconstitutional because it granted the licensing body an unreasonably long period of time-130 or 140 days depending on the calculation method-to consider a permit request. *Fantasyland,* 373 F.Supp.2d at 1143-46. The court then severed the offending time limits from the ordinance. *Id.* at 1146-47. Déjà Vu now challenges the district court's manner of severance.

[11][12][13] We hold that the district court's manner of severance was erroneous. Once the offending provision is removed, the text of the ordinance contains no time limits at all. A licensing requirement for protected expression is patently unconstitutional if it imposes no time limits on the licensing body. *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 228, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) ("[T]he licensor must make the decision whether to issue the license within a *specified* and reasonable time period during which the status quo is maintained ....") (emphasis added). A severance is inappropriate if the remainder of the statute would still be unconstitutional. *See Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 935 (9th Cir.2004).

This conclusion does not require, as Déjà Vu contends, invalidation of the entire ordinance. The district court should have instead severed all provisions of § 6930(b) setting forth the permit requirement because they were not moored to a reasonable time limit, thereby leaving the ordinance's other provisions intact. Owners of adult establishments would have to ***944** comply with the substantive provisions of the ordinance, but would not need to secure a permit prior to operation unless and until the time limit defect is corrected. We therefore remand to the district court to correct its severance order consistent with this opinion. Each party should bear its own costs.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

C.A.9 (Cal.),2007.
Tollis, Inc. v. County of San Diego

505 F.3d 935, 07 Cal. Daily Op. Serv. 12,064, 2007 Daily Journal D.A.R. 15,555

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Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.
C.A.5 (Miss.),1992.

United States Court of Appeals,Fifth Circuit.
LAKELAND LOUNGE OF JACKSON, INC.,
Plaintiff-Appellee,
v.
CITY OF JACKSON, MISSISSIPPI,
Defendant-Appellant.
**No. 92-7291.**

Oct. 5, 1992.
Rehearing and Rehearing En Banc Denied Nov. 4, 1992.

Adult business challenged city's amendment to zoning ordinance to restrict such businesses to areas zoned for light industrial use and, with use permit, to some of the central business district. The United States District Court for the Southern District of Mississippi at Jackson, William Henry Barbour, Jr., Chief Judge, 800 F.Supp. 455, declared ordinance unconstitutional and permanently enjoined its enforcement. City appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) city council properly considered secondary effects of adult businesses in amending zoning ordinance, and (2) city provided sufficient alternative avenues of expression for those businesses.

Reversed and remanded.

Politz, Chief Judge, dissented and filed opinion.

West Headnotes

**[1] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in General. Most Cited Cases
(Formerly 92k90.4(1))

City zoning ordinance which did not ban adult businesses outright but merely limited areas of city in which they might operate was properly analyzed as form of time, place, and manner regulation. U.S.C.A. Const.Amend. 1.

**[2] Constitutional Law 92 2212**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2212 k. Content Neutrality. Most Cited Cases
(Formerly 92k90.4(1))

**Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(1))

While cities may not regulate sexually oriented establishments out of mere distaste for message they communicate, local governments can restrict adult businesses in order to control the bad "secondary effects" such as crime, deterioration of retail trade, and decrease in property values that the establishments bring. U.S.C.A. Const.Amend. 1.

**[3] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most

Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 167.1**

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k167 Particular Uses or Restrictions
414k167.1 k. In General. Most Cited Cases
(Formerly 414k167)
City council properly considered secondary effects of adult businesses in amending zoning ordinance to restrict such businesses to areas zoned for light industrial use and, with use permit, to some of the central business district; drafters of ordinance relied upon studies of secondary effects, majority of council members received some information about those effects during open hearing of planning board, record did not suggest impermissible motive on part of council members, and preamble language took note of secondary effects. U.S.C.A. Const.Amend. 1.

**[4] Constitutional Law 92 2215**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2215 k. Availability of Other Sites. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 167.1**

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k167 Particular Uses or Restrictions
414k167.1 k. In General. Most Cited Cases
(Formerly 414k167)
City provided sufficient alternative avenues of expression for adult businesses in amending zoning ordinance to restrict those businesses to areas zoned for light industrial use and, with use permit, to some of the central business district; substantial number of potential sites existed for those businesses, and there was no requirement that specific proportion of municipality be open for adult businesses or that certain number of sites be available. U.S.C.A. Const.Amend. 1.

***1256** Craig E. Brasfield and Leyser Q. Morris, Deputy City Atty., Office of City Atty., Jackson, Miss., for defendant-appellant.
Matthew M. Moore, Jackson, Miss., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:
The City of Jackson, Mississippi ("Jackson"), amended its zoning ordinance to restrict adult businesses to areas zoned for light industrial use and, with a use permit, some of the central business district. The Lakeland Lounge of Jackson ("Lakeland"), which is such an establishment, challenged the ordinance, and the district court declared it unconstitutional because the members of the city council had not properly considered the secondary effects of sexually oriented businesses, so the ordinance was not content-neutral. Alternatively, the court found that the ordinance did not provide reasonable alternative avenues of communication. Finding no constitutional infirmity in what the city did, we reverse.

I.

In September 1991, a nightclub offering topless dancing opened in Jackson. The city acknowledges that it tried to close the club down for technical code violations, because***1257** of great public uproar, but failed. A few weeks later, another club opened.

In September, the mayor had directed the zoning administrator to begin the process for the adoption of some measure to address the public concern. The city attorney's office and the planning department began to assemble materials concerning adult entertainment and to draft a new regulation. They received examples of other communities' zoning ordinances regulating adult businesses, studies about the effects of such

establishments upon their communities, and legal opinions. Several public hearings were held to discuss the matter, including an open meeting of the planning board on January 21, 1992, to which five of the seven members of the city council were invited and five attended. Immediately following that meeting, and also on January 21, the city council met, and the ordinance was presented but held for final adoption a week later.

In January 1992, Lakeland Lounge of Jackson was incorporated, for the purpose of operating a restaurant/lounge with topless dancing. It received beer licenses from the city and state and executed a lease for a property in an area zoned "general commercial."

On January 28, 1992, the city council adopted an amendment to Jackson's zoning ordinance, seeking to disperse adult entertainment establishments. Such establishments were relegated to "light industrial" zoned areas, and also could be located in the central business district if they obtained use permits. Additionally, adult establishments could not be within 250 feet from each other or within 1,000 feet of any residentially zoned property, church, school, park, or playground. The provision also gave pre-existing establishments three years to comply.

Lakeland filed a complaint in February 1992, seeking to have the ordinance declared unconstitutional and its enforcement enjoined. The district court denied Lakeland's motion for a temporary restraining order. After a bench trial, the court declared the ordinance unconstitutional and permanently enjoined its enforcement. 800 F.Supp. 455. Lakeland Lounge opened for business soon afterward.

II.

[1][2] The Jackson ordinance does not ban adult businesses outright but merely limits the areas of the city in which they may operate. It is thus properly analyzed as a form of time, place, and manner regulation. *City of Renton v. Playtime Theatres,* 475 U.S. 41, 46, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986) (citing *Young v. American Mini Theatres,* 427 U.S. 50, 63 & n. 18, 96 S.Ct. 2440, 2449 & n. 18, 49 L.Ed.2d 310 (1976)). As such a regulation, it presumptively violates the First Amendment if it was "enacted for the purpose of restraining speech on the basis of its content," and it must be "designed to serve a substantial government interest" and may "not unreasonably limit alternative avenues of communication." *Id.* 475 U.S. at 47, 106 S.Ct. at 928. Cities may not regulate sexually oriented establishments out of mere distaste for the message they communicate-that would be content-based infringement upon expression entitled to at least some protection under the First Amendment. *See, e.g., Barnes v. Glen Theatre,* 501 U.S. 560, ----, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991) (recognizing that nude dancing is "expressive conduct within the outer perimeter of the First Amendment") (plurality opinion); *see Renton,* 475 U.S. at 46-49, 106 S.Ct. at 928-30 (discussing requirement of content-neutrality). Local governments, however, can restrict adult businesses in order to control the bad "secondary effects"-such as crime, deterioration of their retail trade, and a decrease in property values-that the establishments bring. *See id.* at 46, 106 S.Ct. at 928.

In determining whether the amended ordinance was actually content-neutral, the district court followed the analysis laid out in *United States v. O'Brien,* 391 U.S. 367, 376-77, 88 S.Ct. 1673, 1678-79, 20 L.Ed. 2d 672 (1968). The court stated that it needed to determine the predominant factor motivating the city council in passing the ordinance; it concluded that the city had not ***1258** shown that that factor was concern over secondary effects.

The court first observed that the ordinance obviously, in its preamble, took note of the secondary effects. Second, it stated that the city had attempted to regulate, rather than prohibit, the adult business. Third, though, the court stated that the city did not show whether the existence of secondary effects had a basis in fact or, more importantly here, "whether that factual basis was considered by the [c]ity in passing the ordinance." The court held that the city council had an insufficient factual predicate by which to base its ordinance upon secondary effects; therefore, the city had not shown that the ordinance was content-neutral.

The district court based its analysis of the bases for the ordinance upon *Renton,* in which the Court stated that a city may establish its interest in a regulation by relying upon evidence "reasonably believed to be relevant to the problem that the city addresses." 475

U.S. at 51-52, 106 S.Ct. at 931. The *Renton* Court held that in enacting an adult business regulation, a city's justifications were not necessarily "conclusory and speculative" where the municipality based its opinion that such businesses had bad secondary effects upon studies of *other* communities. *Id.* at 50, 106 S.Ct. at 930.

In the instant case, the district court held that the city had to show that it properly adopted the zoning ordinance. It stated that there is no testimony that the members of the city council ever looked at the studies about secondary effects or that they received any summary of those studies from their staff. Although one council member testified that she had received materials about such studies, they came from constituents; she did not testify that she had received copies of the material that the city staffs used or that she had provided her materials to her colleagues.

Noting that it was a close question, the court concluded that the city council should have allowed at least some presentation summarizing the secondary effects upon which the council purported to rely and that the council had not produced any evidence that "it relied upon any formal studies to reach the conclusion that there would exist secondary effects if these businesses would be allowed to continue to operate." Concluding that the city had not shown that the amendment was content-neutral, the court held it unconstitutional.

III.

[3] We believe that the district court clearly erred and that the record shows that the city council had sufficient information before it to enact a permissible ordinance. First, the office of planning, city attorney's office, and the ordinance review committee (a subcommittee of the planning board) drafted the ordinance, and they unquestionably considered, and relied upon, the studies as to the secondary effects of sexually oriented business while they were drafting the amendment. Further, the council could properly place some reliance upon others to do research, as state law requires that the planning board make recommendations to the council regarding zoning amendments. We perceive no constitutional requirement that the council members personally physically review the studies of secondary effects; such a holding would fly in the face of legislative reality.[FN1]

FN1. In light of *Renton's* holding that a municipality may rely upon other cities' studies of secondary effect, 475 U.S. at 50, 106 S.Ct. at 930, and discussion in *Barnes* of the possibility that ordinances may be justified by their secondary effects, without any actual legislative finding, 501 U.S. at ----, 111 S.Ct. at 2470 (opinion of Souter, J.), one might argue that legislative findings are no longer necessary, as the record as to secondary effects has already been made. We need not reach such a conclusion to decide this case, however.

Second, although the city council never received a written report or summary of the studies, the city planning board held a public meeting at which the planning director and other city staff members and citizens discussed secondary effects and the work that had gone into the preparation of the proposed ordinance. As testimony and the official minutes of the meeting show, five of the seven members of the ***1259** city council were present at that meeting; as the ordinance passed by a six-to-one vote, a majority of the council must have both voted for the ordinance and attended the meeting.

Third, the language of the amendment indicates the council's concern with the secondary effects. The preamble states as follows:

[T]he Planning Board and City Council of the City of Jackson, Mississippi, find that there is substantial evidence, including numerous studies, reports, and findings on the potential harmful effect of adult entertainment uses made by other cities, experts, city planners, etc., which document that such uses adversely affect property values, cause an increase in crime, encourage businesses to move elsewhere, and contribute to neighborhood blight.

It then asserts that it was "necessary, expedient and in the best interest" of the citizenry
to regulate the operation and location of adult entertainment establishments for the purpose of stemming a potential increase in the criminal activities and disturbances of the peace and good order of the community, maintaining property values, preventing injuries to residential neighborhoods and commercial

districts, and protecting and preserving the quality of life through effective land use planning.

This language might not save a statute that was formulated without specific attention to secondary effects. Nevertheless, in context here, where (1) the drafters of the ordinance did rely upon studies of secondary effects, (2) a majority of the councilmembers did receive some information about the secondary effects during an open hearing of the planning board, and (3) nothing in the record otherwise suggests impermissible motives on the part of the councilmembers, the language of the preamble shows the city council's awareness of the studies upon which the planning staff relied when framing the ordinance and reflects that a reasonable legislature with constitutional motives could have enacted the ordinance. *See* *SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1274 (5th Cir.1988), *cert. denied,*489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989).[FN2]

> FN2. "[We] do not ask whether the regulator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities." *See also* *11126 Baltimore Blvd. v. Prince George's County,* 886 F.2d 1415, 1420 (4th Cir.1989) (intent as set out in legislation's preambles relevant to determination of content neutrality), *vacated on other grounds,*496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990).

IV.

[4] Having decided that the city council had not properly considered the ordinance, the district court did not need to determine whether the zoning plan provided sufficient alternative opportunities for the regulated expression. It did so nevertheless, apparently foreseeing possible reversal on the first issue or seeking to guide the city council's future deliberations.

The court stated that any regulation must provide reasonable alternative avenues of communication for the protected expression. *Renton,* 475 U.S. at 54, 106 S.Ct. at 932. Basing its analysis upon *Renton* and *Woodall v. City of El Paso,* 950 F.2d 255 (5th Cir.), *modified,*959 F.2d 1305 (5th Cir.1992), *cert. denied,*506 U.S. 908, 113 S.Ct. 304, 121 L.Ed.2d 227 (1992), it asserted that a court must consider whether the regulation leaves available land that is physically, legally, and economically suited for adult entertainment businesses. The court found that most of the land zoned for adult businesses was actually unavailable; it then mentioned that four areas with eight to ten locations were available and suitable. Noting that Lakeland argued that, under *Renton,* large available acreage and a substantial number of sites are required in order reasonably to offer alternative avenues of expression, the court held that those sites did not provide ***1260** Lakeland with sufficient alternative sites for the carrying on of its business; if other current and future adult entertainment establishments were factored into the calculus, the number of available sites would be reduced proportionately.

We disagree. First, the district court stated that an unspecified number of the proposed locations were inadequate because they were "in remote areas of the city and are not in any area where other retail or commercial development is located. Clearly this type of area would not be reasonable from any macroeconomic analysis standpoint for any type of retail business, which would be the general classification of topless cabarets."

This analysis is based upon an incorrect view of which legal standard to apply. The initial panel opinion in *Woodall* laid out a doctrine of economic impracticality, essentially stating that a site was impractical if no adult business possibly could expect to profit by opening there. 950 F.2d at 261 n. 5. That section of the opinion, which presumably was the source of the district court's "macroeconomic" language, has been withdrawn and thus has no precedential value. With that discussion deleted, *Woodall* merely states that "land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there." 950 F.2d at 263.[FN3] The fact that these locations do not seem particularly desirable for economic reasons does not matter. As the Supreme Court has noted, "The inquiry for First Amendment purposes is not concerned with economic

impact." *Renton,* 475 S.Ct. at 54, 106 S.Ct. at 932, (*quoting Young v. American Mini Theatres,* 427 U.S. 50, 78, 96 S.Ct. 2440, 2456, 49 L.Ed.2d 310 (1976) (Powell, J., concurring)). As we have noted, "alternative sites need not be commercially viable." *SDJ,* 837 F.2d at 1276-77 (citing *Renton* ). *See also D.G. Restaurant Corp. v. City of Myrtle Beach,* 953 F.2d 140, 147 (4th Cir.1991) (city not obliged to provide commercially desirable land).

FN3. *See also* the modified *Woodall* opinion, 959 F.2d at 1306.

Nothing in the instant record indicates that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure or that legal obstacles exist to their use. *See Woodall,* 950 F.2d at 261-62; *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1214 (5th Cir.1982). Thus, although the record does not permit us to say with precision how many additional sites exist, a substantial number of potential sites do.

Moreover, there is no requirement in *Renton, Woodall,* or elsewhere that a specific proportion of a municipality be open for adult businesses or that a certain number of sites be available. According to the record, two adult entertainment clubs and three adult bookstores were operating in Jackson at the time of the trial; so including Lakeland Lounge, there are six such establishments in the city. As a matter of arithmetic, even without the sites the district court stated were remote, there are more "reasonable" sites available than businesses with demands for them, even if the five previously existing businesses decided to move into the zoned areas (which they need not do for three years under the amortization provisions of the ordinance). Given the limited demand for sites for sexually oriented businesses, this ordinance does not reduce the number of establishments that can open in Jackson, so it does not limit expression.[FN4] When the "remote" areas of the city are included, it is plain that Lakeland has many alternative locations for its business.

FN4. *See Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 71, 101 S.Ct. 2176, 2183, 68 L.Ed.2d 671 (1981) (ordinance banning nude dancing in *American Mini Theatres* distinguished, because it "did not affect the number of adult movie theaters that could operate in the city)".

V.

We thus find that the Jackson City Council properly considered the secondary effects of adult business and provided sufficient alternative avenues of expression for them. The judgment of the district court is ***1261** REVERSED, and this matter is REMANDED for further proceedings as appropriate.

POLITZ, Chief Judge, dissenting:
I must respectfully dissent because I find that the ordinance of the City of Jackson, Mississippi violates the first amendment. The ordinance defines its regulatory scope on the basis of "adult" content and is therefore not content-neutral; it may only be accorded the deferential review given content-neutral regulations if it meets the requirements of a time, place, and manner restriction.[FN5] In my view, these requirements are not met. The Jackson City Council has not demonstrated that its predominant intent was to control negative secondary effects of sexually oriented businesses. In addition, even assuming the ordinance to be a content-neutral restraint of free speech, it fails because alternative channels of communication of the protected speech at issue here are unavailable.

FN5. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *see also SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1273 (5th Cir.1988) ("The *[Renton]* Court submitted the Renton ordinance to the analysis reserved for content-neutral restraints, although the ordinance marked businesses by the content of their product."); Note, *The Content Distinction in Free Speech Analysis after Renton,* 102 Harv.L.Rev. 1904, 1907-08 (1989) (explaining that *Renton* applies a "content-neutral" standard of review to "content-based time, place, and manner regulations").

The Supreme Court in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), analyzed a public exposure statute pursuant to the four-part test enunciated in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20

L.Ed.2d 672 (1968). The *O'Brien* test applies to statutes without content-based references; it includes an analysis of the extent to which the governmental interest is related to the suppression of free expression. The *Barnes* decision did not suggest an expansion of *Renton's* looser scrutiny for content-based statutes; the decision even states that the time, place, and manner test was originally developed for expression taking place in a "public forum" and that *Renton* was "at least one occasion" in which the Court deviated from this application. 501 U.S. 560, 111 S.Ct. at 2460.

The ordinance does not qualify for the deferential review accorded content-neutral restraints because it was not "designed to combat the undesirable secondary effects" of the regulated business.[FN6] Unless the predominant concern of the regulators was to prevent these alleged secondary effects, we should not base our review of the ordinance on the presumption that it is a time, place, and manner restriction unrelated to the suppression of free expression.[FN7] To assess the regulators' predominant concern, "we intrude into the regulatory decision process to the extent that we insist upon objective evidence of purpose-a study or findings." [FN8] Jackson had the burden of establishing that evidence before the city council entitled the council to reach its conclusion.[FN9] The test does not inquire into the council members' subjective beliefs but, rather, searches the legislative history of the ordinance for "an actual basis" upon which an objective regulator could assess the purported secondary effects.[FN10] Although the City need not conduct its own independent study and is certainly entitled to rely upon empirical data from other municipalities, the regulators must have such studies-and not just the ordinance itself-before them.[FN11]

FN6. *City of Renton,* 475 U.S. at 49, 106 S.Ct. at 929.

FN7. *Id.* at 47, 48, 106 S.Ct. at 928, 929; *SDJ, Inc.,* 837 F.2d at 1273 (quoting *City of Renton's* reference to the legislatures' "predominant concern").

FN8. *SDJ, Inc.,* 837 F.2d at 1274.

FN9. *City of Renton,* 475 U.S. at 51-52, 106 S.Ct. at 931; *SDJ, Inc.,* 837 F.2d at 1274.

FN10. *SDJ, Inc.,* 837 F.2d at 1274.

FN11. *Id.* ("[W]e are persuaded that the *City Council* considered *those studies themselves* and not merely the ordinances for which the studies provided support." (emphasis added)).

Uncontroverted testimony before the district court reveals that the Jackson Planning Board submitted no written materials to the city council. The ordinance preamble declares that the City of Jackson intended to regulate secondary effects, yet the city council members did not see-much less rely upon-the data which purportedly engendered their alleged "predominant" concerns. According to the record, four of the seven city council members who ***1262** voted for the ordinance did attend a public meeting of the Jackson Planning Board, but the minutes of that meeting and the testimony before the trial judge did not reflect that any empirical study data were orally recited or meaningfully discussed.[FN12] One city council member, Margaret C. Barrett, did receive some materials regarding secondary effects from her constituents, but she did not circulate this data to her colleagues on the council. Because the council did not examine even an extract of the studies upon which its predominant concerns purportedly rested, I find no basis to justify reviewing this ordinance as a content-neutral regulation. The City used the pretext of technical code violations to attempt to close Jackson's first adult entertainment club. It would appear that the ordinance's preamble is but another such.

FN12. The Minutes of the January 21, 1992 Jackson City Planning Board Public Hearing reflect that Quintus Greene, Director of the Office of Planning, made the following comments:

> Mr. Greene gave a brief summary of the research and intent that have gone into drafting the proposed adult entertainment amendments to the Zoning Ordinance. He mentioned that adult entertainment

> establishments would be permitted by right in I-1 (Light) Industrial Districts and would be permitted by Use Permit in the C-4 Central Business District. He noted these regulations would prohibit such uses within 1000 feet of any residentially zoned property, church, school, park or playground. Also, no adult entertainment establishment could be located within 250 feet of any other such use. He displayed a map of the City which depicts all of the I-1 Districts and the C-4 District, where such uses could be allowed.
>
> The district court very accurately described the testimony evidence regarding the hearing:
>
> The only testimony that the Court has concerning what went on at the hearing came from the testimony of Quintus Greene of the City Planning and Zoning staff, and Mrs. Barrett, the councilwoman. This testimony showed no consideration of the materials sent by the American Planners Association nor any other type of material that either the City Planning and Zoning people had or that Mrs. Barrett herself had....
>
> *There is no testimony whatsoever that the City Council members themselves ever looked at the studies relied upon by its staff, or received any written summary of those studies, or received any oral summary of those studies.*
>
> (Emphasis added.) The majority would ignore these factual findings which wear the buckler and shield of Fed.R.Civ.P. 52(a).

The facts of this case stand in stark contrast to those reviewed by the *SDJ, Inc.* court, wherein a specially compiled report of community effects was filed with and adopted by the city council.[FN13] Similarly, the *Renton* Court quotes the material before the Renton City Council which described secondary effects of adult entertainment and study results.[FN14] Indeed, the *Basiardanes v. City of Galveston* [FN15] court objected that "there [was] no evidence in the record that the Galveston City Council passed [the ordinance] after careful consideration or study of the effects of adult theaters on urban life." [FN16]

FN13. *See* *SDJ, Inc.*, 837 F.2d at 1272.

FN14. *See* *City of Renton*, 475 U.S. at 51, 106 S.Ct. at 931.

FN15. 682 F.2d 1203 (5th Cir.1982).

FN16. *Basiardanes*, 682 F.2d at 1215.

In addition, I am not persuaded that the Jackson ordinance passes constitutional muster even as a time, place, and manner restriction. Even a content-neutral ordinance regulating protected speech must be narrowly tailored to serve a substantial governmental interest and must allow for reasonable alternative avenues of communication.[FN17] The Jackson ordinance bans "[a]dult arcades, adult bookstores, adult cabarets, adult entertainment establishments, adult motels, and adult motion picture theaters" from all areas except those zoned as light industrial. In the light industrial zones such establishments may not be located within 250 feet of each other or 1,000 feet from any residentially zoned property, church, school, park, or playground. By the City's own account to the district court, only 879 acres of Jackson's approximate 70,400 acres are available for adult entertainment uses.[FN18] This is approximately 1.2 percent of the land mass of the ***1263** City, as compared with the more than 5 percent which was available in *Renton*. [FN19] In the district court the City argued that 21 general areas were available; it presented testimony regarding 32 specific sites. By contrast, the *SDJ, Inc.* court, which admittedly analyzed an ordinance in the much larger city of Houston, nonetheless reviewed stronger evidence. One expert responsible for analyzing only 20 percent of the City specified 40 available sites in this portion alone. Other evidence demonstrated that at least 100 and, perhaps, up to tens of thousands of alternative sites existed.[FN20] Accordingly, accepting Jackson's argument at full face value, its list of the available sites is less than impressive.

FN17. *City of Renton*, 475 U.S. at 50, 106 S.Ct. at 930; *SDJ, Inc.*, 837 F.2d at 1273.

FN18. The City had originally argued that a ceiling of 1,043 acres were available but retreated from this position when faced with evidence regarding a restrictive covenant on 163 acres.

FN19. *City of Renton,* 475 U.S. at 53, 106 S.Ct. at 932.

FN20. *SDJ, Inc.*, 837 F.2d at 1277.

From my review of the record I cannot, however, accept the City's list of sites. I cannot because I cannot justify dismissing the district court's factual findings in this case. The district court found only four available areas containing eight to ten prospective sites. This finding is manifestly not clearly erroneous. Although the court makes one reference to macroeconomics, which was discussed in the vacated portion of *Woodall v. City of El Paso,* [FN21] the trial court also discounted proposed sites due to physical impossibilities. The district court does not individually apply each reason for unavailability to each site rejected. But the district court's detailed discussion of the available locales nonetheless reveals that it did not place upon the City a duty of providing "sites at bargain prices." [FN22] For example, the trial court considered warehouses as available because they could be converted to lounges. It also considered a lot next to a slaughterhouse an available adult entertainment site. Referencing the *Renton* economic rule, the trial court specifically discounted Lakeland's arguments that lack of parking rendered certain business district sites inadequate.

FN21. 950 F.2d 255 (5th Cir.), *modified,*959 F.2d 1305 (5th Cir.1992).

FN22. *City of Renton,* 475 U.S. at 54, 106 S.Ct. at 932.

At the very least, I must conclude that this case should be remanded for consideration pursuant to our modifications of *Woodall.* The record clearly shows that physical impossibility, rather than the *Woodall* macroeconomics theory, occasioned a discounting of a majority of the City's proposed 879 acres. The district court described one 300-acre site which lacked physical access as "swampland." Another large site in the northwest sector of the City was described as a floodplain. The testimony of Lakeland's expert also revealed that other alleged sites were adjacent to high voltage power lines or within 1,000 feet of a prohibited use. I therefore must disagree with the majority's conclusion that "nothing in the instant record indicates that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure or that legal obstacles exist to their use."

I respectfully dissent.

C.A.5 (Miss.),1992.
Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.
973 F.2d 1255, 61 USLW 2222

END OF DOCUMENT

Z.J. Gifts D-2, L.L.C. v. City of Aurora
C.A.10 (Colo.),1998.

United States Court of Appeals,Tenth Circuit.
Z.J. GIFTS D-2, L.L.C., doing business as Christie's, an Oklahoma limited partnership,
Plaintiff-Counter-Defendant-Appellee,
v.
CITY OF AURORA, an Incorporated Municipality,
Defendant-Counter-Claimant-Appellant.
**No. 96-1483.**

Feb. 10, 1998.

Business which sold sexually oriented materials brought action challenging city zoning ordinance requiring it to move to industrial area. The United States District Court for the District of Colorado, Matsch, Chief Judge, invalidated ordinance on First Amendment grounds, 932 F.Supp. 1256, and city appealed. The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that: (1) ordinance was content-neutral, and (2) ordinance was narrowly tailored to serve significant governmental interest and left open ample alternative channels of communication.

Reversed and remanded.

West Headnotes

**[1] Federal Courts 170B 776**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Where First Amendment interests are implicated, Court of Appeals is obligated to make independent examination of record in its entirety to ensure challenged regulation does not improperly limit expressive interests; thus, Court of Appeals reviews constitutional facts and conclusions of law de novo. U.S.C.A. Const.Amend. 1.

**[2] Federal Courts 170B 759.1**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk759 Theory and Grounds of Decision of Lower Court
170Bk759.1 k. In General. Most Cited Cases

**Federal Courts 170B 935.1**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk935 Directing Judgment in District Court
170Bk935.1 k. In General. Most Cited Cases
Just as Court of Appeals may affirm grant of summary judgment on any ground adequately supported by record, Court may direct that judgment be entered in favor of any moving party if record adequately supports it. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

**[3] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
City zoning ordinance requiring sexually oriented businesses to locate in industrially-zoned areas was

content-neutral for purposes of First Amendment free speech protections, where city's purpose in enacting ordinance was to regulate harmful secondary effects of such businesses, and city relied on studies that supported that purpose. U.S.C.A. Const.Amend. 1.

**[4] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Dissimilarity of businesses utilized in studies regarding harmful secondary effects of adult businesses, relied on by city when adopting zoning ordinance requiring sexually oriented businesses to locate in industrially-zoned areas, did not affect ordinance's content-neutrality for First Amendment free speech purposes, as applied to adult business that only sold and leased adult materials, but did not provide on-site entertainment. U.S.C.A. Const.Amend. 1.

**[5] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(1))
Where studies relied upon adequately support city's purpose in enacting zoning ordinance regulating the harmful secondary effects associated with sexually oriented businesses, government's regulation of such businesses is justified without reference to content of regulated speech. U.S.C.A. Const.Amend. 1.

**[6] Constitutional Law 92 2212**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2212 k. Content Neutrality. Most Cited Cases
(Formerly 92k90.4(1))
Differences in mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining adult business zoning ordinance's content-neutrality, for purposes of First Amendment free speech protections. U.S.C.A. Const.Amend. 1.

**[7] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in General. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
City zoning ordinance requiring sexually oriented businesses to locate in industrially-zoned areas was narrowly tailored to serve significant governmental interest and left open ample alternative channels of communication, as required by First Amendment free speech protections; city had substantial interest in preventing crime and disease, protecting property values, and preserving quality of life of its residents, industrial zones comprised 10.9% of city's area, and 3.6% of city's total area was in industrial zone near existing water and sewer service. U.S.C.A.

Const.Amend. 1.

**[8] Municipal Corporations 268 611**

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k610 Regulation of Occupations and Employments
268k611 k. In General. Most Cited Cases

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
City was not required to wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulated those businesses. U.S.C.A. Const.Amend. 1.

**[9] Zoning and Planning 414 602**

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k602 k. Regulations in General. Most Cited Cases
City's stated governmental interests in circumscribing adverse secondary effects of sexually oriented businesses must be accorded high respect. U.S.C.A. Const.Amend. 1.

**[10] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(1))

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Even if business that only sold and rented adult materials, but did not provide on-site entertainment, was a new type of adult business, it could not avoid time, place and manner regulation of free speech that was justified by studies of secondary effects of reasonably similar businesses. U.S.C.A. Const.Amend. 1.

***684** Charles H. Richardson (Teresa Kinney, Office of the Aurora City Attorney, Aurora, CO, and Barry Arrington, Law Offices of Barry K. Arrington, P.C., Denver, CO, with him on the briefs), Office of the Aurora City Attorney, Aurora, CO, for Defendant-Counter-Claimant-Appellant.
Michael Gross (Arthur M. Schwartz with him on the briefs), Arthur M. Schwartz, P.C., Denver, CO, for Plaintiff-Counter-Defendant-Appellee.

Before ANDERSON, KELLY, and HENRY, Circuit Judges.

***685** PAUL KELLY, JR., Circuit Judge.
Defendant/Counterclaimant-appellant, the City of Aurora, appeals from the district court's grant of summary judgment in favor of Plaintiff/Counterdefendant-appellee Z.J. Gifts. The district court invalidated a city zoning regulation requiring sexually oriented businesses to locate in industrially-zoned areas and enjoined its enforcement against Z.J. Gifts. Interpreting federal constitutional law, the district court held that the regulation was a content-based restriction of speech as applied to Z.J. Gifts' retail business which sold and leased adult videos and magazines for off-site viewing only. *See Z.J. Gifts v. City of Aurora,* 932 F.Supp. 1256, 1257-60 (D.Colo.1996). We exercise jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1), reverse, and remand for proceedings consistent with this opinion.

*Background*

In early 1993, Aurora city officials became concerned that the city lacked regulatory and enforcement mechanisms to minimize negative effects resulting

from sexually-oriented businesses locating within city limits. In response, the city attorney's office presented a draft ordinance regulating the operation and location of sexually-oriented businesses to the city council in September 1993.

In October 1993, Z.J. Gifts, a limited partnership, leased space in the Granada Park Shopping Center, located in a commercially-zoned area, and prepared the space for retail sales of adult novelties, magazines, and videos. After applying for sales tax and business licenses, the shop, named "Christie's," opened for business on October 30, 1994, and has since been in continual operation. Unlike other adult uses, such as adult theaters, peep shows, and nude dance clubs, Christie's provides no on-site adult entertainment. The shop instead sells and rents adult materials to customers for viewing off premises.

After review of a thorough legislative record, deliberation and public hearings, the Aurora City Council enacted an ordinance regulating all sexually-oriented businesses, including adult bookstores, novelty shops and video stores, on December 13, 1994. The ordinance established comprehensive licensing, operating, and inspection requirements for sexually oriented businesses located within city limits. The ordinance further required sexually oriented businesses to locate in industrially-zoned areas, and prohibited them from locating within 1500 feet of churches, schools, residential districts or dwellings, public parks, and other sexually oriented businesses. *See* Aurora Mun.Code § 32.5-52; I Aplt.App. at 43-44.

Z.J. Gifts filed suit against the city, challenging the constitutionality of several provisions of the ordinance, including the zoning requirements. The city counterclaimed to enjoin Z.J. Gifts from operating Christie's in violation of the ordinance. The city also sought a declaration that Christie's operates in violation of the zoning provision of the ordinance and requested a permanent injunction barring Christie's from operating in that location. The parties filed cross-motions for summary judgment, and the district court granted Z.J. Gifts' motion. The district court held that as applied, the zoning provision requiring Christie's to locate within an industrially zoned area unconstitutionally infringed Z.J. Gifts' free speech interests. Z.J. Gifts' remaining claims for relief were dismissed as moot. The city appealed.

*Discussion*

[1][2] Where First Amendment interests are implicated, this court is obligated to make an independent examination of the record in its entirety to ensure the challenged regulation does not improperly limit expressive interests. *See* Revo v. Disciplinary Bd. of the Supreme Court, 106 F.3d 929, 932 (10th Cir.), *cert. denied,* 521 U.S. 1121, 117 S.Ct. 2515, 138 L.Ed.2d 1017 (1997). Thus, we review constitutional facts and conclusions of law de novo. *See id.* Similarly, we review a district court's grant of summary judgment de novo, using the standard provided in Fed.R.Civ.P. 56(c). *See* Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir.1996). Just as we may affirm a grant of summary judgment on any ground adequately supported by the record, we may direct that judgment be entered in favor of any moving party if the record adequately supports it. ***686** *See* Dickeson v. Quarberg, 844 F.2d 1435, 1444-45 n. 8 (10th Cir.1988).

We recognize that governmental limitations which limit expressive interests strike "[a]t the heart of the First Amendment." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641, 114 S.Ct. 2445, 2458, 129 L.Ed.2d 497 (1994). We are also aware that First Amendment doctrine must be informed by the complex tangle of social, political, and cultural interests in limiting speech as well as protecting it, for the tension between individual rights and community needs is at the core of every First Amendment issue. This tension is most pronounced in cases like this one, where the speech regulated is unpopular and the community's interest in regulating it significant. We undertake review of the Aurora zoning provision against this backdrop of competing community and individual interests.

[3][4] As an initial matter, the district court reviewed Aurora's ordinance as a content-based regulation of speech. *See* Z.J. Gifts, 932 F.Supp. at 1260. Recognizing that most ordinances regulating sexually oriented businesses are considered content-neutral, the court rejected that conclusion because it believed "none of the material relied on by the city council shows that the business of Christie's bears any relationship to [harmful secondary] effects." Id. at 1258. Though we recognize that "[d]eciding whether a ... regulation is content-based or content-neutral is

not always a simple task,"*Turner,* 512 U.S. at 642, 114 S.Ct. at 2459, the district court's emphasis on the relationship between the materials used to justify the ordinance and the nature of Z.J Gifts' retail business is misplaced.

Content-based restrictions on speech, those which "suppress, disadvantage, or impose differential burdens upon speech because of its content,"*id.,* are subject to "the most exacting scrutiny." *Id.* Conversely, content-neutral regulations "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue" because they are unrelated to the content of speech. *Id.* Content-neutral regulations are accordingly subject to intermediate scrutiny. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3068-69, 82 L.Ed.2d 221 (1984). In determining whether a regulation is content-neutral, "[t]he government's purpose [in enacting the regulation] is the controlling consideration." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989). If the regulation "serves purposes unrelated to the content of expression" it is considered neutral, "even if it has an incidental effect on some speakers or messages but not others." *See id.*(citing *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47-48, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986)).

The Supreme Court has long held that city zoning ordinances which place limits on the location of adult uses are valid exercises of the city's police power. *See Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 62-63, 96 S.Ct. 2440, 2448-49, 49 L.Ed.2d 310 (1976). Though such regulations treat adult uses differently from other uses based on their sexually explicit nature, they are "designed to prevent crime, ... maintain property values, ... and preserve ... the quality of urban life." *Renton,* 475 U.S. at 48, 106 S.Ct. at 929 (quotation marks omitted). Because ordinances zoning adult uses are intended to curb the secondary effects of those uses on surrounding communities and burden free speech interests only incidentally, they are generally reviewed as content-neutral regulations subject to a less stringent standard of review. *See id.* at 48-50, 106 S.Ct. at 929-30.

The record clearly establishes Aurora's purpose in enacting the ordinance: to regulate the harmful secondary effects of sexually oriented businesses. The preamble to the ordinance indicated the City's intent to "protect[ ][its] citizens from increased crime; preserve[ ] the quality of life, property values, and character of neighborhoods and businesses; deter[ ] the spread of urban blight; and protect[ ] against the spread of sexually transmitted diseases...." I Aplt.App. at 126; *see Renton,* 475 U.S. at 49, 106 S.Ct. at 929-30. Further, even if Z.J. Gifts could support its allegation that "[m]embers of the Aurora City Council[ ] openly avowed ... that the ordinance was enacted for the express purpose of closing Plaintiff's business[,]"***687** """""""" Aplee. Br. at 4, " 'alleged illicit ... motive[s]' " hidden in legislators' comments will not support a determination that a restriction is content-based. *Renton,* 475 U.S. at 48, 106 S.Ct. at 929 (quoting *United States v. O'Brien,* 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672 (1968)).

[5][6] Most importantly, we disagree that the ordinance's content-neutrality is affected by the city's reliance on studies utilizing slightly dissimilar businesses. As the Eighth Circuit noted in a case remarkably similar to this one, examining the similarity of the businesses utilized in the studies relied on to the businesses regulated in determining an ordinance's content-neutrality "confuses distinct aspects of the *City of Renton* test." *ILQ Investments, Inc. v. City of Rochester,* 25 F.3d 1413, 1416 (8th Cir.), *cert. denied,*513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493 (1994). The district court's inquiry may well be relevant in determining whether the ordinance is "narrowly tailored to regulate only those adult uses shown to have caused adverse secondary effects" under *Renton. Id.* at 1417. But where, as here, the studies relied upon adequately support the city's *purpose* in enacting the ordinance-regulating the harmful secondary effects associated with sexually oriented businesses-the government's regulation of such businesses is "*justified* without reference to the content of the regulated speech." *Rock Against Racism,* 491 U.S. at 791, 109 S.Ct. at 2753 (emphasis in original). Thus, we are satisfied that differences in the mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining an ordinance's content-neutrality. *See Renton,* 475 U.S. at 49, 106 S.Ct. at 929-30 ("[W]ith respect to businesses that *purvey* sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are ... 'content-neutral.' ")

(emphasis added). The city need only rely upon "evidence ...*reasonably* believed to be relevant to the problem that the city addresses." *Id.* at 51-52, 106 S.Ct. at 931 (emphasis added). If the city can show that the ordinance affects "that category of [businesses] shown to produce the unwanted secondary effects,"*id.* at 52, 106 S.Ct. at 931, the ordinance will stand. So long as cities do not use "the power to zone as a pretext for suppressing expression,"*id.* at 54, 106 S.Ct. at 932 (citing *Young*, 427 U.S. at 84, 96 S.Ct. at 2459 (Powell, J. concurring)), attempts to regulate the adverse effects associated with sexually oriented businesses are properly classified as content-neutral.

Given the uncontroverted sexual nature of Z.J. Gifts' business, we are convinced the city has met its burden. The record indicates several of the studies examine the effects of adult businesses or sexually oriented businesses generally. Significantly, at least three of these studies examine the effects of adult bookstores on surrounding communities.[FN1] Although Z.J. Gifts argues and attempts to prove that all other adult bookstores provide some form of on-premises viewing of sexually explicit materials, *see* Aplee. Br. at 13, 16, 22, II Aplt.App. at 344 (Jackson aff.), we think the record fully supports the city's regulation of sexually oriented businesses providing both on- and off-site viewing of sexually explicit materials.

> FN1. *See* I Aplt.App. at 158 (summary of Garden Grove, California land use study reviewing impact of adult businesses); *id.* at 161 (summary of Austin, Texas land use study reviewing crime rates, property values, and trade area characteristics for areas surrounding adult bookstore, theater, and topless bar); *id.* at 162 (summary of Oklahoma City, Oklahoma study examining effect of adult bookstore on property values and crime); *id.* at 163 (summary of Indianapolis, Indiana study examining the effects of sexually oriented businesses on crime rates and property values in surrounding areas; report concludes that "even relatively ... passive use [s] such as ... adult bookstore[s] ... have a serious negative effect on their immediate environs."); *id.* at 166 (summary of Minneapolis, Minnesota land use report concluding "concentrations of sexually oriented businesses have [a] significant relationship to higher crime and lower property values."); *id.* at 168 (summary of Whittier, California study of effects of sexually oriented businesses, including two adult bookstores, on surrounding residential and commercial areas); *id.* at 169 (summary of Amarillo, Texas study of adult businesses, including "bookstores ... with publications featuring nudity and explicit sexual activities," concluding that such businesses lead to increases in street crime).

***688** [7] Properly analyzed as a content-neutral regulation, Aurora's zoning ordinance survives constitutional scrutiny, and the city is entitled to relief, if the city can establish the ordinance is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication. *See Renton*, 475 U.S. at 45, 106 S.Ct. at 927-28; *Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. at 2753-54; *Clark*, 468 U.S. at 293, 104 S.Ct. at 3068-69. The district court, however, analyzed the ordinance under the test set out in *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. *O'Brien* provides that content-neutral regulations having an incidental impact on expressive conduct are constitutional if they further an important or substantial governmental interest and restrict First Amendment freedoms no greater than essential to further the interest. *See id.* We need not choose between the two tests, however, because the *O'Brien* analysis "is, in the last analysis, ... little, if any, different from the standard applied to time, place or manner restrictions." *Clark*, 468 U.S. at 298, 104 S.Ct. at 3071. Review of the record and the legal principles which govern the city's claims indicates that the city prevails under either standard.

Z.J. Gifts does not in any real sense question the substantiality of Aurora's interests in preventing crime and disease, protecting property values, and preserving the quality of life of the city's residents. Indeed, the district court recognized that the city had demonstrated "the legitimacy of its concern" regarding adult uses which provide on-site adult entertainment, but not to those which provide adult materials for off-site consumption. *See Z.J. Gifts*, 932 F.Supp. at 1257-58. As noted earlier, this distinction is constitutionally irrelevant in determining whether Aurora's interests are important or substantial,

particularly in light of the Court's strong statements regarding the government's interest in regulating such businesses in *Young* and *Renton.* Our analysis of Aurora's interest in regulating sexually oriented businesses thus remains unaffected by the district court's distinction between off-site and on-site viewing of sexually explicit materials.

[8][9] To the extent Z.J. Gifts argues that the city has not "demonstrate[d] that the recited harms are real, not merely conjectural," *Turner,* 512 U.S. at 664, 114 S.Ct. at 2470, we disagree. Aurora need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses. It may rely on the experience of other cities to determine whether the harms presented by sexually oriented businesses are real and should be regulated. *See Renton,* 475 U.S. at 51-52, 106 S.Ct. at 930-31. In other words, the city may control a perceived risk through regulation. The Court has long held, and we agree, that Aurora's stated governmental interests in circumscribing the adverse secondary effects of sexually oriented businesses "must be accorded high respect." *Renton,* 475 U.S. at 50, 106 S.Ct. at 930 (quoting *Young,* 427 U.S. at 71, 96 S.Ct. at 2453); *ILQ Investments,* 25 F.3d at 1416.

Similarly, Z.J. Gifts cannot dispute that Aurora's ordinance allows for reasonable alternative avenues of communication. Sexually oriented businesses may locate within the city's industrial zones, which comprise approximately 10.9 percent of the city's area. *See* I Aplt.App. at 120. Approximately 3,200 acres of this land-fully 3.6 percent of the city's total area-are located near existing water and sewer services. *See id.* Thus, Z.J. Gifts is left with more land on which to relocate than was found to be adequate in *Renton* and its progeny. *See, e.g., Renton,* 475 U.S. at 53, 106 S.Ct. at 932 (five percent of city's land "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space" available); *S & G News, Inc. v. City of Southgate,* 638 F.Supp. 1060, 1066 (E.D.Mich.1986), *aff'd,* 819 F.2d 1142 (6th Cir.1987) (2.3 percent of city's land available); *Lakeland Lounge of Jackson, Inc. v. City of Jackson,* 973 F.2d 1255, 1260, 1262-63 (5th Cir.1992) (majority opinion and Politz, C.J., dissenting), *cert. denied* 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1993) (1.2 percent of city's land available).

***689** Z.J. Gifts' only remaining argument is that Aurora's zoning provision is not narrowly tailored to further the interests asserted. *See Renton,* 475 U.S. at 52-53, 106 S.Ct. at 931-32; *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679. The district court held that Aurora had "far less restrictive means of achieving [its] purpose with respect to a business like Christie's [which provides only off-site viewing of adult materials] than [a] zoning provision that would require it to relocate ..." *Z.J. Gifts,* 932 F.Supp. at 1260. We believe the district court construed the narrow tailoring inquiry too narrowly, and held Aurora to a far more stringent standard than required by *Renton* and *O'Brien.*

The district court derived its "least restrictive means" language from *O'Brien,* which stated that an incidental restriction on free speech should be "no greater than is essential to the furtherance of [the] interest." *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679. In recent cases, however, the Court elaborated on *O'Brien,* explicitly holding that time, place or manner regulations on protected speech must be narrowly tailored, but "need not be the least restrictive or least intrusive means of doing so." *Rock Against Racism,* 491 U.S. at 798, 109 S.Ct. at 2757-58. Instead, "[s]o long as the means chosen are not substantially broader than necessary," an ordinance is narrowly tailored if the regulation "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Id.* at 799, 800, 109 S.Ct. at 2758, 2758-59; *see ILQ Investments,* 25 F.3d at 1417-18.

This reading of *O'Brien* 's narrow tailoring inquiry harmonizes with that crafted by the Court in *Renton.* In regulating the harmful effects of sexually oriented businesses, the city need not address all the potential problems created by adult businesses at once. *See Renton,* 475 U.S. at 52-53, 106 S.Ct. at 931-32. Nor is it limited to one method of regulation over another in attempting to curb harmful secondary effects. *See id.* at 52, 106 S.Ct. at 931 ("Cities may regulate adult theaters by dispersing them ... or by effectively concentrating them."). Instead, *Renton* 's constitutional framework grants the city broad discretion to choose the means and scope of its regulation of sexually oriented businesses.

The Court's interpretation of the narrow tailoring prong in time, place and manner analyses recognizes

the judiciary's limited role in reviewing content-neutral limitations on speech. "It is not [the court's] function to appraise the wisdom of [the city's] decision[.]" *Renton,* 475 U.S. at 52, 106 S.Ct. at 931 (citing *Young,* 427 U.S. at 71, 96 S.Ct. at 2452-53). Instead, because legislative bodies are entitled to "reasonable inferences" suggested by the legislative record before them, *see Turner,* 512 U.S. at 666, 114 S.Ct. at 2471, the court simply determines whether the ordinance, as promulgated, "affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects" the city seeks to regulate. *ILQ Investments,* 25 F.3d at 1418. If so, the court's review is complete, and it may not substitute its own judgment for that of the legislature, usurping the legislative body's policy-making function. Where the legislative record validates the legislature's judgment, our obligation to exercise independent judgment "is not a license to ... replace [legislative] factual predictions with our own." *Turner,* 512 U.S. at 666, 114 S.Ct. at 2471. Courts must allow cities like Aurora "reasonable opportunity to *experiment* with solutions to admittedly serious problems." *Young,* 427 U.S. at 71, 96 S.Ct. at 2453 (emphasis added).

[10] In invalidating Aurora's reasonable legislative choices, the district court exceeded the limits imposed by *Renton* and *O'Brien.* Unlike other zoning provisions held unconstitutional, Aurora's ordinance does not attempt to regulate businesses which have a minimal or nonexistent connection to sexually oriented entertainment. *See, e.g., Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 74-77, 101 S.Ct. 2176, 2185-87, 68 L.Ed.2d 671 (1981) (invalidating ordinance prohibiting all live entertainment within city's limits); *Faraone v. City of East Providence,* 935 F.Supp. 82, 88-89 (D.R.I.1996) (granting preliminary injunction against enforcement of ordinance prohibiting rental of "adult oriented x-rated" videotapes on holidays and Sundays by businesses having only ten percent x-rated or ***690** adult oriented videos in total video rental inventory); *World Wide Video v. City of Tukwila,* 117 Wash.2d 382, 816 P.2d 18, 21 (1991) (en banc), *cert. denied,*503 U.S. 986, 112 S.Ct. 1672, 118 L.Ed.2d 391 (1992) (invalidating ordinance regulating sexually oriented businesses, defined to include businesses with ten percent or more of their stock in trade consisting of sexually oriented merchandise). Nor does the city seek to justify its actions with a completely barren legislative record. *See, e.g., Discotheque, Inc. v. City Council of Augusta,* 264 Ga. 623, 449 S.E.2d 608, 609-10 (1994) (summary judgment improper in favor of City where City produced no probative evidence of experience of other municipalities regarding negative secondary effects of sexually oriented businesses); *Quetgles v. City of Columbus,* 264 Ga. 708, 450 S.E.2d 677, 678 (1994), *cert. denied,*514 U.S. 1083, 115 S.Ct. 1794, 131 L.Ed.2d 722 (1995) (same). Instead, Christie's, and businesses like it, are indisputably sexually oriented businesses-specifically, "adult bookstores" as defined by the ordinance. *See* Aurora Mun.Code § 32.5-2 (adult bookstore means "a commercial establishment which devotes a significant or substantial portion of its stock-in-trade ... to the sale, rental or viewing ... of books, magazines, periodicals, ... films, motion pictures, video cassettes, ... or other visual representations ... of 'specified sexual activities' or 'specified anatomical areas.' "); I Aplt.App. at 263-75 (Inventory list for Christie's); *id.* at 119 (Anderson aff.). The legislative record before the city fully supported the city's concerns regarding the negative secondary effects caused by sexually oriented businesses, such as decreased property values and increased crime, which were precisely the problems Aurora sought to regulate by enacting the ordinance. *See* I Aplt.App. 124-26 (Preamble to Aurora Mun.Code § 32.5). In short, even if, as Z.J. Gifts claims, Christie's is "a new type of adult business, it may not avoid time, place and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses." *ILQ Investments,* 25 F.3d at 1418 (footnote omitted).

On this record, Aurora's ordinance satisfies *Renton* and *O'Brien,* as it promotes the city's well-established interest in regulating harmful secondary effects caused by sexually oriented businesses reasonably similar to those studied by other municipalities without unnecessarily regulating dissimilar businesses. We accordingly REVERSE the district court's judgment. On REMAND, the district court shall vacate its judgment and conduct further proceedings consistent with this opinion.

C.A.10 (Colo.),1998.
Z.J. Gifts D-2, L.L.C. v. City of Aurora
136 F.3d 683, 98 CJ C.A.R. 1041

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Erie Boulevard Triangle Corp. v. City of Schenectady
N.D.N.Y.,2003.

United States District Court,N.D. New York.
ERIE BOULEVARD TRIANGLE CORPORATION, d/b/a Another World Books, d/b/a Adult Educational Books; Broadway Schenectady Entertainment, Inc.; Management Consulting Engineering Corp.; and Rocco Palmer, Plaintiffs,
v.
CITY OF SCHENECTADY, Defendant.
**No. 00-CV-1716.**

March 11, 2003.

Adult entertainment businesses brought suit challenging constitutionality of amendments to adult entertainment zoning ordinance. Businesses moved for summary judgment. The District Court, Hurd, J., held that: (1) ordinance was content neutral; (2) fact issues precluded summary judgment on constitutionality of ordinance; and (3) claim that ordinance was not enacted pursuant to proper procedures was barred by failure to commence Article 78 proceeding within statutory limitations period.

Motion for summary judgment denied.

West Headnotes

**[1] Constitutional Law 92 2212**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2212 k. Content Neutrality. Most Cited Cases
(Formerly 92k90.4(3))
In determining whether adult entertainment zoning ordinance is content neutral, question is whether ordinance is aimed at content of activity at adult entertainment establishment, or at secondary effects of such establishments on surrounding community.

**[2] Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Court could look to preamble of adult entertainment zoning ordinance in determining whether ordinance was enacted to address secondary effects of adult entertainment establishments, or to suppress adult entertainment activities.

**[3] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(3))
Adult entertainment ordinance which was aimed at adverse secondary effects of adult establishments, as indicated by its preamble and statements of city officials, rather than at suppression of free speech, was content neutral, and thus subject to intermediate scrutiny.

**[4] Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Municipalities are not required to conduct empirical studies of the impact of adult entertainment establishments on their own cities, but are entitled to rely on the experiences of other cities, in showing that adult entertainment ordinance is reasonably related to secondary effects city intends to ameliorate.

**[5] Zoning and Planning 414 76**

414 Zoning and Planning

414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
In the absence of actual and convincing evidence from challengers to the contrary, municipalities need not demonstrate with empirical evidence that challenged adult entertainment zoning ordinance will successfully reduce crime.

**[6] Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Report of expert regarding secondary effects of adult entertainment businesses in general could provide reasonable basis for city's decision to require all adult entertainment establishments to relocate to certain zones, although it would have been preferable for city to have studied actual effects of such establishments in city, rather than relying on expert's report and anecdotal evidence.

**[7] Federal Civil Procedure 170A 2491.5**

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 k. Civil Rights Cases in General. Most Cited Cases
Genuine issues of material fact, as to whether content neutral adult entertainment ordinance was narrowly tailored to serve substantial government interest, and whether ordinance allowed for reasonable alternative avenues of communication in confining such businesses to lots within industrial zones that were not in close proximity with residences, schools and similar structures, precluded summary judgment on constitutionality of ordinance.

**[8] Zoning and Planning 414 584.1**

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k584 Time for Proceedings
414k584.1 k. In General. Most Cited Cases

**Zoning and Planning 414 587**

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k584 Time for Proceedings
414k587 k. Effect of Delay. Most Cited Cases
Failure to timely commence Article 78 proceeding under New York law to challenge procedures used to enact amendments to adult entertainment ordinance within four months required dismissal, as untimely, of cause of action attacking ordinance as procedurally flawed. N.Y.McKinney's CPLR 7801 et seq.

***23** Office of Lee David Greenstein (Lee D. Greenstein, Esq., of Counsel), Albany, NY, for Plaintiffs,
Carter Conboy Case Blackmore Maloney & Laird, P.C. (Michael J. Murphy, Esq., of Counsel), Albany, NY, for Defendant.
City of Schenectady Corporation Counsel (Joseph R. Cardamone, Esq., Of Counsel), Schenectady, NY, for Defendant.

MEMORANDUM-DECISION and ORDER

HURD, District Judge.

## I. *INTRODUCTION*

Plaintiffs commenced the instant action against the defendant City of Schenectady, New York ("City" or "Schenectady") contending that Schenectady's zoning ordinance regulating adult entertainment businesses violates their constitutional rights. A second cause of action alleges that amendments to the ordinance were not properly enacted. Plaintiffs move for summary judgment pursuant to Fed.R.Civ.P. 56 seeking a declaration that the City's Adult Entertainment Ordinance (hereinafter "Adult Entertainment Ordinance" or "Ordinance") as amended is unconstitutional on its face and as applied to them. Defendants oppose. Oral argument was heard on December 23, 2002 in Albany, New York. Decision was reserved.

## II. *FACTS*

This case was the subject of a prior Memorandum-Decision & Order dated June 29, 2001, *Erie Blvd. Triangle Corp. v. City of Schenectady,* 152 F.Supp.2d 241 (2001), familiarity with which is assumed. The facts pertinent to the instant motion for summary judgment are set forth below.

**A.** ***The Parties***

Plaintiff Erie Boulevard Triangle, Corp. ("Erie") operates two adult entertainment establishments in Schenectady that offer for sale and rental sexually explicit, non-obscene videos, magazines, and books. (Pls.' Stmnt. of Mat. Facts at ¶ 1.) Plaintiff Management Consulting and Engineering Corp. ("MCEC") owns certain property in ***24** Schenectady that it intends to use as an alternative location for an adult bookstore in the event the City's Adult Entertainment Ordinance requires Erie to close its existing stores. (*Id.* at ¶ 2.) Plaintiff Broadway Schenectady Entertainment, Inc. ("Broadway") was formed to operate an adult bookstore on MCEC's property. (*Id.* at ¶ 3.) Plaintiff Rocco Palmer ("Palmer") is a resident of the City and the sole owner of Erie, MCEC, and Broadway. (*Id.* at ¶ 4.) The City is a political subdivision of the State of New York located in Schenectady County, New York.(*Id.* at ¶ 5.)

**B.** ***Adult Entertainment Ordinance***

In July 1984, the City enacted its adult use zoning regulations. *See* City of Schenectady Code of Ordinance § 264-91. (*Id.* at ¶ 7.) The Adult Entertainment Ordinance confined future adult entertainment business to the City's Light Industrial "G" and Heavy Industrial "H" zoning districts. (*Id.*) Adult entertainment businesses wishing to operate in the City were required to obtain a special permit. (*Id.*) The Ordinance also provided certain "proximity restrictions" within zoning districts G and H. Specifically, adult entertainment businesses could not be located within 500 feet of any other adult use; 500 feet of any building containing one or more dwelling units or rooming units; 1000 feet from the property line of any public or private school, library, park, or playground; or 500 feet from the property line of any church or other house of worship. (*Id.*) Existing adult entertainment establishments were "grandfathered" under the Ordinance. As a result, Erie's two establishments became lawful, non-conforming uses. (*Id.*)

On January 11, 1999, the City adopted City Ordinance 98-25, which amended the Adult Entertainment Ordinance. (*Id.* at ¶ 8; Pl.'s Ex. B.) Ordinance 98-25 altered the way in which the proximity restrictions were calculated; added proximity restrictions with respect to nursery schools, day care centers and primary and secondary schools; eliminated the need for special permits; and terminated the pre-existing, non-conforming uses within one year of January 11, 1999. (*Id.*)

On July 12, 1999, the City adopted Ordinance 99-11 which again amended the Adult Entertainment Ordinance. This amendment provided that adult businesses could not be located within 300 feet of the property line of another adult business. (*Id.* at ¶ 9; Pl.'s Ex. C.) Ordinance 99-11 also terminated pre-existing, non-conforming uses within one year of the Ordinance's enactment. (*Id.*)

On July 25, 1999, the City adopted a new ordinance that expressly repealed the amendments of Ordinance 98-25. (*Id.* at ¶ 10.) On November 13, 2000, the City adopted Ordinance 2000-13, which excluded bicycle and hiking trails from the proximity restrictions. (*Id.* at ¶ 11; Pl.'s Ex. E.) Thus, adult entertainment businesses could be located within 1000 feet of bicycle or hiking trails. (*Id.*) Ordinance 2000-13 was adopted as a direct result of the litigation in *Nikolaidis v. City of Schenectady,* 00-CV-1236. (*Id.* at ¶ 12; Def.'s Ex. A at 85.)

In adopting the amendments to the Adult Entertainment Ordinance, the City relied upon a report prepared by Robert Penna, Ph.D. (the "Penna Report") (*Id.* at ¶ 13.) The Penna Report addressed the adverse secondary effects alleged to be associated with adult entertainment in other municipalities. (*Id.* at ¶ 14.) The report did not specifically study Schenectady. (*Id.*) The City also purports to have relied upon other anecdotal evidence of the secondary effects of sexually oriented businesses. (*See* Brockbank Aff. at ¶¶ 3-7; Oct. 31, 2002 Jurczynski Aff., at ¶¶ 4-8). ***25** This other evidence includes convictions on charges of prostitution of the owner and his wife of a nude dancing facility (the Toy Box) in the City; complaints from police officers regarding sexual activity in and near sexually oriented businesses within the City; citizen complaints of noise, increased crime, declining

property values, concern for the welfare of their families, and sexual activity in and near sexually oriented businesses within the City; complaints from business owners; and personal observations of the City's mayor. (*Id.;* May 18, 2001 Jurczynski Aff. at ¶ 5.) The City did not obtain or review any data regarding property values, crime rates, or traffic or noise levels within the vicinity of adult businesses. (Pl.'s Stmnt. of Mat. Facts at ¶ 17.) Further, the City does not have any records of citizen complaints. (*Id.* at ¶ 19.) [FN1] The only evidence of local secondary effects considered by the City's Planning Commission consisted of the testimony of two residents. (*See* Pl.'s Ex. M, p. 9-10.) One of the residents stated that adult bookstores are an eyesore and threaten the moral character of the City. (*Id.*) The other resident, a representative of the Calvary Baptist Church, testified that adult material is detrimental to the community. (*Id.*)

> FN1. Albert Jurczynski, Schenectady's mayor, testified at deposition that he received a total of six to eight complaints regarding adult entertainment establishments and had received one complaint since June 29, 2001. (Pl. Stmnt. of Mat. Facts at ¶ 19.)

The amendments to the Adult Entertainment Ordinance were enacted by the City without the substance of the amendments being referred to the City's Planning Commission for review, and without a public hearing or notice to the public of their passage. (Pl.'s Stmnt. of Mat. Facts at ¶ 29.)

**C.** ***Enforcement of the Zoning Ordinance Against Erie***

On January 6, 2000, the City provided Erie with notice that it would have to close its adult oriented businesses by July 11, 2000. (*Id.* at ¶ 30.) Erie appealed this determination to the Schenectady Board of Zoning Appeals ("SBZA"). (*Id.* at ¶ 31.) The City opposed the appeal. (*Id.* at ¶ 33.) In June 2000, the SBZA granted Erie an extension to continue operating its adult oriented businesses until June 13, 2001. (*Id.*) On July 7, 2000, the City informed Erie that it was in violation of City Code 128-6 with respect to the use of doors on video booths at the businesses. (*Id.* at ¶ 34.) The City ultimately withdrew its enforcement effort regarding the video booths after receiving a letter from Erie's counsel. (*Id.* at ¶ 36.)

**D.** ***Efforts to Obtain an Alternate Location***

In July 2000, plaintiff MCEC purchased certain property within the City purportedly to open an adult entertainment establishment that complied with the Adult Entertainment Ordinance. (*Id.* at ¶ 37.) On August 5, 2000, plaintiff Broadway applied for a building permit to construct a new building to house an adult bookstore. (*Id.* at ¶ 38.) Thereafter, the County of Schenectady commenced eminent domain proceedings to condemn the property purchased by MCEC. (*Id.* at ¶ 39.)

**E.** ***Procedural History***

Erie commenced the instant litigation on November 13, 2000, asserting two causes of action. The First Cause of Action contends that the City violated its rights under the United States and New York State Constitutions. The Second Cause of Action contests the procedures employed by the City in adopting Ordinance 2000-13. ***26** By Memorandum-Decision & Order dated June 29, 2001, Erie's motion for a preliminary injunction enjoining enforcement of the Adult Entertainment Ordinance was granted. *See Erie Blvd. Triangle Corp.*, 152 F.Supp.2d 241. In that Memorandum-Decision & Order, it was determined that "there is a substantial likelihood that the City will not be able to demonstrate that the eliminating of the grandfathering provision from the Adult Ordinance was designed to further the City's interest in ameliorating the secondary effects of adult businesses within Schenectady." *Id.* at 247-48. By Memorandum-Decision & Order dated July 15, 2002, Erie was granted leave to amend its Complaint to add MCEC and Broadway as plaintiffs. (Dkt. No. 38.) An amended complaint was filed on July 22, 2002. Defendants filed an answer to the amended complaint on September 23, 2002.

**III.** ***STANDARD OF REVIEW***

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The ultimate inquiry is whether a reasonable jury could find for the nonmoving party based on the

evidence presented, the legitimate inferences that could be drawn from that evidence in favor of the nonmoving party, and the applicable burden of proof. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining a motion for summary judgment, all inferences to be drawn from the facts contained in the exhibits and depositions "must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Hawkins v. Steingut, 829 F.2d 317, 319 (2d Cir.1987). Nevertheless, "the litigant opposing summary judgment 'may not rest upon mere conclusory allegations or denials' as a vehicle for obtaining a trial." Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir.1980) (quoting SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir.1978)).

## IV. *DISCUSSION*

### A. *Constitutionality of the Adult Entertainment Ordinance*

At issue here is the constitutionality of Schenectady's Adult Entertainment Ordinance. The proper analytical framework is that set forth by a series of Supreme Court decisions including Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) ( "*Young* "); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) ("*Renton* "); and City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) ( "*Alameda Books* "). Under these cases, the first inquiry is whether the ordinance bans adult uses altogether. *Renton*, 475 U.S. at 46, 106 S.Ct. 925; *see* *Alameda Books*, 535 U.S. 425, 122 S.Ct. 1728, 1733, 152 L.Ed.2d 670 (2002). If the ordinance does not ban adult uses altogether, but merely imposes zoning restrictions upon them, the ordinance is analyzed as a time, place, and manner regulation. *Alameda Books*, 122 S.Ct. at 1733. Assuming the ordinance to be a time, place, and manner regulation, the second inquiry is whether the ordinance is content neutral. *Id.* If the ordinance is content based, it is "presumptively invalid and subject to strict scrutiny." *Id.* An ordinance that is "aimed not at the content ... but rather at the secondary effects of ... [adult uses] on the ***27** surrounding community, namely at crime rates, property values, and the quality of the city's neighborhood ... [is] ... content neutral." *Id.* at 1734. If the ordinance is content neutral, the third inquiry is whether the "ordinance was designed to serve a substantial government interest and ... reasonable alternative avenues of communication remain[ ] available." *Id.*

#### 1. *Ban on Adult Uses*

It is undisputed that Schenectady's Adult Entertainment Ordinance does not ban all adult uses. Rather, it merely seeks to limit the operation of adult entertainment uses to certain zones within the City-"a sort of adult zoning regulation." *Id.* Accordingly, the Adult Entertainment Ordinance must be analyzed as a time, place, and manner regulation. *Alameda Books*, 122 S.Ct. at 1733; *Renton*, 475 U.S. at 46, 106 S.Ct. 925.

#### 2. *Content Neutral*

[1] The next inquiry is whether the Adult Entertainment Ordinance is content neutral. *Alameda Books*, 122 S.Ct. at 1733. This entails an examination of whether the ordinance is aimed at the content of the activity at the adult entertainment establishments, or the secondary effects of such establishments on the surrounding community. *Alameda Books*, 122 S.Ct. at 1734; *Renton*, 475 U.S. at 47, 106 S.Ct. 925. "In determining whether a regulation is content-neutral, '[t]he government's purpose [in enacting the regulation] is the controlling consideration.' " Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 686 (10th Cir.1998), *cert. denied*, 525 U.S. 868, 119 S.Ct. 162, 142 L.Ed.2d 133 (1998) ("*Aurora* ") (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

Although the subject Ordinance is aimed at adult entertainment establishments, "the inference of impermissible discrimination is not strong. An equally strong inference is that the ordinance is targeted not at the activity, but at its side effects." *Alameda Books*, 122 S.Ct. at 1740 (Kennedy, J., concurring). It is evident from the record that the Adult Entertainment Ordinance was adopted to address the purported secondary effects of adult entertainment establishments upon the surrounding community. "A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it." *Id.* This conclusion is supported by the

preamble to the Adult Entertainment Ordinance, the Penna Report, and the affidavits of the City's major and corporation counsel. (*See* Pl.'s Exs. B, C, J at ¶ 6, M, I; Def.'s Ex. C, D.)

[2] The preamble to the Ordinance states that:

based upon a comprehensive study of the adverse secondary impacts of adult use establishments as documented by other communities in the country in accordance with the ruling of the U.S. Supreme Court in the matter of the *City of Renton v. Playtime Theaters, Inc.,...* and commissioned by the Office of the Corporation Counsel, the council of the City of Schenectady finds that:

1) There are adverse secondary impacts associated with the establishment and operation of adult-oriented businesses within a community;

2) Among these adverse secondary impacts are a deterioration in the local quality of life, an adverse effect upon local property values, an adverse effect upon local economic viability, an imposition, whether intentional or unintentional, of exposure to adult-oriented expression undesired by neighbors, pedestrians and passersby, an increase in traffic, noise, litter and nuisance, criminal and illicit sexual behavior, a threat to the ***28** health and safety of children and young adults and an undermining of the established sense of community;

3) These adverse secondary impacts of the establishment and operation of adult-oriented businesses are a threat to the general health, safety and economic viability of the community;

4) The unregulated establishment and operation of adult-oriented businesses would lead to the widespread imposition of adverse secondary impacts upon the residents, businesses, economic viability, property values, and quality of life of the City would, therefore, be detrimental to the general health, safety and economic viability of the community....

Whereas, it is the express intent of the City of Schenectady in adopting this chapter to:

a) Ameliorate, mitigate, reduce or prevent the widespread and unregulated imposition of the adverse secondary impacts of adult-oriented businesses upon the residents, businesses, economic viability, property values, quality of life and general health, safety and welfare of the community.

(Pl.'s Ex. B.) *See* *Renton,* 475 U.S. at 48, 106 S.Ct. 925 (finding an ordinance to be content neutral because "[t]he ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views.") (internal quotation and alterations omitted); *see also* *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 723 n. 28 (7th Cir.2003) (looking to the text of the ordinance, any preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware to determine the predominant concerns behind the enactment of an ordinance); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 862 (8th Cir.2003) (looking to the ordinance's stated purposes and legislative findings to determine the intent of ordinance); *Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 514 (4th Cir.2002) (looking to the ordinance's preamble for language addressing the city's desire to address secondary effects); *Aurora,* 136 F.3d at 686 (relying upon preamble to ordinance in making determination that ordinance was enacted to address secondary effects). This evidences that the purpose of the Adult Entertainment Ordinance was to address the purported secondary effects of adult entertainment establishments.

It also is evident that the City relied upon the Penna Report before adopting the amendments to the Adult Entertainment Ordinance. (*See* Pl.'s Exs. B, C, D, I, J at ¶¶ 6-7.) The Penna Report states, among other things, that:

it is highly probable that the City of Schenectady does and will continue to experience adverse secondary impacts associated with adult entertainment establishments and businesses. We believe that the City therefore can, based upon the experiences of a broad spectrum of counties, towns, and cities across the country, attempt to ameliorate these impacts though the utilization of its ... zoning powers.

(*Id.*) This also evidences that the intent of the Adult Entertainment Ordinance was to address the

secondary effects of adult entertainment establishes, and not to limit speech.

[3] Finally, the affidavits of Schenectady Mayor Jurczynski and Schenectady Corporation Counsel Michael Brockbank further support the conclusion that the intent of the Adult Entertainment Ordinance was to reduce the secondary effects ***29** of adult entertainment establishments. (*See* Def.'s Ex. C, D.) Plaintiffs offer no evidence from which it can be conclusively determined on a motion for summary judgment that the Ordinance was aimed at specific content rather than the secondary effects of adult entertainment establishments. Accordingly, the Adult Entertainment Ordinance will be evaluated under the intermediate scrutiny standard.

**3. *Narrowly Tailored to Serve a Substantial Government Interest***

Under the intermediate scrutiny standard, the question is "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books,* 122 S.Ct. at 1737 (plurality opinion). "In conducting this inquiry, [courts] are required ... to answer two questions: (1) 'what proposition does a city need to advance in order to sustain a secondary-effects ordinance?'; and (2) 'how much evidence is required to support the proposition.' " *Ben's Bar,* 316 F.3d at 721 (quoting *Alameda Books,* 122 S.Ct. at 1741 (Kennedy, J. concurring) [FN2]); *see also Alameda Books,* 122 S.Ct. at 1736 (plurality opinion) ("The municipality's evidence must fairly support the municipality's rationale for its ordinance."); *see also, SOB, Inc.,* 317 F.3d at 862 ("[T]he fighting issue ... is whether the [municipality] had sufficient evidence of adverse secondary effects to justify enacting the Ordinance.").

> FN2. There was no majority opinion in *Alameda Books.* Accordingly, it has been noted that "[b]ecause Justice Kennedy's concurrence is the narrowest opinion joining the judgment of the Court in *Alameda Books,...* it is the controlling opinion." *Ben's Bar,* 316 F.3d at 722 and 724 n. 30; *See also, SOB, Inc.,* 317 F.3d at 862 n. 1; *Encore Videos, Inc. v. City of San Antonio,* 310 F.3d 812, 819 (5th Cir.2002).

With respect to the first question, Justice Kennedy points out in his concurring opinion in *Alameda Books* that "the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one will reduce the secondary effects without substantially reducing speech." *Alameda Books,* 122 S.Ct. at 1742. Thus, the City must set forth its proposition. Once the City has done so, the analysis turns to whether there is sufficient evidence to support the proposition. *Alameda Books,* 122 S.Ct. at 1742.

**a. *The City's Proposition*** [FN3]

> FN3. Plaintiffs do not challenge the original Adult Entertainment Ordinance, but, rather, attack the constitutionality of the amendments to that Ordinance. (*See* Pl.'s Mem. of Law at 17.) Thus, the ensuing analysis will focus on the amendments.

The relevant inquiry entails an examination of the City's rationale for its Adult Entertainment Ordinance, and more particularly, the amendments thereto. *Alameda Books,* 122 S.Ct. at 1736 (plurality opinion), 1741 (Kennedy, J., concurring). It appears from the face of the Ordinance that it was enacted to reduce the purported secondary effects of adult entertainment establishments. In the original enactment, the Ordinance stated that "adult bookstores and adult entertainment, because of their very nature, are recognized as having serious objectionable characteristics, *particularly when several of them are concentrated under certain circumstances.*" (Pl.'s Mem. of Law at 17) (emphasis added.) Numerous studies and cases discuss "the geographical correlations between the presence or concentration of adult business establishments and enhanced crime rates." *Alameda Books,* 122 S.Ct. at 1734-35 (plurality opinion) and ***30** at 1747-48 (Souter, J., dissenting); *Young,* 427 U.S. at 71 n. 34, 96 S.Ct. 2440. This rational (prohibiting the concentration of adult entertainment establishments) does not, however, explain the amendments, particularly with respect to the termination of the pre-existing, non-conforming uses. The effect of the amendments on plaintiffs would be to require Erie's adult entertainment establishments to relocate to certain zones; not reduce the concentration of adult entertainment establishments. In fact, Ordinance 99-11 reduced the proximity restrictions, thereby

contradicting the idea that the secondary effects associated with adult entertainment establishments are reduced when such establishments are dispersed rather than concentrated.[FN4]

> FN4. The Supreme Court has noted that, once a municipality has identified unwanted secondary facts, they are free to adopt schemes they believe will address those secondary effects. "Cities may regulate adult theaters by dispersing them ... or by effectively concentrating them.... It is not our function to appraise the wisdom of the city's decision to require adult theaters to be separated rather than concentrated in the same areas.... The city must be allowed a reasonable opportunity to experience with solutions to admittedly serious problems." *Renton,* 475 U.S. at 52, 106 S.Ct. 925 (internal citations, alterations and quotations omitted).

The preamble to the amendments, however, illustrate other purposes of the Ordinance. These other purposes include reducing the effect of adult entertainment establishments on property values, the health and safety of young adults and children, and on the established sense of community and general quality of life in the City. (*See* Pl.'s Ex. B.) [FN5] These are all goals that have been approved by the Supreme Court. In *Young* and *Renton,* the Supreme Court stated that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *Renton,* 475 U.S. at 50, 106 S.Ct. 925 (quoting *Young,* 427 U.S. at 71, 96 S.Ct. 2440); *see also Aurora,* 136 F.3d at 688. Requiring adult entertainment establishments to locate to certain sections, or zones, within the City to protect residential neighborhoods and commercial areas from "urban blight" is a valid rationale. *See Renton,* 475 U.S. at 50, 52, 106 S.Ct. 925; *Young,* 427 U.S. at 71-72, 96 S.Ct. 2440; *Deja Vu-Everett-Federal Way, Inc. v. City of Federal Way,* 46 Fed.Appx. 409, 2002 WL 1929375 (9th Cir.2002) ("*Deja Vu* "); *Z.J. Gifts D-4, L.L.C. v. City of Littleton,* 311 F.3d 1220 (10th Cir.2002); *Aurora,* 136 F.3d 683.

> FN5. The City's purported interest in reducing "exposure to adult-oriented expression undesired by neighbors, pedestrians and passersby" (*see* Pl.'s Exs. B and C), is suspect and arguably an impermissible basis upon which to enact the Ordinance. *See Erznoznik v. City of Jacksonville,* 422 U.S. 205, 208-12, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) ("Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive....But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power....[T]he limited privacy interests of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.")

**b. *The City's Rationale for the Amendments***

The next question is whether the City's evidence supports its rationale for the amendments. In granting plaintiffs' motion for a preliminary injunction, it was found that

The City has submitted no evidence whatsoever that either the 1999 Amendment or the 2000 Amendment was designed to address the secondary effects of adult businesses within the City which ***31** were not adequately addressed by the initial version of the Adult Ordinance, or that plaintiff's businesses are responsible for any adverse secondary effects in their current, grandfathered locations.... [T]he City has wholly failed to provide any rational explanation why the elimination of the grandfathering provision under the original version of the Adult Ordinance was necessary to accomplish this objective....

[I]t is clear that the City cannot show that it had before it, and considered, evidence that adverse secondary effects still exist and that the city had a reasonable basis for believing that the new restrictions it enacted would specifically address these effects. In light of the fact that the City's actual experience under the Adult Ordinance demonstrates an absence of evidence of secondary effects, it simply cannot be said that it was reasonable to conclude that a study of other communities was relevant to the issue of whether the grandfathered adult businesses were creating adverse secondary effects within the City. Accordingly ... there is a substantial likelihood that the City will not

be able to demonstrate that the eliminating of the grandfathering provision from the Adult Ordinance was designed to further the City's interest in ameliorating the secondary effects of adult businesses within Schenectady.

*Erie Blvd. Triangle Corp.*, 152 F.Supp.2d at 247-48 (internal quotation and citation omitted).

Since that decision, however, the Supreme Court issued its decision in *Alameda Books.* In *Alameda,* the City of Los Angeles conducted a study in 1977 of the effects of adult entertainment establishments. *Alameda Books,* 122 S.Ct. at 1732. The study "concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities." *Id.* at 1732. Based upon the study, in 1978, Los Angeles enacted an ordinance prohibiting "the establishment, substantial enlargement, or transfer of ownership of an adult arcade, bookstore, cabaret, motel, theater, or massage parlor, or a place for sexual encounters within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park." *Id.* Five years later, the City of Los Angeles amended its adult entertainment ordinance by prohibiting "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." *Id.* The amendment provided that the operation of an adult arcade, bookstore, cabaret, motel, theater or massage parlor, or place for sexual encounters "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same location." *Id.* Before enacting the amendments, Los Angeles did not conduct any new studies concerning the success or failure of the prior law, and did not ascertain whether the plaintiffs' non-conforming businesses were responsible for any alleged adverse secondary effects.

The Ninth Circuit struck down the ordinance finding that Los Angeles "failed to demonstrate ... that the prohibition on multiple-use adult establishments was designed to serve its substantial interest in reducing crime." *Id.* at 1734. "The Court of Appeals found that the 1977 study did not reasonably support the inference that a concentration of adult operations within a single adult establishment produced greater levels of criminal activity because the study focused on the effects that a concentration of establishments-not a concentration of operations within a single establishment-had on crime rates." *Id* at 1734-35.

***32** The Supreme Court reversed the Ninth Circuit and approved of Los Angeles's modification of its existing adult entertainment ordinance by relying upon the same 1977 study the City used in enacting the original ordinance. *Alameda Books,* 122 S.Ct. at 1736-38; *see also Deja Vu-EverettFederal Way, Inc.*, 46 Fed.Appx. 409, 2002 WL 1929375. The Supreme Court believed that "it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Alameda Books,* 122 S.Ct. at 1735. More important, perhaps, the plurality opinion rejected a requirement that the city demonstrate with empirical data that its ordinance will successfully lower the secondary effects. *Id.* at 1736. "Such a requirement would go too far in undermining our settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech." *Id.* (internal quotations and citations omitted); *id.* at 1743 ("[W]e have consistently held that a city must have latitude to experiment ... and that very little evidence is required.") (Kennedy, J., concurring); *see also Renton,* 475 U.S. at 52, 106 S.Ct. 925; *Young,* 427 U.S. at 71, 96 S.Ct. 2440. "A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *Id.* Other cases have reached similar results. For example, in *BZAPS, Inc. v. City of Mankato,* 268 F.3d 603, 607 (8th Cir.2001), the Eighth Circuit stated that "once a city has validly forbidden adult uses within a particular area, it may enforce that ordinance against all adult uses in that area without showing that a particular use will produce secondary effects. *Renton*... does not require cities to discriminate among adult uses." Similarly, in *Deja Vu,* the Ninth Circuit expressly rejected the arguments that: (1) a municipality's amendments to its adult zoning laws were unconstitutional because the municipality had not shown that the then-existing regulations had proven ineffective at curbing the secondary effects of adult uses; and (2) the municipality should be required to conduct its own study to show why the existing regulations need to be modified. *Deja Vu,* 46 Fed.Appx. at 410-11.

[4][5] Thus, the First Amendment is satisfied "so long as whatever evidence the city relied upon is reasonably believed to be relevant to the problem that the city addresses." *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925. Municipalities are not required to conduct empirical studies of the impact of adult entertainment establishments on their own city, but are "entitled to rely on the experiences of ... other cities." *Id.* at 51, 106 S.Ct. 925; *see also Ben's Bar,* 316 F.3d at 725-26; *Encore Videos,* 310 F.3d at 821; *BZAPS, Inc.,* 268 F.3d at 606 (upholding ordinance where municipality relied upon studies of other cities); *Clark v. City of Lakewood,* 259 F.3d 996, 1015 (9th Cir.2001); *Aurora,* 136 F.3d at 687. Further, in the absence of actual and convincing evidence from plaintiffs to the contrary, municipalities need not demonstrate with empirical evidence that its ordinance will successfully reduce crime. *Alameda,* 122 S.Ct. at 1736.

This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the ***33** municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rational in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

*Id.* at 1736.

[6] Plaintiffs contend that there is no evidence substantiating the City's claim that it adopted the Adult Entertainment Ordinance and the amendments thereto to address the alleged secondary effects of adult entertainment establishments. Plaintiffs argue that no evidence other than the Penna Report was considered by the City in support of the Adult Entertainment Ordinance and its amendments, and that the Penna Report itself is unreliable. Plaintiffs further maintain that the loosening of the proximity restrictions contradicts the City's purported rationale for the Ordinance. The City responds that it enacted the Adult Entertainment Ordinance and its amendments to address the impact that adult entertainment establishments allegedly have on crime, property values, retail businesses, urban blight, quality of life, and the tax base. (Murphy Aff. at ¶ 13.) The City relies upon the Penna Report it commissioned in 1998 that analyzes the secondary effects of adult entertainment establishments in other cities, the Supreme Court's decision in *Renton,* complaints from City residents and police officers, the testimony of two citizens at a City Council meeting, the observations of its current mayor, and a 1994 report from New York City.

[7] When fairly read, the Penna Report may provide a reasonable basis for the City's decision to require all adult entertainment establishments to relocate to certain zones within the City. For example, the Penna Report identifies a negative impact on the commercial climate of all the cities studies. (Pl.'s Ex. I.) This negative impact includes decreased commercial property values; the reluctance of commercial establishments to remain, or relocate, next to an adult entertainment establishment; high increases in business turn over rates as compared to areas not containing adult entertainment establishments; and the difficulty in attracting customers to non-adult entertainment businesses that are in close proximity to adult establishments. (*Id.*) The Penna Report also identified, among other things, a negative impact on residential property values. (*Id.*) It is reasonable for the City to conclude that the Penna Report supports the notion that restricting adult entertainment establishments to industrial areas will reduce the secondary effect of those establishments in commercial and residential areas. Thus, a fair-minded trier of fact could reasonably conclude that the evidence upon which the City relied fairly supports the rationale for the Ordinance. Although it would be preferable for the City to have studied the actual effects of adult entertainment establishments in Schenectady, the City did not have an opportunity to assess the efficacy of its proposal because the current pre-existing, non-conforming uses have always been in the commercial locations. In other words, the City cannot know whether requiring adult entertainment establishments to relocate to industrial areas will successfully reduce the unwanted secondary effects in commercial and/or nearby residential zones until all adult entertainment establishments (including those that are now there) are removed from those zones. In any event, the City is not obligated to undertake any such empirical studies. *Alameda Books,* 122 S.Ct. at

1736.

***34** Plaintiffs also attack the basis for the Penna Report and further claim that the existing adult entertainment establishments that operate in Schenectady have operated without incident. These are disputed issues of fact that preclude summary judgment. Plaintiffs' contention that their businesses have operated for many years without adversely affecting the City or neighborhoods is not based on any empirical or other tangential evidence, but upon the conclusory statement of Erie's treasurer that was qualified as being "upon information and belief." (Montal Aff., ¶ 79.) This is an insufficient basis upon which to award summary judgment in plaintiffs' favor. *See Alameda Books,* 122 S.Ct. at 1736. Plaintiffs do not offer any other evidence that disputes the City's factual findings. Although plaintiffs' expert purports to be undertaking an empirical study of the secondary effects of adult entertainment establishments on the City of Schenectady, no such studies are included in the record. Whether the Penna Report is a reliable source upon which the City could reasonably rely is a factual issue inappropriate for resolution on summary judgment. The City's evidence, including the Penna Report, the evidence of secondary effects discussed in *Renton* and *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 585 P.2d 1153 (1978), *cert. denied,*441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979),[FN6] and the 1994 report prepared by the New York City Department of City Planning (*see* Pl.'s Exs. B, C, and M), may be sufficient to support its rationale that relocating adult entertainment businesses out of commercial and/or residential areas will decrease the purported negative secondary effects of those establishments in commercial and residential areas-areas in which the City apparently is primarily concerned with improving.[FN7] *See Renton,* 475 U.S. at 54, 106 S.Ct. 925 ("Renton has not used the power to zone as a pretext for suppressing expression, but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning."***35** ) (internal quotations and citations omitted); *see also Giovani Carandola,* 303 F.3d at 516 ("[A] governmental entity may rely on the 'evidentiary foundation' set forth in [*Renton* and *Young* ] ... to 'conclude that such nude dancing [i]s likely to produce the same secondary effects in its jurisdiction unless the plaintiff produces clear and convincing evidence to the contrary.' ") (quoting *City of Erie v. Pap's A.M.,* 529 U.S. 277, 296-97, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion)).

FN6. It is evident from the Ordinance that the City took *Renton* into consideration when enacting the amendments. (*See* Pl.'s Exs. B, C.) *Renton* discussed the secondary effects of adult entertainment establishments as found in *Northend Cinema. Renton* held that a city is entitled to rely upon the experiences of other cities and the findings summarized in court cases. *Renton,* 475 U.S. at 50-51, 106 S.Ct. 925. Looking at the evidence in the light most favorable to the non-movant, it is reasonable to infer that the City considered the secondary effects discussed in *Renton,* which includes those discussed in *Northend Cinema.*

FN7. The City points to additional anecdotal evidence that it allegedly relied upon in drafting the ordinances. Such additional anecdotal evidence includes the following: the Rabbit Lounge, an adult entertainment business, was a known hangout for prostitutes and pimps; the owner of the "Toy Box," another adult business, and his wife were convicted of prostitution-related charges; undocumented complaints from residents and neighboring municipalities concerning adult business in Schenectady; undocumented businesses that have left the City and refused to relocate to the City; the Mayor's personal experience regarding property values in the City; studies performed by Oneida County, New York and the City of Utica, New York; and testimony from residents that "establishments of this nature threaten[ ] the moral character of the City," and "[are] detrimental to the City." (*See* Def.'s Ex. C, D; Pl.'s Exs. J, M.) It is unclear whether this other evidence was actually considered by the City when it enacted the Ordinance and the amendments thereto. Even without this evidence, in the absence of clear and convincing evidence to the contrary, the City's evidence is sufficient to withstand Plaintiffs' motion for summary judgment. *See Alameda Books,* 122 S.Ct. at

1736; *Giovani Carandola,* 303 F.3d at 516.

**4.** ***Alternative Avenues of Communication***

The City's Ordinance may be found to be unconstitutional if it does not allow for reasonable alternative avenues of communication. *Renton,* 475 U.S. at 53-54, 106 S.Ct. 925. This is because, "[t]hough the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech." *Alameda Books,* 122 S.Ct. at 1739-40 (Kennedy, J., concurring). "Content-neutral zoning ordinances ... are permissible so long as 'reasonable avenues of communication' are left open ... a question that is answered through an analysis of how much land is available in which adult businesses may be located under the zoning system." *Littleton,* 311 F.3d at 1239 (quoting *Renton,* 475 U.S. at 53-54, 106 S.Ct. 925). "In undertaking that analysis, the courts must examine what land is actually available, but also must keep in mind that adult businesses must 'fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees.' " *Id.* (quoting *Renton,* 475 U.S. at 54, 106 S.Ct. 925).

The City, through the affidavit of its zoning officer, states that there are 924 acres and 349 parcels located in the G and H zones in which adult entertainment establishments can locate. (Def.'s Ex. H, ¶ 4.) Of these 924 acres and 349 parcels, 439 acres and 101 parcels would be potential sites where adult entertainment businesses could locate. (*Id.*) Taking into consideration the proximity requirements of the Adult Entertainment Ordinance, the City asserts that there are a total of thirteen potential sites for approximately four existing adult entertainment establishments. (*Id.,* ¶ 6.) The City contends that its data is based upon zoning office files "which identify 101 potential lots within G and H zones, identify readily available public access to such lots, identify the properties as suitable for commercial enterprises and are, or have the potential to be, part of an actual business real estate market." (*Id.* at ¶ 8.)

Plaintiffs agree with the City with respect to three potential sites. (Pl.'s Ex R, ¶ 11.) Plaintiffs contend that the remaining potential sites offered by the City are not fit for general commercial operations. According to plaintiffs, two of the sites consist of a local governmental sewage treatment plant and a newspaper printing plant, and therefore, are unlikely to become available for commercial use. (*Id.* at ¶ 14.) Plaintiffs insist that the remaining sites are industrial sites that either do not have the necessary infrastructure (*i.e.* street lights and sidewalks) necessary to protect the public health, safety, and welfare, or cannot provide sufficient parking to comply with other City zoning requirements.

Much of plaintiffs' "evidence," however, consists of supposition; not actual evidence. For example, plaintiffs' expert states that "it is *likely* to be impossible for any of these industrial uses to provide adequate parking for an adult cabaret, and it *could* be problematic for them to provide ***36** parking for an adult bookstore." (Dkt. No. 50 at 16) (emphasis added.) [FN8] These possibilities are an insufficient evidentiary basis upon which to rule out the City's proposed sites and grant summary judgment to plaintiffs. These competing opinions merely highlight the existence of issues of fact that preclude the grant of summary judgment in favor of plaintiffs.

FN8. *See also id.* at 18 ("[A]n Adult Use *could* be barred by a lack of adequate parking"), 19 ("The vacant parcel that *appears* to be part of a rail yard ... is a permanent occupancy *not likely* to relocate."), 19 ("The scrap yard ... is undoubtedly encumbered by serious hazardous waste contamination.") (emphases added).

**B.** ***Enactment of Amendments***

[8] Plaintiffs also attack the amendments to the Adult Entertainment Ordinance on the ground that they were not enacted in accordance with the proper procedures. A proceeding pursuant to N.Y.C.P.L.R. Art. 78 is available to challenge whether an ordinance was enacted in accordance with the proper procedures. *Save Pine Bush, Inc. v. City of Albany,* 70 N.Y.2d 193, 202, 518 N.Y.S.2d 943, 512 N.E.2d 526 (1987). The statute of limitations for Article 78 proceedings is four months. N.Y.C.P.L.R. § 217; *Save Pine Bush,* 70 N.Y.2d at 203, 518 N.Y.S.2d 943, 512 N.E.2d 526. Plaintiffs failed to timely commence an Article 78 proceeding challenging the procedures used

to enact the amendments to the Adult Entertainment Ordinance. The plaintiff's second cause of action must be dismissed.

**V. *CONCLUSION***

The City of Schenectady's Adult Entertainment Ordinance does not ban all adult uses and is content neutral. Questions of fact remain whether the Ordinance is narrowly tailored to serve a substantial government interest. Questions of fact also remain whether the Ordinance allows for reasonable alternative avenues of communication. Plaintiffs failed to timely challenge the procedures used to enact the amendments to the Ordinance.

Accordingly, it is

ORDERED that

1. Plaintiffs' motion for summary judgment is DENIED; and

2. Plaintiffs' Second Cause of Action is DISMISSED.

IT IS SO ORDERED.

N.D.N.Y.,2003.
Erie Boulevard Triangle Corp. v. City of Schenectady
250 F.Supp.2d 22

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5634 East Hillsborough Ave., Inc. v. Hillsborough County, Fla.
M.D.Fla.,2007.
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.
5634 EAST HILLSBOROUGH AVENUE, INC., d/b/a "Tootsies;" Gemini Property Ventures, LLC, d/b/a "Showgirls;" and Showgirls Mens Club, Inc., d/b/a "Showgirls," Plaintiffs,
v.
HILLSBOROUGH COUNTY, FLORIDA, Defendant.
**No. 8:06-cv-1695-T-26EAJ.**

Oct. 4, 2007.

Luke Charles Lirot, Noel Howard Flasterstein, Law Offices of Luke Charles Lirot, P.A., Clearwater, FL, for Plaintiffs.
James C. Stuchell, Scott D. Bergthold, Law Office of Scott D. Bergthold, P.L.L.C., Chattanooga, TN, Robert E. Brazel, Hillsborough County Attorney's Office, Tampa, FL, for Defendant.

***ORDER***

RICHARD A. LAZZARA, United States District Judge.
***1** Before the Court is Defendant's Motion for Summary Judgment and various affidavits, depositions, exhibits [FN1] and Plaintiff's Response in Opposition and affidavits and exhibits.[FN2] After careful consideration of the arguments, the record and the applicable law, the Court concludes that the Motion should be granted.

FN1. *See* dockets 35-42.

FN2. *See* dockets 45, 46 & 47.

**Background**

The Plaintiffs in this consolidated action are sexually oriented businesses located in Hillsborough County, Florida. This action involves a constitutional challenge, both facially and "as applied" to three adult use ordinances. In one of the two complaints,[FN3] the Plaintiffs are "bikini bars" located in the County: Tootsies in Tampa, Showgirls in Plant City, and Showgirls in Valrico. In the second complaint,[FN4] the Plaintiffs include additional adult businesses in Hillsborough County, including the adult book stores known as 4-Play Videos III, Pleasures I, and Planet X, all licensed adult bookstores in Tampa, and an additional bikini bar known as Showgirls Men's Club in Brandon.[FN5] According to the first complaint, a "bikini bar" is "a place of public assembly serving alcohol to patrons, in conjunction with providing First Amendment protected dance performances, the content of which emphasizes issues dealing with a variety of human emotions, all presented by females wearing [bikinis]."[FN6] These bikini bars are located in "an area of generic commercial uses which are fronted by widely traveled roads."[FN7]

FN3. *See* docket 1.

FN4. *See* docket 1 at 8:06-cv-2323-T-26MAP.

FN5. *See* docket 1 at 8:06-cv-2323-T-26MAP at paras. 8-13.

FN6. *See* docket 1 at paras. 8, 9 & 10.

FN7. *See* docket 1 at para. 14; docket 1 at 8:06-cv-2323-T-26MAP at para. 16.

On September 7, 2006, Hillsborough County's Board of Commissioners (the Board) unanimously adopted three ordinances [FN8] which regulate sexually oriented businesses in Hillsborough County: Ordinance 06-24; Ordinance 06-25, and Ordinance 06-26.[FN9] All of these three ordinances regulate sexually oriented businesses. Ordinance 6-24 involves zoning, Ordinance 06-25 involves licensing and regulations, and Ordinance 6-26 involves "bikini bars." The purpose of all three ordinances is articulated in the body of the ordinances as follows:

FN8. *See* docket 35, Ex. A, B & C.

FN9. The effective date of the ordinances was January 10, 2007; however, according to

> the County, it has not enforced the three ordinances against the Plaintiffs in this action.
>
> It is the purpose of this ordinance to regulate [*the location of sexually oriented businesses* in Ord. 06-24; *sexually oriented businesses* in Ord. 06-25; *alcoholic beverage establishments* in Ord. 06-26] in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of [*sexually oriented businesses within the County* in Ords. 06-24 & 06-25; *paid physical contact in alcoholic beverage establishments between patrons and certain employees of the establishment* in Ord. 06-26]. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the purpose nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the purpose nor effect of this ordinance to condone or legitimize the distribution of obscene material *or performances.*
> ***2** Ord. 06-24 § 2.02.06(D)(1); Ord. 06-25 § 2 1/2-41(a); Ord. 06-26 § 3-61(A) (emphasis added). Each ordinance also contains a section titled "Findings and Rationale" which recites that the Board has reviewed evidence of adverse secondary effects of adult uses presented in hearings and in reports made available to the Board and lists numerous opinions in cases in which courts have interpreted evidence of this nature. Ord. 06-24 § 2.02.06(D)(2); Ord. 06-25 § 2 1/2-41(b); Ord. 06-26 § 3-61(B).

Relying on the cases cited in addition to evidence presented in hearings and reports made available to the Board, each of the three ordinances articulates the findings. In both the zoning and the licensing and regulatory ordinances, the findings by the Board are as follows:

> Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, public safety risks, prostitution, potential spread of disease, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal behavior associated with alcohol consumption, negative impacts on surrounding properties, litter, and sexual assault and exploitation.
>
> ....[FN10]
>
> FN10. The zoning ordinance contains the following additional statement regarding the location of sexually oriented businesses:
>
> > Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.
> >
> > Ord. 06-24 § 2.02.06(D)(2)(b).
>
> Each of the foregoing negative secondary effects constitutes a harm which the County has a substantial government interest in preventing and/or abating in the future. This substantial government interest in preventing secondary effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the County's interest in regulating sexually oriented businesses extends to future secondary effects that could occur in the County related to current sexually oriented businesses as well as sexually oriented businesses that may locate in the County in the future. The County finds that the cases and secondary effects documentation relied on in this ordinance are reasonably believed to be relevant to said secondary effects.
> Ord. 06-24 § 2.02.06(D)(2)(a)(c); Ord. 06-25 § 2 1/2-41(b)(1) (2). The "bikini bar" ordinance [FN11] contains the following findings by the Board:
>
> FN11. Ord. 06-26.

1. Paid physical contact between scantily-clad employees of alcoholic beverage establishments, including "bed" dances, "couch" dances, and "lap" dances as they are commonly called, are associated with and can lead to illicit sexual activities, including masturbation, lewdness, and prostitution, as well as other negative effects, including sexual assault.

2. The County finds that such paid physical contact by bikini-clad or otherwise scantily-clad employees in alcoholic beverage establishments, even though said employees are not nude or semi-nude as defined in other portions of the Hillsborough County code, is substantially similar to and presents similar concerns as conduct by nude and semi-nude performers in sexually oriented businesses.

***3** 3. Each of the negative effects targeted by this ordinance constitutes a harm which the County has a substantial government interest in preventing and/or abating in the future. This substantial government interest in preventing such negative effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between the regulated establishments and other, non-regulated establishments. The County finds that the cases and secondary effects documentation relied on in this ordinance are reasonably believed to be relevant to the County's interest in preventing illicit sexual behavior.

Ord. 06-26 § 3-61(B)(1)(2)(3).

Two public hearings were held before the Board prior to their adoption-one on August 2, 2006, and the other on August 16, 2006. Testimony was adduced both for and against the ordinances. The Board also reviewed judicial decisions, [FN12] secondary effects reports,[FN13] and affidavits from private investigators.[FN14]Both sides presented opinions from retained expert witnesses.[FN15]The County retained Richard McCleary, Ph.D., a criminologist and university professor who provided two reports.[FN16]Experts were also retained by the opposition to the ordinances: Terry A. Danner, Ph.D., who is the Chair for the Department of Criminal Justice at Saint Leo University; Randy D. Fisher, Ph.D., who is an associate professor of Psychology and Director of the Survey Research Laboratory at the University of Central Florida; Judith Lynne Hanna, Ph.D., who is an anthropologist, dance scholar and dance critic; and Richard Schauseil, who is a licensed Florida real estate agent.[FN17]The experts for the Plaintiffs opined that the crime associated with sexually oriented businesses was not more prevalent in areas where they are located, contrary to the reports provided by the experts retained by the County.[FN18]The Board considered all of the reports and testimony, both for and against the passage of the ordinances.

FN12. *See*docket 36 at Ex. D-01.

FN13. *See*docket 36 at Ex. D-05, pp. 8-11 (documenting higher sex-related crimes in study areas and 89% of indecent exposure crimes were committed on premises of adult businesses-study done in Phoenix in 1979); Ex. D-04, pp. 13-14 (documenting "illegal sex and unsanitary conditions in sexually oriented businesses"-study done in Tucson in 1990); Ex. D-07, pp. 5-6 & 8 (articulating findings on criminal activities of prostitution, public lewdness, narcotics and indecent exposure associated with sexually oriented businesses and difficulty in enforcement of laws due to private areas blocked from view and booth configurations-legislative report in 1997 by Houston City council); Exs. D-08-18, D20a-23 (including reports from various cities including the dramatic decline in crime in Times Square after the removal of sexually oriented businesses there); Ex. D-19, pp. 32-38 (documenting paid acts of females engaging in masturbation in adult cabarets-transcript from testimony taken in Phoenix's hearings in "Adult Cabaret" in 1997). The record contains numerous additional studies, expert reports from other cases and testimony from other proceedings which predominantly support the fact that higher crime rates occur in areas where sexually oriented businesses exist.

FN14. *See*docket 36, Ex. D-03, which contains numerous affidavits from private investigators' visits to numerous bikini bars and adult bookstores in Hillsborough County. Many of the adult bookstores had peep show booths in which evidence of masturbation was detected. One of the

investigators purchased a "bed dance" and a "couch dance" from the employees at a bikini bar. Ex. D-03, pp. 2-3. Another investigator returned at a later time and received lap dances from two other employees. Ex. D-33. The Board also reviewed affidavits from private investigators' visits to sexually oriented businesses in Manatee County which contained similar evidence. Ex. D-25 & D-26.

FN15. *See* docket 37 Ex. D-29 & D-30 (providing opinions in favor of the passage of the ordinance); dockets 38-42 Ex. D-34a-34h, D35a-35h, D36a-36e, D37a-37g & D38a-d (providing opinions opposed to the passage of the ordinance).

FN16. *See* docket 37, Ex. D-29 & D-30 (substantiating that negative secondary effects of sexually oriented businesses such as ambient crime, illicit behavior such as paid sexual touching, and the spread of disease resulting from illicit sexual behavior, are well-documented and need not be established by comparing adult and non-adult businesses such as bars____ report prepared by Richard McCleary, Ph.D. to the Board dated August 30, 2006).

FN17. Three of these four experts were used in the opposition to summary judgment in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1270-71 (11th Cir.2003). No mention is made in the opinion of Dr. Hanna.

FN18. In this summary judgment proceeding, Plaintiffs submitted four new affidavits of their experts. To the extent they contain material and opinions of experts not previously disclosed to the County, this Court should not consider them. *See* *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1247 (11th Cir.2007) (striking new affidavits from four experts as untimely because they were filed in response to motion for summary judgment and information had not been earlier disclosed); *Norfolk Southern Corp. v. Chevron U.S.A., Inc.*, 279 F.Supp.2d 1250, 1274 (M.D.Fla.2003), *rev'd on other grounds*, 371 F.3d 1285 (11th Cir.2004) (holding that where affidavits of experts were filed after hearing on motion for summary judgment and affidavits contain information not found in original opinion, affidavits were stricken as late-filed expert disclosures which were prejudicial). Nevertheless, out of an abundance of caution, this Court has considered them in this summary judgment proceeding.

**Applicable Law**

The standard of review that applies to facial and "as applied" challenges to sexually oriented business ordinances is "intermediate scrutiny," as opposed to strict scrutiny, provided the ordinances do not totally ban sexually oriented businesses and they serve a substantial government interest such as curtailing adverse secondary effects. *See* *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000) (plurality opinion). In construing these types of ordinances, courts first look at whether the local government has carried its initial burden of showing that the ordinance was enacted for the purpose of regulating "adverse secondary effects." If the local government shows that the ordinance was enacted for this purpose, then the ordinance is deemed to be content-neutral, not directed at speech, and does not require strict scrutiny. Once this initial burden is satisfied, the burden shifts to the sexually oriented business to "cast direct doubt" on the local entity's rationale that enough evidence was presented to support its claim that its ordinance serves to reduce secondary effects without substantially reducing speech.[FN19] *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 451, 122 S.Ct. 1728, 1742-43, 152 L.Ed.2d 670 (2002); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F.3d 1251, 1263-64 (11th Cir.2003), *cert. denied*, 541 U.S. 988, 124 S.Ct. 2016, 158 L.Ed.2d 491 (2004). If doubt is cast on the rationale for the ordinance, then, presumably, the local entity must submit additional evidence to remove that doubt.

FN19. That the local entity cannot rely on "shoddy data or reasoning" is true; however, this statement in the plurality opinion of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39, 122 S.Ct. 1728, 1736, 152 L.Ed.2d 670 (2002), does not raise the

evidentiary bar for the local government. *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 880 (11th Cir.2007) (citing Justice Kennedy's concurrence as the holding in *Alameda* ).

***4** The amount of evidence the local government needs to support its rationale for its ordinance is "very little." *Alameda Books*, 535 U.S. at 451, 122 S.Ct. at 1742-43;*Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 880 (11th Cir.2007).[FN20] The same evidentiary standard of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 115 L.Ed.2d 504 (1991) remains in place today:

FN20 *Daytona Grand* became final on September 17, 2007, the date the mandate issued from the Eleventh Circuit Court of Appeals. *See* 6:02-cv-1468-JA-KRS at docket 202.

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed to be relevant* to the problem that the city addresses. *Alameda Books*, 535 U.S. at 451, 122 S.Ct. at 1743 (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29) (emphasis added); *Daytona Grand*, 490 F.3d at 880 (quoting same).

The Eleventh Circuit in *Peek-A-Boo Lounge* traced the history of how the United States Supreme Court has analyzed cases involving a local government's ordinance adopted to reduce the secondary effects of adult entertainment establishments. Generally, zoning ordinance cases are analyzed using the evidentiary standard set forth in *Renton*,[FN21] and public nudity ordinance cases are reviewed by the standard articulated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).[FN22]*Peek-A-Boo Lounge*, 337 F.3d at 1255-56.Over the years, however, the Supreme Court has melded the two standards together to some degree, largely due to the numerous plurality opinions. *Peek-A-Boo Lounge*, 337 F.3d at 1255.For example, although *Renton* applies to zoning ordinances, the third prong of the *Renton* standard is the second prong of the *O'Brien* standard.*Daytona Grand*, 490 F.3d at 874 n. 20;*Peek-A-Boo Lounge*, 337 F.3d at 1264 (relying on *Alameda Books* ). In analyzing the cases, it is well-established that the local government need only recite in its ordinance "the protection and preservation of the quality of life in the city" in order to show that reducing negative secondary effects is the rationale for the ordinance. *Zibtluda, LLC v. Gwinnett County, Ga.*, 411 F.3d 1278, 1286 (11th Cir.2005).

FN21. Zoning ordinances limiting the location of adult businesses are evaluated based on time, place, and manner regulations. A zoning ordinance is reviewed based on the following framework:

> [F]irst, the court must determine whether the ordinance constitutes an invalid total ban or merely a time, place, and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.
>
> *Daytona Grand*, 490 F.3d at 870.

FN22. A public nudity ordinance should be upheld if the following four prongs are met:

> (1) [is] within the constitutional power of the government to enact; (2) further[s] a substantial government interest; (3)[is] unrelated to the suppression of free expression; and (4) restrict[s] First Amendment freedoms no greater than necessary to further the government's interest.
>
> *Peek-A-Boo Lounge*, 337 F.3d at 1264.

The case of *Daytona Grand* is the most recent statement on the standard to be applied in this case. In *Daytona Grand,* the Eleventh Circuit followed the standard set forth in *Peek-A-Boo Lounge* and the precedent relied on therein when it reversed the

district court on its ruling voiding the three nudity ordinances after denying summary judgment and conducting a six-day bench trial. The Eleventh Circuit reiterated its statement in *Peek-A-Boo Lounge* regarding the type of evidence necessary to support a local entity's rationale:

> To satisfy *Renton,* any evidence "reasonably believed to be relevant"-including a municipality's own findings, evidence gathered by other localities, or evidence described in judicial opinion-may form an adequate predicate to the adoption of a secondary effects ordinance.

***5** *Daytona Grand,* 490 F.3d at 881.The entity need not rely on "empirical" studies as opposed to "anecdotal" accounts. *Id.*"Anecdotal evidence is not 'shoddy' *per se."Id.* If the local entity could have reached a different conclusion about the interaction between adult businesses and adverse secondary effects based on its own knowledge, the ordinance is not considered unconstitutional. *Id.* As long as the entity's rationale for the ordinance is reasonable, even if other reasonable but different conclusions exist, the court must not substitute its judgment for the local government's.*Id.* at 882.

**Argument**

Plaintiffs primarily argue that they submitted evidence at the public hearing in the form of expert reports, opinions, and testimony, and now on summary judgment in the form of four affidavits from their four experts, that refute the data submitted by the County. Additionally, Plaintiffs argue that the data provided by the County does not relate to the areas surrounding the Plaintiffs' businesses in Hillsborough County. Plaintiffs contend that summary judgment must not be permitted because a genuine issue of material fact has been shown through the discrepancies between the data submitted by the County and Plaintiffs' own affiants' information. Plaintiffs' experts claim that Plaintiffs' businesses add no heightened probability that crime occurs more frequently in areas where sexually oriented businesses are located as opposed to any other type of "non-adult" business.

The County argues that its evidence supports its rationale for the creation of all three ordinances. The ordinances, it argues, are deemed to be content-neutral and are narrowly tailored to combat the adverse secondary effects of sexually oriented businesses. Without banning speech, the ordinances fairly regulate the time, place and manner in which sexually oriented businesses may operate. The County argues that it was not required to show that its ordinances regulate all sources of secondary effects or that "non-adult" entertainment businesses have just as many or greater negative secondary effects than sexually oriented businesses. The County contends that the Plaintiffs' evidence did not cast doubt on the rationale for the ordinances, which is supported by judicial opinions, reports, studies, expert opinions, direct testimony, and direct evidence from investigators visiting adult book stores and bikini bars in Hillsborough County.

**Analysis**

The Court agrees with the County. There is no question from a reading of the three ordinances that they do not constitute a ban on sexually oriented businesses, but rather regulations on time, place, and manner. The ordinances, as stated in the body of each of them, strive "neither to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market."*See Zibtluda,* 411 F.3d at 1286.

***6** Second, the rationale of the County appears in all three ordinances. The foremost reason for the enactment of the ordinances is "to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County [Ords. 06-24 & 06-25]" and "of paid physical contact in alcoholic beverage establishments between patrons and certain employees of the establishment [Ord. 06-26]." The rationale is expressed in terms of preventing "deleterious secondary effects." Having placed its rationale in the body of each of the three ordinances, the County has met its initial burden of showing that the ordinances were enacted for the purpose of regulating adverse secondary effects. As such, the ordinances are considered content-neutral, or not directed at speech, and therefore subject to First Amendment review under intermediate scrutiny. *See Daytona Grand,* 490 F.3d at 870 (quoting *Peek-A-Boo Lounge,* 337 F.3d at 1264;*Zibtluda,* 411 F.3d at 1284-85).

Having determined that intermediate scrutiny applies, the Court finds that the ordinances are crafted to serve a substantial government interest-a reduction in negative secondary effects, while allowing for reasonable alternative channels of communication. All three ordinances provide that the "substantial government interest in preventing secondary effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses."Ord. 06-24 § 2.02.06(D)(2)(c); Ord. 06-25 § 2 1/2-41(b)(2). Plaintiffs attack the County's evidence essentially on the basis that it failed to use empirical studies to show that sexually oriented businesses attract more crime than non-sexually oriented businesses, and in fact, Plaintiffs' experts opined that the opposite is true. Plaintiff takes issue specifically with Dr. McCleary's opinion for the County and points to the twenty-five studies relied on by Dr. Danner to refute the finding that significant crime-related adverse secondary effects are caused by and associated with the operation of sexually oriented businesses.[FN23]

FN23. *See*docket 38 Ex. D34a-34h; docket 47, Exh. A.

The County contends that Dr. Danner applied the wrong standard to the ordinances, ignored the County's true rationale for the ordinances, and used faulty data to support his conclusions about the ordinances. In his expert report, Dr. Danner concluded as follows:

> [in] over twenty studies using law enforcement generated crime data and done in five states over 9 years with a variety of research designs have failed to produce any significant evidence that adult cabarets are uniquely criminogenic. The meta-analysis of all these studies combined suggests that alcohol-serving adult cabarets are probably no more likely to facilitate criminal behavior than their non-adult entertainment providing counterparts. It is most likely that alcohol is the common denominator and that whether or not a nightclub offers adult entertainment is inconsequential to the crime-related secondary effects produced by such late-night alcohol serving environments. Other business related factors not measured in these studies, such as the quality of management and the details of location, have probably influenced the variance in measurable crime causing effects that have been found among them.

***7** *See*docket 42, Ex. D38a at p. 16.In his affidavit filed for purposes of this summary judgment, Dr. Danner opined that the operation of adult entertainment businesses does not disproportionately increase criminal activity over and above any normal crime to be expected in a retail business or place of public assembly. In other words, he concluded that adult entertainment businesses are not "uniquely criminogenic." He made a distinction between less frequented adult bookstores and heavily patronized "gentlemen clubs." He noted that the County's evidence was lacking for "bikini bars."

Even if this Court were to consider the information provided in the four affidavits, it would not change the outcome of this case, because the information contained in those affidavits is either already in the legislative record or insufficient to cast doubt on the County's rationale for the ordinances. Considering all of the evidence provided by Plaintiffs' four experts, Drs. Danner, Fisher, and Hanna, and Mr. Schauseil, together, the Court finds that the Board reasonably relied on or "reasonably believed to be relevant" the studies presented by the County about the problem of adverse secondary effects. *See* *Peek-A-Boo Lounge,* 337 F.3d at 1262-64.The County submitted more than the "very little evidence" that is required to support its claim that the ordinances serve to reduce adverse secondary effects and do not substantially reduce free speech. *Peek-A-Boo Lounge,* 337 F.3d at 1264.The County not only relied upon an expert and studies used and approved by other courts, but retained investigators who actually visited similar or the same sexually oriented businesses as the Plaintiffs in this case and found evidence to support criminal conduct, the spread of communicable diseases, and other non-crime related adverse secondary effects.

Once the County relied on evidence it reasonably believed to be relevant to the problem of adverse secondary effects, the burden then shifted to the Plaintiffs to "cast direct doubt" on the County's reasoning. This cannot be accomplished, however, by simply providing reports and testimony reaching a contrary conclusion such as those prepared and given by Drs. Danner, Fisher, and Hanna, and Mr. Schauseil, all experts retained by the Plaintiffs.[FN24]*Daytona Grand* made it clear that given the existence of

different conclusions based on studies, either empirical or anecdotal, the Court may not substitute its judgment for the Board. Thus, out of an abundance of caution, this Court has considered all of the evidence, including the information in the four affidavits submitted by Plaintiffs. This Court cannot say that the Plaintiffs have cast direct doubt on the County's rationale for the ordinances. The process is not one in which the County must exclude all theories inconsistent with its own. Even assuming the Plaintiff's position for its rationale is also considered to be plausible and reasonable, this Court, as noted, cannot substitute its judgment for that of the Board. In this case, the Board considered all of the voluminous reports and the testimony at the public hearings and concluded that the County's rationale for these three ordinances was reasonably believed to be relevant to the reduction of adverse secondary effects associated with sexually oriented businesses. This record contains no basis upon which to reverse that determination.

FN24. *See* docket 35 at Ex. J-02, pp. 5-138.

***8** It is therefore **ORDERED AND ADJUDGED** as follows:

(1) Defendant's Motion for Summary Judgment (Dkt.35) is **GRANTED.**

(2) The Clerk is directed to enter Final Summary Judgment in favor of Defendant and against Plaintiffs.

(3) The Clerk is directed to close this case.

**DONE AND ORDERED.**

M.D.Fla.,2007.
5634 East Hillsborough Ave., Inc. v. Hillsborough County, Fla.
Not Reported in F.Supp.2d, 2007 WL 2936211 (M.D.Fla.)

END OF DOCUMENT

Daytona Grand, Inc. v. City of Daytona Beach, Fla. C.A.11 (Fla.),2007.

United States Court of Appeals,Eleventh Circuit.
DAYTONA GRAND, INC., a Florida corporation doing business as Lollipop's Gentlemen's Club, Miles Weiss, Plaintiffs-Appellants Cross-Appellees,
v.
CITY OF DAYTONA BEACH, FLORIDA, a municipal corporation, Defendant-Appellee Cross-Appellant.
**No. 06-12022.**

June 28, 2007.

**Background:** Owners and operators of an adult theater sued the city claiming that zoning and public nudity ordinances violated the First Amendment. The United States District Court for the Middle District of Florida, No. 02-01469-CV-ORL-28-KRS,John Antoon, II, J., 410 F.Supp.2d 1173, upheld the zoning ordinances, but struck down the nudity ordinances, and parties cross-appealed.

**Holdings:** The Court of Appeals, Marcus, Circuit Judge, held that:
(1) zoning ordinance limiting the locations where adult businesses may be located provided for a constitutionally sufficient number of sites to satisfy requirements of First Amendment, and
(2) public nudity ordinances did not violate First Amendment.

Affirmed in part, reversed in part, and remanded.

West Headnotes

**[1] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in General. Most Cited Cases

**Constitutional Law 92 2215**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2215 k. Availability of Other Sites. Most Cited Cases
Zoning ordinances limiting the locations where adult businesses may be located are evaluated under First Amendment under the three-part test for time, place, and manner regulations established in *City of Renton;* under that test, a new zoning regime must leave adult businesses with a reasonable opportunity to relocate, and the number of sites available for adult businesses under the new zoning regime must be greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect. U.S.C.A. Const.Amend. 1.

**[2] Constitutional Law 92 2210**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2210 k. Zoning and Land Use in General. Most Cited Cases
Simply because adult businesses must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not establish that a zoning ordinance limiting the locations where adult businesses may be located violates First Amendment. U.S.C.A. Const.Amend. 1.

**[3] Constitutional Law 92 2215**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses;

Adult Businesses or Entertainment
92k2215 k. Availability of Other Sites. Most Cited Cases

**Zoning and Planning 414 76**

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k76 k. Particular Uses. Most Cited Cases
Zoning ordinance limiting the locations where adult businesses could be located provided for a constitutionally sufficient number of sites to satisfy requirements of First Amendment; twenty-four sites in the district were available for First Amendment purposes, notwithstanding that all of the land in the district was owned by a single private landowner who could be reluctant or unwilling to develop or sell the land, and it was not constitutionally significant that the land was mostly vacant where the city had provided sufficient infrastructure for a private developer to commence development, including a paved road, telephone and power lines, and water and sewer lines. U.S.C.A. Const.Amend. 1.

**[4] Zoning and Planning 414 321**

414 Zoning and Planning
414VI Nonconforming Uses
414k321 k. In General. Most Cited Cases
Constitution does not require a "grandfathering" provision for existing nonconforming adult businesses, and any vested right to continue operating as a lawful nonconforming use derives from state law.

**[5] Constitutional Law 92 2642**

92 Constitutional Law
92XXI Vested Rights
92k2642 k. Zoning and Land Use. Most Cited Cases

**Zoning and Planning 414 326**

414 Zoning and Planning
414VI Nonconforming Uses
414k326 k. Unlawful Use. Most Cited Cases
Adult business failed to establish a vested right under Florida law to continue operating under new zoning ordinance as a lawful nonconforming use; when business began operating, it violated the zoning ordinances as then written, and consequently it could not have relied on existing law because it began operating plainly in contravention of that law, and there was no evidence of bad faith or arbitrary behavior by the city.

**[6] Constitutional Law 92 2187**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2187 k. Public Nudity or Indecency. Most Cited Cases
Public nudity ordinances that incidentally impact protected expression should be upheld under First Amendment if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest. U.S.C.A. Const.Amend. 1.

**[7] Constitutional Law 92 2213**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
For purposes of First Amendment analysis, reducing the secondary effects associated with adult businesses is a substantial government interest that must be accorded high respect. U.S.C.A. Const.Amend. 1.

**[8] Constitutional Law 92 1150**

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases
In showing that an ordinance challenged under First Amendment furthers a substantial, independent government interest, a city need not conduct new studies or produce evidence independent of that

already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses; although a municipality must rely on at least some pre-enactment evidence, such evidence can consist of a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion. U.S.C.A. Const.Amend. 1.

**[9] Constitutional Law 92 2219**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2219 k. Theaters in General. Most Cited Cases

**Constitutional Law 92 2240(1)**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2240 Performers
92k2240(1) k. In General. Most Cited Cases

**Intoxicating Liquors 223 15**

223 Intoxicating Liquors
223II Constitutionality of Acts and Ordinances
223k15 k. Licensing and Regulation. Most Cited Cases

**Public Amusement and Entertainment 315T 9(2)**

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(2) k. Dancing and Other Performances. Most Cited Cases

Public nudity ordinances, which required at least G-strings and pasties in all adult theaters regardless of location, and which required slightly more modest clothing at establishments that either served alcohol or were located within 500 feet of an establishment that served alcohol, did not violate First Amendment; city showed that nudity ordinances furthered its interest in reducing the negative secondary effects associated with adult theaters, the ordinances were narrowly tailored, and police calls for service (CAD) data relied on by business owners could have substantially undercounted incidents of many of the types of crime that the city sought to reduce. U.S.C.A. Const.Amend. 1.

***862** Daniel R. Aaronson, Banjamin & Aaronson, P.A., Ft. Lauderdale, FL, Gary S. Edinger, Gary S. Edinger, P.A., Gainesville, FL, for Plaintiffs-Appellants Cross-Appellees.
Scott D. Bergthold, Law Office of Scott D. Bergthold, P.L.L.C., Chattanooga, TN, Marie Hartman, Daytona Beach, FL, for Defendant-Appellee Cross-Appellant.
Anthony Angelo Garganese, Brown, Garganese, Weiss & D'Agresta, P.A., Orlando, FL, for Florida League of Cities, Inc., Amicus Curiae.
James Michael Johnson, Alliance Defense Fund of Louisiana, Shreveport, LA, for Citizens for Community Values, Amicus Curiae.

Appeals from the United States District Court for the Middle District of Florida.

Before HULL and MARCUS, Circuit Judges, and BARZILAY,[FN*] Judge.

FN* Honorable Judith M. Barzilay, Judge, United States Court of International Trade, sitting by designation.

MARCUS, Circuit Judge:
At issue today is the constitutionality of several zoning and public nudity ordinances adopted by the City of Daytona Beach ("the City") to regulate adult theaters. The owners and operators of Lollipop's Gentlemen's Club ("Lollipop's"), an adult theater in Daytona Beach, sued the City claiming that these ordinances violate the First Amendment. The district court upheld the zoning ordinances, finding that the City had provided a constitutionally sufficient number of available sites for adult theaters, and also denied Lollipop's claim that it was "grandfathered in" under Florida law. However, the district court struck down the nudity ordinances, concluding that they did not further the substantial government interest in reducing negative secondary effects associated with adult

theaters.

After thorough review, we affirm the district court's determination that the zoning ordinances pass constitutional muster, as well as its ruling that, under Florida law, Lollipop's is not entitled to grandfather status. But as for the nudity ordinances, we conclude that the City has indeed carried its evidentiary burden of establishing their constitutionality because ***863** the ordinances further substantial government interests, and, accordingly, we reverse and remand for further proceedings consistent with this opinion.

## I. *Background*

### *A. Zoning Ordinances*

In 1981, after years of increasing urban blight and economic decline, the City of Daytona Beach adopted various zoning ordinances in an effort to reduce the perceived secondary effects of adult businesses by limiting the locations where they could open and operate.[FN1] Among other things, the zoning ordinances permitted adult theaters[FN2] to open only in the City's Business Automotive ("BA") zoning districts, and even there prohibited them from locating within certain distances of churches, schools, parks, playgrounds, or other adult businesses.[FN3]

> FN1. *See* Daytona Beach, Fla., Ordinance 81-292 (Sept. 16, 1981); *see also* Daytona Beach, Fla., Ordinance 82-67 (Feb. 17, 1982) (amending the definition of "adult theater").
>
> FN2. The zoning ordinances define "adult theater," in relevant part, as "[a] use which exhibits any motion picture, exhibition, show, live show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, [or] sexual excitement." Daytona Beach, Fla., Ordinance 82-67 § 1 (Feb. 17, 1982), *codified at* Daytona Beach, Fla., Land Dev.Code art. II, § 3.1 (2001).
>
> FN3. Ordinance 81-292 added new provisions to and amended existing provisions of the City's zoning ordinances then in effect in order "[t]o reduce the adverse impacts of adult bookstores and adult theaters upon the City's neighborhoods." Ordinance 81-292 § 4. The Ordinance added definitions for "adult theater" and "adult bookstore," amended various provisions of the existing zoning ordinances for consistency, and, most importantly, added new sections to limit the locations where these adult businesses could open and operate. Those sections provided:
>
> > 51.2.1 Adult bookstores and adult theaters shall be permitted as a matter of right in BA, BA-1, and BA-2 Districts. These adult uses shall not pyramid into or be allowed within the BW Districts.
> >
> > 51.2.2 It shall be unlawful to locate any adult theater and adult bookstore within 400 feet of any area of the City zoned R-1aa, R-1a, R-1a(1), R-1b, R-1c, R-2, R-2a, RA, R-2b, RP, R-3, PUD, T-1 or T-2.
> >
> > 51.2.3 It shall be unlawful to locate any adult bookstore and adult theater within 1,000 feet of any other such adult bookstores or adult theaters.
> >
> > 51.2.4 It shall be unlawful to locate any adult bookstore and adult theater within 400 feet of any church, school, public park or playground, or any other public or semi-public place or assembly where large numbers of minors regularly travel or congregate.
> >
> > 51.2.5 Distances in 51.2.3 and 51.2.4 shall be measured from property line to property line, without regard to the route of normal travel.
>
> Ordinance 81-292 § 4. The Ordinance also limited adult businesses' use of outside advertising signs, prohibited them from painting their buildings in "garish colors," and required that all windows and doors be "blacked or otherwise obstructed" to block visibility of the inside from outside. *Id.*

In the mid-1980s, the zoning ordinances were

challenged on various grounds in *Function Junction, Inc. v. City of Daytona Beach,* 705 F.Supp. 544 (M.D.Fla.1987), *aff'd,*864 F.2d 792 (11th Cir.1988) (table). Gerald Langston, the City's Director of Planning and Redevelopment and a key participant in formulating the zoning ordinances, testified in that case as an expert in urban planning and about the legislative process that led to their enactment. Langston said that, before enacting the zoning ordinances, the City had conducted a local study of urban blight and decay that identified two blighted areas: the old downtown and the beachside. Langston explained that the identification of these areas as blighted was based on characteristics such as: "a significant percentage of deteriorating structures; a large number of small ... lots, which did not allow cars; ***864** a notable parking problem; a high incidence of crime, particularly, on the beachside; and a large percentage of antiquated, underground utility systems, such as drainage, water and sewer systems." *Id.* at 547. Langston testified that the blight deterred investment-hotel development ceased in 1975, and in the late 1970's, Daytona Beach was denominated the "City of Sleaze." *Id.*

Langston explained that the City of Daytona Beach then created a Redevelopment Design and Review Board to deal with the blight problem. *Id.* Langston worked with the Board and testified that it "considered studies of blight in Boston and Detroit by the American Society of Planning Officials in 1979-1980. These studies show strong evidence that the central location of adult uses, like the 'Combat Zone' in Boston, causes the blighted area to grow and creates blight in fringe areas." *Id.* Langston also opined, "[b]ased upon his education, experience, knowledge of blight in Daytona Beach and his participation in drafting the subject ordinance," that live nude and seminude entertainment businesses "promote and perpetuate urban decay" and that "adult businesses have impacted on crime in the area surrounding Daytona Beach." *Id.*

David Smith, an assistant state attorney who had prosecuted drug and prostitution offenses in Daytona Beach, also testified that " 'most definitely' there were more drug and prostitution offenses in topless bars than in other bars." *Id.* at 548. Based in part on this testimony by Langston and Smith, the district court in *Function Junction* upheld the zoning ordinances. *Id.* at 552.

In 1993, the City enacted several amendments to the zoning ordinances that, among other things, required adult theaters to obtain pre-approval from a Technical Review Committee before being able to open and operate in the BA districts. In a First Amendment challenge brought by several adult theaters, the United States District Court for the Middle District of Florida entered a preliminary injunction preventing the City from enforcing the 1993 amendments because, the court found, the plaintiffs were likely to prevail at trial on their claims. *Red-Eyed Jack, Inc. v. City of Daytona Beach,* 165 F.Supp.2d 1322, 1330 (M.D.Fla.2001) [hereinafter *Red-Eyed Jack I*].

While the *Red-Eyed Jack* litigation was still pending, the City amended its zoning ordinances still again to eliminate the constitutional infirmities identified by the district court.[FN4] Relevant here, the City once ***865** again allowed adult theaters to open in the BA districts without pre-approval.[FN5] The City also created a new zoning district category, the M-5 Heavy Industrial Zoning District ("M-5"),[FN6] and ultimately applied it to 210 acres in the western part of the City.[FN7] Within this new M-5 district, adult theaters were permitted to open without the distance requirements that applied in BA districts. Although the M-5 district consisted mostly of undeveloped land, the City ensured that telephone and power lines were installed in the district's interior, the county paved a previously dirt road through it, and the City approved a preliminary plat for a fifty-five-acre subdivision straddling that road.[FN8] As a result of these changes, the district court concluded that the zoning ordinances were constitutional. *Red-Eyed Jack, Inc. v. City of Daytona Beach,* 322 F.Supp.2d 1361, 1362 (M.D.Fla.2004) [hereinafter *Red-Eyed Jack II*]. The court found that twenty-four new sites were available in the M-5 district and that, in concert with one site already found to be available in the BA district, this created a constitutionally sufficient number of sites for the ten adult businesses that were operating or seeking to operate in Daytona Beach at that time. *Id.* at 1375.

FN4. Daytona Beach, Fla., Ordinance 01-367 § 1 (Sept. 5, 2001). Ordinance 01-367 enacted the substantive provisions that are currently in force in the BA districts:

> Adult bookstores and adult theaters are permitted as of right in BA districts. The

purpose of the conditions is to reduce the adverse impacts of adult bookstores and adult theaters upon neighborhoods by avoiding the concentration of uses which cause or intensify physical and social blight; improving visual appearance of adult uses; reducing negative impacts of adult uses upon other business uses, neighborhood property values, residential areas, and public and semi-public uses; insuring that adult uses do not impede redevelopment and neighborhood revitalization efforts; and avoiding adult uses in heavily used pedestrian areas. The following conditions must be met:

(a) It shall be unlawful to locate any adult bookstore or adult theater within 400 feet of any residential, R-PUD, T-1, or T-2 district.

(b) It shall be unlawful to locate any adult bookstore or adult theater within 1,000 feet of any other adult theater or adult bookstore.

(c) It shall be unlawful to locate any adult bookstore or adult theater within 400 feet of any church, school, public park, or playground, or any other public or semi-public place of assembly where large numbers of minors regularly travel or congregate.

(d) Distances shall be measured from property line to property line, without regard to the route of normal travel.

(e) Outside advertising shall be limited to one identification sign, not to exceed 20 square feet. Advertisements, displays, or other promotional materials shall not be shown or exhibited to be visible to the public from a pedestrian sidewalk or walkway or from other public or semi-public areas; and such displays shall be considered signs.

(f) Buildings shall not be painted in garish colors or such other fashion as will effectuate the same purpose as a sign. All windows, doors, and other apertures shall be blacked or otherwise obstructed so as to prevent viewing of the interior of the establishment from without.

Daytona Beach, Fla., Land Dev.Code art. XI, § 3.2 (2001).

FN5. The distance requirements between adult theaters and churches, schools, parks, playgrounds, and other adult businesses remain in effect.

FN6. Daytona Beach, Fla., Ordinances 01-456 & 01-457 (Oct. 17, 2001).

FN7. Initially, the City zoned twenty acres as M-5, but after the district court entered still another injunction based on its finding that the City still did not provide a sufficient number of sites where adult theaters could open and operate, the City zoned as M-5 an additional 190 acres adjacent to the original twenty acres. Daytona Beach, Fla., Ordinance 03-195 (May 7, 2003); *see also* *Red-Eyed Jack, Inc. v. City of Daytona Beach,* 322 F.Supp.2d 1361, 1364-65 (M.D.Fla.2004).

FN8. Daytona Beach, Fla., Ordinance 03-196 (May 7, 2003).

*B. Nudity Ordinances*

In conjunction with the zoning ordinances adopted in 1981, the City enacted Ordinance 81-334 to prohibit nudity and sexual conduct in establishments that serve alcohol.[FN9] Specifically, in any establishment***866** that deals in alcoholic beverages, Ordinance 81-334 prohibits: the "expos[ure] to public view [of a] person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks"; the "expos[ure] to public view [of] any portion of [a woman's] breasts below the top of the areola"; a wide variety of sexual activities; and any "simulation" or "graphic representation, including pictures or the projection of film, which depicts" any of the conduct prohibited by the Ordinance. In addition, Ordinance 81-334 provides that no person "maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit"

any of the proscribed conduct.

> FN9. In relevant part, Ordinance 81-334 provides:
>
> (a) No person shall expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages.
>
> (b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages.
>
> (c) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any person to expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or simulation thereof within the establishment dealing in alcoholic beverages.
>
> (d) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breasts below the top of the areola or any simulation thereof within the establishment dealing in alcoholic beverages.
>
> (e) No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act which is prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus or genitals; or the simulation thereof within an establishment dealing in alcoholic beverages.
>
> (f) No person shall cause and no person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit the exposition of any graphic representation, including pictures or the projection of film, which depicts human genitals; pubic area; vulva; anus; anal cleft or cleavage; buttocks; female breasts below the top of the areola; sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus, or genitals; or any simulation thereof within any establishment dealing in alcoholic beverages.
>
> Daytona Beach, Fla., Ordinance 81-334 § 1 (Oct. 21, 1981), *codified at* Daytona Beach, Fla., Code § 10-6 (2001). Section 2 of Ordinance 81-334, although not codified in the City's Code of Ordinances, provides the City's rationale for Ordinance 81-334's enactment:
>
> It is hereby found that the acts prohibited in Section 1 above encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, that actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public, and it is the intent of this ordinance to prohibit nudity, gross sexuality, and the simulation and depiction thereof in establishments dealing in alcoholic beverages.
>
> *Id.* § 2.

By 2001, the City of Daytona Beach became concerned that some bars were exploiting a loophole in Ordinance 81-334 by separating alcohol and nudity within a single structure but allowing for ready access between the two areas. The City also became

increasingly concerned that lewd and lascivious conduct within adult theaters was increasing and that nudity in streets, parks, and other public places was especially a problem during events such as Spring Break and Black College Reunion.

Motivated by these perceived concerns, the City enacted Ordinance 02-496 to reduce "lewd and lascivious behavior, prostitution, sexual assaults and batteries, ... other criminal activity, ... [the] degradation of women, and ... activities which break down family structures and values."[FN10] In fact, Ordinance 02-496 was enacted as a general public nudity ordinance and prohibited any person over ten years of age from "recklessly, knowingly, or intentionally"***867** appearing in any public place with "anything other than a full and opaque covering" over the following areas: "[t]he male or female genitals, pubic area, or anal cleavage"; "[t]he nipple and areola of the female breast"; "at least one-half of that outside surface area of the breast located below the top of the areola, which area shall be reasonably compact and contiguous to the areola"; "[o]ne-third of the male or female buttocks centered over the cleavage of the buttocks for the length of the cleavage"; and, even if covered, the "male genitals in a discernibly turgid state."[FN11] Ordinance 02-496 also provided a non-exhaustive list of items of clothing that are *not* sufficient to comply with its provisions: "items commonly known as G-strings, T-backs, dental floss, and thongs."[FN12]

FN10. Daytona Beach, Fla., Ordinance 02-496 § 5 (Oct. 2, 2002).

FN11. Daytona Beach, Fla., Code § 62-183(a), (b), *enacted by* Ordinance 02-496 § 14.

FN12. Daytona Beach, Fla., Code § 62-183(c), *enacted by* Ordinance 02-496 § 14. Ordinance 02-496 added Article VI, "Public Nudity," to Chapter 62 of the City's Code of Ordinances. Article VI first states the City's purpose for adding a public nudity prohibition to the City's Code of Ordinances:

> (a) It is the intent of this article to protect and preserve the health, safety and welfare of the people of The City of Daytona Beach by prohibiting any person from recklessly, knowingly, or intentionally appearing nude in a public place, or recklessly, knowingly, or intentionally causing or permitting another person to appear nude in a public place within the City, subject to the exceptions provided in § 62-[184].
>
> (b) The City Commission has further expressed its intent and findings in Ordinance 02-496, adopting this article.

Daytona Beach Code § 62-181. After defining the terms "breast," "buttocks," "public place provided or set apart for nudity," and "public place," *see id.* § 62-182, Article VI then lists the following substantive prohibitions:

> (a) It shall be unlawful for any person ten years of age or older to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person ten years of age or older to appear in a public place in a state of dress or undress such that any of the following body parts or portions thereof are exposed to view or are covered with anything other than a full and opaque covering which completely covers all of the described area:
>
> (1) The male or female genitals, pubic area, or anal cleavage.
>
> (2) The nipple and areola of the female breast; and in addition at least one-half of that outside surface area of the breast located below the top of the areola, which area shall be reasonably compact and contiguous to the areola.
>
> (3) One third of the male or female buttocks centered over the cleavage of the buttocks for the length of the cleavage. This area is more particularly described as that portion of the buttocks which lies between the top and bottom of the buttocks, and between two imaginary straight lines, one on each side of the anus

and each line being located one-third of the distance from the anus to the outside perpendicular line defining the buttocks, and each line being perpendicular to the ground and to the horizontal lines defining the buttocks.

(b) It shall be unlawful for any person to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person to appear in a public place in a manner as to show or display the covered male genitals in a discernibly turgid state.

(c) Attire which is insufficient to comply with these requirements includes but is not limited to those items commonly known as G-strings, T-backs, dental floss, and thongs.

(d) Body paint, body dye, tattoos, latex, tape, or any similar substance applied to the skin surface, any substance that can be washed off the skin, or any substance designed to simulate or which by its nature simulates the appearance of the anatomical area beneath it, is not full and opaque covering as required by this section.

*Id.* § 62-183. Article VI then provides that "[t]he offense of public nudity or exposure as set forth in section 62-183 shall not occur in any of the following instances:"

(1) When a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration, or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain; or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or the Florida Constitution.

*Id.* § 62-184(a) (citations omitted).

***868** In July 2003, less than a year after the City enacted Ordinance 02-496, a panel of this Court decided *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir.2003). That decision suggested that an ordinance that does not leave an erotic dancer "free to perform wearing pasties and G-strings" would violate the First Amendment because it would significantly affect the dancer's "capacity to convey [an] erotic message." *Id.* at 1274 (quotation marks omitted). About five weeks later, the City enacted Ordinance 03-375, which amended Ordinance 02-496 to allow erotic dancers to wear G-strings and pasties "within a fully enclosed structure legally established as an adult theater" that is more than 500 feet from an establishment that serves alcohol.[FN13] Within 500 feet of an alcohol-serving establishment, however, Ordinance 02-496 applies and, as described above, requires clothing somewhat more modest than G-strings and pasties.[FN14]

FN13. Daytona Beach, Fla., Ordinance 03-375 § 9 (Aug. 20, 2003), *codified at* Daytona Beach, Fla., Code § 62-184(b). Ordinance 03-375 added the following exception to the City's Code of Ordinances:

(1) In the course of the presentation of erotic dance or other artistic expression which is entitled to first amendment protection within a fully enclosed structure legally established as an adult theater as defined in the Land Development Code:

a. The breast covering required by subsection 62-183(a)(2) shall not be required, except that nipples and areolae

shall be covered.

b. The buttocks covering required by subsection 62-183(a)(3) shall not be required, and subsection 62-183(c) shall not apply.

Daytona Beach Code § 62-184(b)(1), *enacted by* Ordinance 03-375 § 9.

FN14. Specifically, the more modest clothing requirements apply to an adult theater that:

a. is located in the same structure as an establishment dealing in alcoholic beverages ... unless the closest point of the premises of the alcoholic beverage establishment is more than 500 feet from the boundary line of the adult theater use; or

b. is located under the same roof as an establishment dealing in alcoholic beverages ... unless the closest point of the premises of the alcoholic beverage establishment is more than 500 feet from the boundary line of the adult theater use; or

c. shares any wall, floor, or ceiling with an establishment dealing in alcoholic beverages ...; or

d. shares an entry area with an establishment dealing in alcoholic beverages ...; or

e. provides for or permits the interior passage of customers directly or indirectly between it and an establishment dealing in alcoholic beverages ..., whether or not a separate cover or admission fee is charged; or

f. is located adjacent or next door to an establishment dealing in alcoholic beverages ...; or

g. is located within 500 feet of an establishment dealing in alcoholic beverages ..., measured from property line of one use to property line of the other use, including parking areas and other appurtenances associated with each use; or

h. is not legally authorized to operate as an adult theater.

Daytona Beach Code § 62-184(b)(2), *enacted by* Ordinance 03-375 § 9.

***869** *C. Lollipop's Lawsuit*

On December 10, 2003, Lollipop's brought this suit challenging the constitutionality of the zoning ordinances and of Ordinances 81-334, 02-496, and 03-375. First, Lollipop's claimed that the zoning ordinances do not offer reasonable alternative venues for adult theaters to communicate their erotic message because an insufficient number of sites are available for adult theaters. Alternatively, Lollipop's claimed that it was "grandfathered in" as a lawful nonconforming use under Florida law. The district judge, who also presided over the *Red-Eyed Jack* litigation, granted summary judgment to the City of Daytona Beach on both claims, noting that the City had made no changes to the zoning ordinances since his decision in *Red-Eyed Jack II* and that Lollipop's provided no evidence that warranted a departure from the earlier decision.

Second, Lollipop's challenged Ordinances 81-334, 02-496, and 03-375, urging that they neither further a substantial government interest nor are narrowly tailored. The district court granted final summary judgment to the City on Lollipop's narrow tailoring claim, but concluded that there was a genuine issue of material fact about whether the three nudity ordinances furthered a substantial government interest. Thereafter, at a six-day bench trial, Lollipop's presented expert testimony in an effort to cast direct doubt on the City's rationale for enacting the nudity ordinances. The experts explained at trial that they had conducted two empirical studies using data provided by the City. They concluded based on the data they examined that adult theaters in Daytona Beach had no statistically significant effect on crime rates, and that the City's evidence offered to the contrary was "shoddy" and "meaningless."

The district court agreed and concluded that Lollipop's

evidence cast direct doubt on the City's rationale for enacting the nudity ordinances:

> Plaintiffs have succeeded in their attempt to cast direct doubt on the City's rationales for its ordinances. As persuasively demonstrated by Plaintiffs' expert studies, the City's pre-enactment evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the City's evidence lacks data which would allow for a comparison of the rate of crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is, as Plaintiffs assert, "meaningless."

The court also determined that the additional evidence provided by the City in an effort to renew support for the ordinances was similarly flawed. The district court, therefore, held that Ordinances 81-334, 02-496, and 03-375 did not further a substantial government interest and declared that they violated the First Amendment. In fact, the district court struck all three nudity ordinances in their entirety, except for subsection 10-6(e) of the Daytona Beach Code (enacted by Ordinance 81-334) because that subsection regulates non-expressive conduct.

These appeals followed: Lollipop's argued that the district court had improvidently entered summary judgment for the City on its challenge to the zoning ordinances, as well as on its claim to grandfather status. The City, in turn, cross-appealed the court's determination that the three nudity ordinances were unconstitutional.***870** Lollipop's also appealed from the grant of final summary judgment to the City on its claim that the nudity ordinances are not narrowly tailored.[FN15]

> FN15. Lollipop's also claimed in the district court that it is exempt from Ordinance 02-496 by its own terms, but the district court had no occasion to rule on this claim because it declared Ordinance 02-496 unconstitutional. Because Lollipop's does not raise this argument on appeal, the claim is deemed abandoned. *See* *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir.2004).

II. *Zoning Ordinances*

The City's zoning ordinances do not ban adult theaters altogether but do restrict them to the BA and M-5 zoning districts and, in the BA districts, impose distance requirements between adult theaters and churches, schools, parks, playgrounds, and other adult businesses.[FN16] We review the constitutionality of a city ordinance *de novo*. *See* *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1255 (11th Cir.2003).

> FN16. In BA districts, an adult theater must be located at least 400 feet from "any residential, R-PUD, T-1, or T-2 district," 400 feet from any church, school, park, playground, or "any other public or semi-public place of assembly where large numbers of minors regularly travel or congregate," and 1000 feet from other adult businesses. Daytona Beach, Fla., Land Dev.Code art. XI, § 3.2 (2001).

[1] It is by now well-established that zoning ordinances limiting the locations where adult businesses may be located are evaluated under the three-part test for time, place, and manner regulations established in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and reaffirmed in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). *Peek-A-Boo Lounge*, 337 F.3d at 1264; *see also* *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1333 (11th Cir.2000). We have summarized the *Renton* framework this way:

> first, the court must determine whether the ordinance constitutes an invalid total ban or merely a time, place, and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.

*Peek-A-Boo Lounge*, 337 F.3d at 1264; *see also* *Renton*, 475 U.S. at 46-50, 106 S.Ct. 925.

Because neither party disputes that the first two prongs have been satisfied or that the zoning ordinances serve a substantial government interest, our analysis under *Renton* focuses solely on whether the zoning ordinances provide adult theaters with reasonable alternative channels of communication. We hold that they do.

A new zoning regime must leave adult businesses with a "reasonable opportunity to relocate," and "the number of sites available for adult businesses under the new zoning regime must be greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect." *Fly Fish, Inc. v. City of Cocoa Beach,* 337 F.3d 1301, 1310-11 (11th Cir.2003) (quoting *David Vincent,* 200 F.3d at 1337 n. 17). Although a district court's calculation of the number of sites that a zoning ordinance makes available for adult businesses is a factual finding that we review only for clear error, the district court's methodology in making that calculation-such as whether a particular ***871** site is "available" and provides a reasonable avenue for communicating an adult business's erotic message-is a legal determination that we review *de novo. David Vincent,* 200 F.3d at 1333; *see also Fly Fish,* 337 F.3d at 1309.

[2] We have enumerated several "general rules" to aid in deciding whether a particular site is available for First Amendment purposes:

> First, the economic feasibility of relocating to a site is not a First Amendment concern. Second, the fact that some development is required before a site can accommodate an adult business does not mean that the land is, *per se,* unavailable for First Amendment purposes. The ideal lot is often not to be found. Examples of impediments to the relocation of an adult business that may not be of a constitutional magnitude include having to build a new facility instead of moving into an existing building; having to clean up waste or landscape a site; bearing the costs of generally applicable lighting, parking, or green space requirements; making [do] with less space than one desired; or having to purchase a larger lot than one needs. Third, the First Amendment is not concerned with restraints that are not imposed by the government itself or the physical characteristics of the sites designated for adult use by the zoning ordinance. It is of no import under *Renton* that the real estate market may be tight and sites currently unavailable for sale or lease, or that property owners may be reluctant to sell to an adult venue.

*David Vincent,* 200 F.3d at 1334-35. As the Supreme Court explained in *Renton,* simply because adult businesses "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." 475 U.S. at 54, 106 S.Ct. 925.

[3] Here, the district court relied on its earlier finding in *Red-Eyed Jack II* that twenty-five sites-twenty-four in the M-5 district and one in the BA district-are available for adult theaters. 322 F.Supp.2d at 1372-75. Because the *Red-Eyed Jack II* court found that, at most, ten adult theaters were operating or seeking to operate in the City of Daytona Beach, *id.* at 1367, it held that the zoning ordinances provide for a constitutionally sufficient number of sites, *id.* at 1375. In the instant case, the district court concluded that Lollipop's had presented no evidence to warrant a departure from its earlier ruling in *Red-Eyed Jack II.*

Lollipop's vigorously disagrees, contending that the M-5 district is no more than "unimproved industrial property" and that, therefore, the twenty-four lots in the M-5 district cannot count as being "available" under *Renton.* The undisputed historical facts concerning the M-5 district are these: (1) telephone and power lines extend through the interior of the M-5 district along a now-paved road; (2) water and sewer lines have been installed up to the boundary of the M-5 district; (3) a preliminary plat has been approved for fifty-five acres of the M-5 district that would create at least twenty-four one-acre sites fronting the now-paved road; and (4) the entire M-5 district is owned by a single private landowner, not by the City. *Id.* at 1372, 1374.

Under the applicable case law, these undisputed facts yield the conclusion that the twenty-four sites in the M-5 district are available for First Amendment purposes. It is irrelevant for our purposes that all of the land in the M-5 district is owned by a single private landowner who may be reluctant or unwilling to develop or sell the land. *See* ***872***David Vincent,* 200 F.3d at 1335 (holding that "[i]t is of no import under *Renton* that the real estate market may be tight and sites currently unavailable for sale or lease, or that property owners may be reluctant to sell to an adult

venue," and finding sites available even though there was "no evidence that any of the land is for sale"). Nor is it constitutionally significant that the land is mostly vacant where, as here, the City has provided sufficient infrastructure for a private developer to commence development, including a paved road, telephone and power lines, and water and sewer lines. *See id.* at 1334 ("Examples of impediments to the relocation of an adult business that may not be of a constitutional magnitude include having to build a new facility instead of moving into an existing building....").

Although we have acknowledged that "the physical characteristics of a site or the character of current development could render relocation by an adult business unreasonable," examples of such unavailable sites are "land under the ocean, airstrips of international airports, and sports stadiums." *Id.* at 1335. Here, the land in the M-5 district is hardly comparable to such sites, where relocation is, for all practical purposes, untenable. Finally, the City has removed the legal obstacles that might have prevented adult theaters from relocating to the M-5 district, and has gone so far as to approve a preliminary plat for a fifty-five-acre subdivision straddling the main road in the M-5 district. *Cf. id.* at 1335 ("[T]he First Amendment is not concerned with restraints that are not imposed by the government itself...."). In short, we agree with the district court that the twenty-four sites in the M-5 district are available under *Renton.* And because the record shows that no more than ten adult theaters are operating or seeking to operate in Daytona Beach, the zoning ordinances are constitutional; reasonable alternative channels of communication are available.

[4] Lollipop's also claims that, even if the zoning ordinances are constitutional, Lollipop's is otherwise "grandfathered in" under Florida law.[FN17] Lollipop's argument is grounded on the contention that the zoning ordinances were unconstitutional at the time that Lollipop's began operating as an adult theater. Although the City may now have cured the earlier constitutional defects, Lollipop's argues that no valid law made Lollipop's unlawful when it opened. Thus, according to Lollipop's, its right to operate at its current location "vested" at that time, and it may continue to operate there despite any subsequent changes to the zoning ordinances that rendered it a nonconforming use.[FN18] The district court granted summary judgment to the City on this claim too, and we review the district court's determination *de novo. See Reserve, Ltd. v. Town of Longboat Key,* 17 F.3d 1374, 1377 (11th Cir.1994).

FN17. The Constitution does not require a "grandfathering" provision for existing nonconforming adult businesses, *David Vincent,* 200 F.3d at 1332, and any vested right to continue operating as a lawful nonconforming use derives from state law, *see Coral Springs St. Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1333 (11th Cir.2004).

FN18. Lollipop's is located at 639 Grandview Avenue in Daytona Beach, Florida, and has been operating as an adult theater there since October 2000. Although the City disputes when Lollipop's began operating as an adult theater, Lollipop's claim to grandfather status was decided in the district court on the City's motion for summary judgment, and therefore we construe the record in the light most favorable to Lollipop's.

[5] "Not surprisingly, vested rights are not created easily" under ***873**Florida law. *Coral Springs St. Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1333 (11th Cir.2004) . "The overarching pattern in Florida's case law is that vested rights can be created ... only in two circumstances." *Id.* at 1334. The first occurs "when a party has reasonably and detrimentally relied on existing law, creating the conditions of equitable estoppel," while the second occurs "when the defendant municipality has acted in a clear display of bad faith." *Id.* Here, neither circumstance applies. It is undisputed that when Lollipop's began operating as an adult theater, it violated the zoning ordinances as then written. As a matter of logic, then, Lollipop's cannot have relied on existing law because it began operating plainly in contravention of that law. Nor is there any record evidence of bad faith or arbitrary behavior by the City. Therefore, on this record, the district court correctly concluded that Lollipop's has failed to establish a vested right to continue operating as a lawful nonconforming use.

## III. *Nudity Ordinances*

[6] We analyze the three nudity ordinances challenged here under the four-part test for expressive conduct set

forth by the Supreme Court in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and employed in *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). As we have explained:

> According to this test, public nudity ordinances that incidentally impact protected expression should be upheld if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest.

*Peek-A-Boo Lounge,* 337 F.3d at 1264. Here, our analysis focuses on the second and fourth prongs because there is no dispute between the parties as to the first and third prongs.

*A. Substantial Government Interest*

[7] Under *O'Brien* 's second prong, a city must establish that the challenged ordinance furthers a substantial government interest. *Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion).[FN19] It has ***874** been by now clearly established that reducing the secondary effects associated with adult businesses is a substantial government interest "that must be accorded high respect." *City of L.A. v. Alameda Books, Inc.,* 535 U.S. 425, 444, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring in the judgment) (quotation marks omitted);[FN20] *see also Pap's A.M.,* 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) ("[C]ombating the harmful secondary effects associated with nude dancing [is] undeniably important."); *Ctr. for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153, 1166 (9th Cir.2003) ("It is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated ***875** with adult entertainment establishments is substantial.").

> FN19. In *Pap's A.M.,* like some of the Supreme Court's other decisions in this area, there was no majority opinion on the First Amendment issue before the Court. Justice O'Connor wrote a plurality opinion, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, which upheld under *O'Brien* the constitutionality of the nudity ordinance at issue. *Pap's A.M.,* 529 U.S. at 289-302, 120 S.Ct. 1382 (plurality opinion). Relevant here, the plurality concluded that *O'Brien* 's second prong was satisfied because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important," and because the evidence that the city produced established that "it was reasonable for [the city] to conclude that ... nude dancing was likely to produce the[se] secondary effects." *Id.* at 296-97,120 S.Ct. 1382. Justice Scalia wrote a separate opinion, joined by Justice Thomas, concurring in the judgment. They agreed that the ordinance should be upheld, "not because it survives some lower level of First Amendment scrutiny [i.e., *O'Brien*], but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.* at 307-08,120 S.Ct. 1382 (Scalia, J., concurring in the judgment) (quotation marks omitted). Justice Souter concurred in part and dissented in part. He agreed with the plurality that the nudity ordinance at issue should be analyzed under *O'Brien. Id.* at 310,120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). But he dissented from the judgment because, unlike the plurality, he concluded that the city failed to carry its evidentiary burden to show that its ordinance furthered a substantial government interest. *Id.* at 313-17, 120 S.Ct. 1382. Justice Stevens also wrote a dissenting opinion, joined by Justice Ginsburg.
>
> For our purposes, a majority of the Court-the four-Justice plurality along with Justice Souter-held that nudity ordinances that are designed to combat the secondary effects associated with nude dancing are analyzed under the *O'Brien* framework. *See id.* at 289-91,120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). As for the Court's judgment that the ordinance at issue was constitutional-supported by the plurality and by Justices Scalia and Thomas's concurrence in the judgment-no rationale

explaining that result gained the support of a majority of the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quotation marks omitted). In *Pap's A.M.,* the plurality upheld the ordinance on the rationale that it survived First Amendment scrutiny under the *O'Brien* framework, and although the votes of Justices Scalia and Thomas were necessary for the judgment, their grounds for concurring in the judgment were far broader than the plurality's, namely, that the First Amendment did not apply "at all." *See Pap's A.M.,* 529 U.S. at 307-08, 120 S.Ct. 1382 (Scalia, J., concurring in the judgment). As such, the plurality's holding with respect to the *application* of *O'Brien* is the narrowest ground supporting the judgment in *Pap's A.M.* and, therefore, represents the holding of that case under *Marks. Peek-A-Boo Lounge,* 337 F.3d at 1261-62; *accord Heideman v. S. Salt Lake City,* 348 F.3d 1182, 1198 (10th Cir.2003); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 862 n. 1 (8th Cir.2003); *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 719 (7th Cir.2003).

FN20. *Alameda Books* addressed the constitutionality of a zoning ordinance under the *Renton* framework, rather than a public nudity ordinance under the *O'Brien* framework. We have explained, however, that the third step of the *Renton* analysis, which asks whether an ordinance "is designed to serve" a substantial government interest, is "virtually indistinguishable" from the second prong of the *O'Brien* test, which asks whether an ordinance "furthers" a substantial government interest. *Peek-A-Boo Lounge,* 337 F.3d at 1264-65. Therefore, although we are addressing the constitutionality of the City's nudity ordinances under *O'Brien,* our analysis also relies on cases that addressed the constitutionality of zoning ordinances under *Renton.*

There was no majority opinion in *Alameda Books.* Justice O'Connor wrote a plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, that applied *Renton* and concluded that the zoning ordinance at issue was constitutional. *Alameda Books,* 535 U.S. at 429-43, 122 S.Ct. 1728 (plurality opinion). Justice Kennedy wrote a separate opinion concurring in the judgment. He agreed with the plurality that the zoning ordinance at issue should be analyzed under *Renton,* but he concurred in the judgment because he believed that "the plurality's application of *Renton* might constitute a subtle expansion, with which [he did] not concur." *Id.* at 445,122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). Justice Souter dissented, and his opinion was joined by Justices Stevens, Ginsburg, and, in part, Breyer. *Id.* at 453-66, 122 S.Ct. 1728 (Souter, J., dissenting). Because Justice Kennedy concurred in the judgment in *Alameda Books* on the narrowest grounds, his opinion represents the Supreme Court's holding in that case under *Marks. Peek-A-Boo Lounge,* 337 F.3d at 1264; *accord SOB, Inc.,* 317 F.3d at 862 n. 1; *Ben's Bar, Inc.,* 316 F.3d at 722.

[8] As for whether an ordinance "furthers" this interest, a city bears the initial burden of producing evidence that it relied upon to reach the conclusion that the ordinance furthers the city's interest in reducing secondary effects. *Peek-A-Boo Lounge,* 337 F.3d at 1269. To that end, a city need not "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925); *see also id.* at 438,122 S.Ct. 1728 (plurality opinion) ("[A] municipality may rely on any evidence

that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest."(quotation marks omitted)); *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (quoting *Renton* 's "reasonably believed to be relevant" language). Although a municipality "must rely on at least *some* pre-enactment evidence," such evidence can consist of "a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion." *Peek-A-Boo Lounge*, 337 F.3d at 1268; *see, e.g., Pap's A.M.*, 529 U.S. at 300, 120 S.Ct. 1382 (plurality opinion) (finding sufficient that "the city council relied on this Court's opinions detailing the harmful secondary effects caused by [adult] establishments ..., as well as on its own experiences"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in the judgment)[FN21] (permitting a municipality to rely on prior judicial opinions); *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925 (holding that the city was entitled to rely on the experiences of other cities and on a judicial opinion).

FN21. Just as in *Alameda Books* and *Pap's A.M.*, a majority of the Court in *Barnes* did not support a single rationale explaining the result. The plurality opinion written by Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, upheld the regulation under the *O'Brien* framework. *Barnes*, 501 U.S. at 569-72, 111 S.Ct. 2456 (plurality opinion). Relevant here, the plurality found *O'Brien* 's second prong satisfied by evidence that the regulation at issue "furthers a substantial government interest in protecting order and morality," which the plurality considered to be an interest "unrelated to the suppression of free expression." *Id.* at 569-70,111 S.Ct. 2456. Justice Scalia concurred in the judgment because, in his view, a general public nudity prohibition "is not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. 2456 (Scalia, J., concurring in the judgment). Justice Souter also concurred in the judgment. Unlike Justice Scalia, he agreed with the plurality that the regulation should be analyzed under *O'Brien*. But Justice Souter "[wrote] separately to rest [his] concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments." *Id.* at 582,111 S.Ct. 2456 (Souter, J., concurring in the judgment). As we have explained, "[b]ecause Justice Souter provided the narrowest grounds for the judgment of the Court in *Barnes*, his concurrence constitutes the holding of that case" under *Marks*. *Peek-A-Boo Lounge*, 337 F.3d at 1260; *accord Heideman*, 348 F.3d at 1197-98.

Once a city has provided evidence that it reasonably believed to be relevant to its rationale for enacting the ordinance, plaintiffs must be given the opportunity to "cast direct doubt on this rationale," either by demonstrating that the city's evidence does not support its rationale or by furnishing evidence that disputes the city's factual findings. *Peek-A-Boo Lounge*, 337 F.3d at 1265 (quoting ***876***Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion)); *see, e.g., Pap's A.M.*, 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion) (rejecting claim when plaintiff "never challenged the city council's findings or cast any specific doubt on the validity of those findings"). "If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books*, 535 U.S. at 439, 122 S.Ct. 1728 (plurality opinion) (citing *Pap's A.M.*, 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion)); *see also Peek-A-Boo Lounge*, 337 F.3d at 1269.

Although the burden lies with the municipality, a court "should be careful not to substitute its own judgment for that of the [municipality,]" and the municipality's "legislative judgment should be upheld provided that [it] can show that its judgment is still supported by credible evidence, upon which [it] reasonably relies." *Peek-A-Boo Lounge*, 337 F.3d at 1273.

[9] Here, the City of Daytona Beach plainly carried its initial burden to show that the three challenged nudity ordinances furthered its interest in reducing the negative secondary effects associated with adult theaters. The City has produced a substantial body of evidence that it reasonably believed to be relevant to

combating those problems. Ordinance 81-334 prohibits nudity and sexual conduct in establishments that serve alcohol. As the Ordinance itself says, the City's rationale was to reduce the negative secondary effects associated with adult theaters:

> It is hereby found that the acts prohibited in [this ordinance] encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, that actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public....

Ordinance 81-334 § 2. To support this rationale, Ordinance 81-334 cites two Supreme Court decisions, *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (per curiam), and *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), both of which upheld prohibitions on nude dancing in establishments that serve alcohol. *See* *Bellanca,* 452 U.S. at 718, 101 S.Ct. 2599 (upholding statute where the legislature had found that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior"); *LaRue,* 409 U.S. at 118-19, 93 S.Ct. 390 ("The ... conclusion ... that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one.").

Although the City's reliance on these cases may be sufficient to carry the City's initial burden, *see* *Pap's A.M.,* 529 U.S. at 296-97, 120 S.Ct. 1382 (plurality opinion) (suggesting that a city can carry its initial burden by relying solely on relevant Supreme Court cases), the legislative history of Ordinance 81-334 shows that the City also relied on its own experiences to support its rationale. That legislative history includes: a document describing the difficulties faced by law enforcement in arresting and successfully prosecuting crimes relating to prostitution and pornography and listing arrests for prostitution and other crimes that occurred in or near many Daytona***877** Beach adult businesses; a short memorandum written by the City's police chief that provides "a partial list of situations, offenses and incidents which have occurred within the areas of topless bar establishments .... [that] can be substantiated by police reports and testimony of various police officers"; police dispatch records of calls for service ("CAD data"[FN22]) from areas around adult businesses from November 1980 to July 1981, which were attached to the police chief's memorandum; police reports of eighty-three prostitution arrests; police reports of seven arrests for assault and battery of a police officer in or near an adult theater; and the minutes of a public hearing summarizing local business owners' firsthand accounts of criminal activity in and around adult businesses.

> FN22. "CAD" stands for Computer Automated Dispatch.

This legislative history supporting the enactment of Ordinance 81-334 is more than sufficient to carry the City's initial burden under *O'Brien* 's second prong. *See, e.g., Alameda Books,* 535 U.S. at 452, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (concluding that the city carried its initial burden with "a single study and common experience"); *Pap's A.M.,* 529 U.S. at 297-98, 120 S.Ct. 1382 (plurality opinion) (holding that the city's legislative findings were sufficient because "city council members, familiar with [the city's] commercial downtown ..., are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments"); *see also* *Peek-A-Boo Lounge,* 337 F.3d at 1269-70.

As for Ordinances 02-496 and 03-375, the City likewise carried its initial burden of proof. Ordinance 02-496 was enacted as a general public nudity ordinance "to protect and preserve the health, safety and welfare" of the City's residents. Daytona Beach, Fla., Code § 62-181(a), *enacted by* Ordinance 02-496 § 14. The Ordinance sets forth the following findings: "The appearance of persons in the nude in public places ... increases incidents of lewd and lascivious behavior, prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women, and facilitates other activities which break down family structures

and values." Ordinance 02-496 § 5. To support these findings, the City relied on, among other things, newspaper articles describing incidents of public nudity and other criminal activity during Spring Break and Black College Reunion, [FN23] narrative reports by undercover detectives describing instances of sexual conduct, nudity, and violations of Ordinance 81-334 by ***878** dancers at adult theaters,[FN24] and the Supreme Court's decisions in *Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, and *Barnes,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504. As with Ordinance 81-334, the pre-enactment evidence for Ordinance 02-496 is sufficient for the City to carry its initial burden under *O'Brien*'s second prong.

FN23. *See* Henry Frederick, *Police Chief: Spring Break, BCR Hurt Family Tourism,* Daytona Beach News-Journal, Apr. 16, 2002 (" 'Youth-oriented street festivals like BCR and Spring Break keep family tourism away.' "); Anne Geggis, *Barter on the Beach: Beads for Breasts,* Daytona Beach News-Journal, Mar. 24, 2002 ("Daytona Beach police confirm they've been seeing more than usual this year-and issuing more $104 tickets for exposure of female breasts than at previous Spring Breaks.... 'Even the chief this (past) weekend witnessed it and moved to make an arrest of a mother and daughter on Atlantic Avenue,' says [a] spokesman for the Daytona Beach police." ..."Some are concerned the atmosphere is ripe for an incident like the New York City 'wilding' of 2000 during which women's clothes were torn off their bodies."); Audrey Parente, *BCR "Shocking" for Pennsylvania Sisters,* Daytona Beach News-Journal, Apr. 15, 2002, at 6A (" 'I saw guys exposing themselves,' Miller said. Schubert said she saw '... women in small clothes-thongs and very exposing bras....' Worse than the exposure, she said she saw drug use and drug sales. 'I saw a young man in a car in front of me smoking a joint and passing it from car to car. They were walking around on the road.' ").

FN24. For example, on March 8, 2002, several undercover investigators went to Lollipop's "to conduct a covert inspection of the activities" there:

> During this inspection, alcoholic beverages were being sold and consumed.... This writer observed bare breasted dancers performing "lap" dances involving simulated intercourse by the female dancer [who placed] her buttocks in the lap of the patron and began to manipulate her hips back and forth and up and down. While engaged in the previous activities, dancers would rub their bare breasts in the faces of the patrons and allow the patrons to lick and suck the breasts.... This writer observed every dancer to be in violation of the exposed breasts ordinance while alcohol was being served and consumed.
>
> Daytona Beach Police Department, *Florida Offense/Incident Report No. 0203103,* at 1-2 (Mar. 11, 2002).

Ordinance 03-375 amended Ordinance 02-496 to allow erotic dancers to wear G-strings and pasties within an adult theater located more than 500 feet from an establishment that serves alcohol, but Ordinance 02-496's somewhat more restrictive clothing requirements[FN25] remain applicable within 500 feet of such an establishment. Daytona Beach, Fla., Code § 62-184(b), *enacted by* Ordinance 03-375 § 9. In support of Ordinance 03-375, the City relied on Mr. Langston's and Mr. Smith's testimony from *Function Junction, Inc.*, 705 F.Supp. 544.[FN26] As we have noted, Langston testified that live nude and seminude entertainment businesses "promote and perpetuate urban decay" and that "adult businesses have impacted on crime in the area surrounding Daytona Beach." *Id.* at 547. Smith, who as an assistant state attorney had prosecuted drug and prostitution offenses in Daytona Beach, concurred that "there were more drug and prostitution offenses in topless bars than in other bars." *Id.* at 548.

FN25. *See supra* note 12.

FN26. Although *Function Junction* was a challenge to the City's zoning ordinances, 705 F.Supp. at 545, the City relied on testimony from that case in support of Ordinance 03-375.

The City also relied on several controlled studies

conducted by Dr. William George about the relationship between drinking alcohol and sexual conduct. Thus, for example, one study found that exposure to erotica led male subjects to drink more alcohol than did exposure to non-erotic materials.[FN27] Another study found that young men who believed they had consumed alcohol-regardless of whether they had in fact done so-displayed greater interest in viewing violent and/or erotic images and reported increased sexual arousal than young men who believed they had not consumed alcohol.[FN28] Still another study found that study participants perceived a woman they believed had consumed alcohol as being "significantly more aggressive, impaired, sexually available, and as significantly more likely to engage in foreplay and intercourse" than a woman whom study participants believed had not consumed alcohol.[FN29] ***879** Finally, Ordinance 03-375 expressly incorporates all of the evidence that the City previously had relied on to support Ordinances 81-334 and 02-496. The City's pre-enactment evidence for Ordinance 03-375 is sufficient to carry the City's initial burden under *O'Brien*'s second prong.

FN27. William H. George et al., *The Effects of Erotica Exposure on Drinking,* 1 Annals Sex Res. 79 (1988).

FN28. William H. George & G. Alan Marlatt, *The Effects of Alcohol and Anger on Interest in Violence, Erotica, and Deviance,* 95 J. Abnormal Psych. 150 (1986).

FN29. William H. George et al., *Perceptions of Postdrinking Female Sexuality: Effects of Gender, Beverage Choice, and Drink Payment,* 1988 J. Applied Soc. Psych. 1295, 1295.

Because the City carried its initial burden, the district court properly gave Lollipop's the opportunity to "cast direct doubt" on the City's rationale, either by demonstrating that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings. *See Pap's A.M.,* 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion); *Peek-A-Boo Lounge,* 337 F.3d at 1265; *see also Alameda Books,* 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion). To this end, as we have noted, two expert witnesses testified that the City's pre-enactment evidence consisted of "shoddy," "meaningless," and "unreliable" data and that its reasoning was equally "shoddy." The experts explained that the City provided no empirical data to support the conclusion that prostitution and other crimes occurred more frequently in and around adult theaters than elsewhere, and that the CAD data and police reports lacked reliability because they did not cover all of the areas where adult theaters are located in Daytona Beach and contained no comparison data from other areas of the City against which the incidents occurring in and around adult theaters could be measured. Similarly, Lollipop's experts said that the narrative reports of undercover law enforcement and the testimony from *Function Junction* about urban blight and crime being found around adult theaters lacked comparative data, did not cover a sufficient period of time to rule out momentary fluctuations, and were merely the result of stepped-up law enforcement. (Experts' Report 62-63, 161-63.) The experts also observed that Dr. George's studies were conducted in controlled laboratory settings, and, therefore, the experts opined, the studies' conclusions could not be generalized to the "real world situation of alcoholic beverage consumption in an adult nightclub that features topless or nude entertainment." (*Id.* at 167-68.)

To buttress their critique of the City's evidence, Lollipop's experts conducted two empirical studies. The first study analyzed CAD data provided by the City for the forty-four months preceding Ordinance 81-334's enactment "to examine the relationship between the presence of adult cabarets in areas and the rates of crime in those areas." (*Id.* at 3.) The experts compared CAD data from areas that had adult theaters to control areas that did not and "found no statistically significant differences in overall rates of crime between study and control areas." (*Id.* at 4.) They concluded that their empirical study "cast grave doubt on the findings of the City Commission that the combination of nude (topless) dancing and alcohol increase[s] 'rape, attempted rape, murder, and assaults on police officers.' " (*Id.* at 2 (quoting Ordinance 81-334 § 2).)

The second empirical study focused on the City's rationale for Ordinances 02-496 and 03-375 and examined CAD data from March 1999 to April 2003. This study compared the presence of an adult theater to other "demographic variables previously used by

criminologists and found to be related to criminal activity, such as a local area's population, age structure (especially the presence of young adults)," "race/ethnic composition," "housing vacancies," "female-headed households," and "the number of alcohol retail sale establishments." (*Id.* at 56; *see also id.* at 186.) Based on their statistical analysis, Lollipop's experts concluded that these other variables "were statistically strongly related to crime events," whereas the presence of an adult ***880** theater "accounted for an insubstantial amount" of crime in the relevant area. (*Id.* at 56 (emphasis omitted); *see also id.* at 186-87.) The experts concluded that only 1-3.5% of the criminal activity within a 1000-foot radius of adult theaters could be attributed to the theaters, and that adult theaters accounted for zero or near-zero percent of the sex crime activity in their near vicinity. (*Id.* at 57.)

The district court agreed with Lollipop's experts that the City's pre-enactment evidence for all three nudity ordinances was "shoddy" and "meaningless." It concluded that Lollipop's had succeeded in casting direct doubt on the City's rationale for each ordinance and declared all three nudity ordinances unconstitutional. The district court said that Lollipop's experts' "scientific" studies cast direct doubt on the City's "anecdotal" evidence primarily because the court read the Supreme Court's decision in *Alameda Books* and our opinion in *Peek-A-Boo Lounge* to have "raised the bar somewhat" on *Renton* 's "reasonably believed to be relevant" standard. (Dist. Ct. Am. Order 9-10.)

In *Alameda Books,* the plurality explained the *Renton* standard this way:

> In *Renton,* we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest.

*Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion) (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925). But the plurality then warned: "This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.* Although Justice Kennedy's opinion, not the plurality, is the holding in *Alameda Books,* we quoted the plurality's "shoddy data" and "fairly supports" language several times in *Peek-A-Boo Lounge*, 337 F.3d at 1262-63, 1265, 1266, 1269.

We do not agree, however, with Lollipop's claim that either *Alameda Books* or *Peek-A-Boo Lounge* raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies. Justice Kennedy's *Alameda Books* concurrence, which all parties agree states the holding of that case under the rationale explained in *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), emphasized that the evidentiary standard announced in *Renton* remained sound:

> [W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*"

*Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925 (emphasis added)).[FN30]

> FN30. Even if the plurality had constituted the actual holding in *Alameda Books,* the plurality also reaffirmed *Renton* 's continued validity and explicitly refused to raise cities' evidentiary burden. To the contrary, the plurality *criticized* Justice Souter's dissent for "rais [ing] the evidentiary bar" by "ask[ing] the city to demonstrate, not merely by appeal to common sense, *but also with empirical data,* that its ordinance will successfully lower crime." *Alameda Books,* 535 U.S. at 439-41, 122 S.Ct. 1728 (plurality opinion) (emphasis added). The plurality explicitly rejected this requirement because it "would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of

protected speech." *Id.* at 439, 122 S.Ct. 1728.

***881** Our opinion in *Peek-A-Boo Lounge* is consistent with Justice Kennedy's concurrence in *Alameda Books* and with *Renton.* There, a panel of this Court held that "[t]o satisfy *Renton,* any evidence 'reasonably believed to be relevant'-including a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion-may form an adequate predicate to the adoption of a secondary effects ordinance,"*Peek-A-Boo Lounge,* 337 F.3d at 1268, and we remanded that case with specific instructions to uphold the ordinance "provided that the County['s] ... judgment is still supported by credible evidence, *upon which [it] reasonably relies,*"*id.* at 1273 (emphasis added).

Here, Lollipop's argument that the City's evidence is flawed because it consists of "anecdotal" accounts rather than "empirical" studies essentially asks this Court to hold today that the City's reliance on anything but empirical studies based on scientific methods is unreasonable. This was not the law before *Alameda Books,* and it is not the law now. *See Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (reiterating that a city need not "conduct new studies or produce evidence independent of that already generated by other cities" (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925)); *Pap's A.M.,* 529 U.S. at 300, 120 S.Ct. 1382 (plurality opinion) (criticizing the dissent for "ignor[ing] Erie's actual experience and instead requir[ing] ... an empirical analysis"). Rather, the City of Daytona Beach could reasonably rely upon "[c]ommon sense," *see Bellanca,* 452 U.S. at 718, 101 S.Ct. 2599, "its own experiences," *see Pap's A.M.,* 529 U.S. at 300, 120 S.Ct. 1382 (plurality opinion), "the experiences of ... other cities," *Renton,* 475 U.S. at 51, 106 S.Ct. 925, or city officials' local knowledge, *see Alameda Books,* 535 U.S. at 451-52, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge ...." (citations omitted)); *see also Pap's A.M.,* 529 U.S. at 297-98, 120 S.Ct. 1382 (plurality opinion).

To be sure, as the *Alameda Books* plurality admonished, the City cannot "get away with shoddy data or reasoning," and its evidence must "fairly support" its rationale. *See*535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion). But this is simply another way of saying that the City's reliance on evidence supporting its rationale must be *reasonable.* Anecdotal evidence is not "shoddy" *per se.* At most, Lollipop's experts' studies suggest that the City *could* have reached a different conclusion during its legislative process about the relationship between adult theaters and negative secondary effects. But demonstrating the possibility of such an alternative does not necessarily mean that the City was barred from reaching other reasonable and different conclusions. *See G.M. Enters., Inc. v. Town of St. Joseph,* 350 F.3d 631, 639 (7th Cir.2003) ("Although this evidence shows that the [town] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [town's] legislative process."); *see also Alameda Books,* 535 U.S. at 437, 122 S.Ct. 1728***882** (plurality opinion) (noting that a city "does not bear the burden of providing evidence that rules out every theory ... that is inconsistent with its own").

Our review is designed to determine whether *the City's* rationale was a reasonable one, and even if Lollipop's demonstrates that another conclusion was also reasonable, we cannot simply substitute our own judgment for the City's. *See Peek-A-Boo Lounge,* 337 F.3d at 1273; *see also Barnes,* 501 U.S. at 583, 111 S.Ct. 2456 (Souter, J., concurring in the judgment) ("At least as to the regulation of expressive conduct, '[w]e decline to void [a statute] essentially on the ground that it is unwise legislation ....' " (quoting *O'Brien,* 391 U.S. at 384, 88 S.Ct. 1673 (alterations in original))); *Renton,* 475 U.S. at 52, 106 S.Ct. 925 ("It is not our function to appraise the wisdom of [the city's] decision to [regulate] adult theaters ...." (second alteration added and quotation marks omitted)); *cf. Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("[C]ourts should not be in the business of second-guessing fact-bound empirical assessments of city planners.").

The City of Daytona Beach relied on, among other things, the Supreme Court's decisions in *Bellanca, LaRue, Barnes,* and *Pap's A.M.;* numerous police reports of criminal activity-including prostitution and assaults on police officers-in and around adult

theaters; undercover police investigations that revealed numerous violations of City ordinances by adult theaters; the City's police chief's documentation of criminal activity in and around adult theaters; CAD data showing calls-for-service to police dispatchers from areas near adult theaters; extensive testimony taken in *Function Junction,* 705 F.Supp. at 547-48; studies conducted by Boston and Detroit showing that adult businesses tend to increase urban blight; studies of urban blight and decay in Daytona Beach; controlled laboratory studies showing a correlation between alcohol and sexual conduct; anecdotal accounts from local business owners about increased crime in and around adult theaters; and newspaper articles describing increases in problems related to nudity and alcohol surrounding events such as Spring Break and Black College Reunion. Because Lollipop's has failed to cast direct doubt on the aggregation of evidence that the City reasonably relied upon when enacting the challenged ordinances, we hold that the ordinances further a substantial government interest under *O'Brien.*

Moreover, a close examination of Lollipop's experts' studies calls into question their stated conclusion that they "cast grave doubt" on the City's evidence that adult theaters increase crime, and, equally important, the studies do not even purport to address the City's evidence that adult theaters tend more generally to perpetuate urban blight and decay. First, one underlying methodological problem with both studies suggests that they cast little or no doubt on the City's evidence that nudity in establishments that serve alcohol encourages "prostitution, ... undesirable behavior ..., [and] sexual, lewd, lascivious, and salacious conduct among patrons and employees ... in violation of law and [en]dangers ... the health, safety and welfare of the public." *See* Ordinance 81-334 § 2. The experts' studies are based solely on CAD data, which, in lay terms, is essentially 911 emergency call data. Relying on such data to study crime rates is problematic, however, because many crimes do not result in calls to 911, and, therefore, do not have corresponding records in the City's CAD data.[FN31] This is especially true ***883** for crimes, such as lewdness[FN32] and prostitution, that the City sought to reduce by enacting the challenged ordinances. *See* Ordinance 02-496 § 5 (seeking to reduce "lewd and lascivious behavior, prostitution, sexual assaults and batteries, ... other criminal activity, [and the] degradation of women"); Ordinance 81-334 § 2 (seeking to reduce "prostitution, ... undesirable behavior, ... [and illegal] sexual, lewd, lascivious, and salacious conduct among patrons and employees" of adult theaters); *see also* Ordinance 03-375 § 4 (relying on legislative record for Ordinances 81-334 and 02-496).

FN31. *See* Richard McCleary & James W. Meeker, *Do Peep Shows "Cause" Crime? A Response to Linz, Paul, and Yao,* 43 J. Sex Res. 194, 196 ("Modern criminologists do *not* use CFSs [i.e., calls for service or CAD data,] to measure crime or crime risk. In 2000-2004, the official journals of the two national criminology professional associations, *Criminology* and *Justice Quarterly,* published 245 articles. Of the 100 that analyzed a crime-related statistic, ... [only] two analyzed CFSs, but even in these two cases, CFSs were not used to measure crime or crime risk.").

FN32. Under Florida law, lewdness is at least a second-degree misdemeanor. *See*Fla. Stat. § 796.07.

Such crimes are often "victimless," in the sense that all of those involved are willing participants, and, therefore, they rarely result in calls to 911. College students on Spring Break are unlikely to call 911 after a wild night out on the town despite having participated in exactly the sort of activity that the City's nudity ordinances were enacted to reduce. Likewise, an encounter between a prostitute and a "john" rarely leads to a 911 call. By contrast, the City's "anecdotal" evidence may be a more accurate assessment of such crimes because it is not based on a data set that undercounts the incidents of such "victimless" crimes. *Cf. World Wide Video of Wash., Inc. v. City of Spokane,* 368 F.3d 1186, 1195-96 (9th Cir.2004) ("Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects."(citation and alteration omitted)).[FN33]

FN33. We also note that at least three other circuits have rejected, for similar reasons, attempts by plaintiffs to use studies based on CAD data to cast direct doubt on an ordinance that the municipality supported with evidence of the sort relied upon by the

City of Daytona Beach here. *See* *Gammoh v. City of La Habra,* 395 F.3d 1114, 1126-27 (9th Cir.2005); *G.M. Enters., Inc.,* 350 F.3d at 639; *SOB, Inc.,* 317 F.3d at 863 & n. 2. Interestingly, Daniel Linz, one of the experts hired by Lollipop's, also co-authored the studies found to be insufficient in two of these cases. *See* *G.M. Enters., Inc.,* 350 F.3d at 635-36, 639; *SOB, Inc.,* 317 F.3d at 863.

A second problem with Lollipop's experts' studies is that, even if the underlying CAD data fully reflected all of the conduct that Daytona Beach sought to reduce, the experts appear to draw conclusions that overstate the underlying data. For example, the study that focuses on Ordinance 81-334 concludes that "crimes against persons, crimes against property, and sex crimes, including both rape and prostitution[,] are not more common in areas with adult businesses than they are in similar control areas." (Experts' Report 2.) But the experts' own underlying data suggests otherwise-for three of the six pairs of study and control areas that the experts examined, "the study areas [i.e., areas with adult theaters,] *do show significantly higher rates of crime* than the control areas." (*Id.* at 29-30 (emphasis added).)

The experts attempt to explain away this result by pointing to the other three pairs-two show no "significant" difference between study and control areas, and one shows a significantly higher crime rate in the control area than the study area. The ***884** experts assert, without much discussion, that "[t]his mixed pattern" shows that "factors other than the presence of a nude cabaret are affecting rates of crime." (*Id.* at 30.) The experts are no doubt correct that factors other than the presence of adult theaters affect crime rates in Daytona Beach; crime is plainly caused by many factors. But that does little to undermine the City's conclusion that adult theaters *also* affect crime rates, especially when the experts' own analysis shows a statistically significant correlation between adult theaters and increased crime in half of the areas in the study.[FN34]

FN34. In addition to crimes against persons, crimes against property, and sex crimes, the study that focused on Ordinance 81-334 also analyzed "miscellaneous incidents that share in common that they involve violations of social norms ...., includ[ing] drunkenness, disorderly conduct, drug offenses, liquor law violations, and weapons complaints." (Experts' Report 27.) The study found a statistically significant increase in these so-called "norm violations" in areas with adult theaters compared to control areas, (*id.* at 33-34), which could be read to support part of the City's rationale for Ordinance 81-334. *See* Ordinance 81-334 § 2 (seeking to reduce "undesirable behavior" and "dangers to the health, safety and welfare of the public"). Similarly, the study that focused on Ordinance 02-496 found a statistically significant increase in drug related offenses in areas with adult theaters compared to control areas. (Experts' Report 80, 105 tbl.10.)

Finally, both studies focus only on criminal activity and do not even purport to address the connection between adult theaters and urban blight. Ordinance 03-375, which amended Ordinance 02-496, was supported by testimony from *Function Junction* that adult theaters promote and perpetuate urban blight, which in Daytona Beach was characterized by "a significant percentage of deteriorating structures; a large number of small ... lots, which did not allow cars; a notable parking problem; a high incidence of crime, particularly, on the beachside; and a large percentage of antiquated, underground utility systems, such as drainage, water and sewer systems." 705 F.Supp. at 547. Lollipop's experts' studies examine only one of these conditions-high crime rates-and, notably, do not address at all the City's evidence that adult theaters tend to perpetuate these other features of urban blight. Although Lollipop's experts argue that the testimony provided in *Function Junction* was based on unreliable data and methodologically unsound analysis, we repeat that the City's reliance on such evidence need only have been *reasonable,* and it was.

In short, the CAD data relied on by both studies may substantially undercount incidents of many of the types of crime that the City sought to reduce; the data that the studies did analyze show some statistically significant correlations between adult theaters and increased criminal activity; and the studies completely fail to address evidence of increased urban blight and decay that the City reasonably relied on when enacting Ordinance 03-375. Thus, Lollipop's has failed to cast

direct doubt on all of the evidence that the City reasonably relied on when enacting the challenged ordinances. *See* Peek-A-Boo Lounge, 337 F.3d at 1268 (noting that "the government must rely on at least *some* pre-enactment evidence" (emphasis in original)); Wise Enters., Inc. v. Unified Gov't of Athens-Clarke County, 217 F.3d 1360, 1364 (11th Cir.2000) (noting that a municipality "must have *some* factual basis" for its rationale (emphasis in original) (quotation marks omitted)); *see also* World Wide Video, 368 F.3d at 1195 (explaining that a city needs only "some" evidence to support its ordinances); Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 481 (5th Cir.2002) ("*Renton* teaches us that the government must produce *some* evidence ***885** of adverse secondary effects ...." (emphasis in original) (citation omitted)). Accordingly, we hold that Ordinances 81-334, 02-496, and 03-375 further a substantial government interest under *O'Brien*.[FN35]

> FN35. Inasmuch as the district court concluded that Lollipop's had cast direct doubt on the City's evidence, it allowed the City to present post-enactment evidence in an effort to renew support for a theory justifying its ordinances. But because we have concluded that Lollipop's failed to cast direct doubt on the City's evidence, there is no need to consider the City's post-enactment evidence. *See* Alameda Books, 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion) ("If plaintiffs fail to cast direct doubt on [the city's] rationale ..., the municipality meets the standard set forth in *Renton*.").

*B. Narrow Tailoring*

Under the fourth prong of the *O'Brien* test, an ordinance that imposes a reasonable time, place, or manner restriction on nudity must be "no greater than is essential to the furtherance of the government interest." Pap's A.M., 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion). The Supreme Court has made clear, however, that *O'Brien* does not impose strict scrutiny's familiar "least restrictive means" requirement:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Ward v. Rock Against Racism, 491 U.S. 781, 798-99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (footnote and citation omitted) (alteration in original); *see also* Pap's A.M., 529 U.S. at 301-02, 120 S.Ct. 1382 (plurality opinion) (noting that "least restrictive means analysis is not required" under *O'Brien*).

Here, the combined effect of Ordinances 81-334, 02-496, and 03-375 is that at least G-strings and pasties are required in all adult theaters regardless of location, and that Ordinance 02-496's slightly more modest clothing requirements apply at establishments that either serve alcohol or are located within 500 feet of an establishment that serves alcohol. Lollipop's argues that requiring more than G-strings and pasties at establishments that serve alcohol imposes a greater restriction than is necessary to further the City's substantial interest in reducing negative secondary effects:

> Appellants are claiming, *at a minimum,* that adults have a right to perform in pasties and G-strings where alcohol is served. Appellants further argue that the City's ordinances are unduly restrictive because they should allow pasties and G-strings at more locations. Appellants' claim should be understood in the broadest terms: government simply has no business telling adults what they can and cannot wear beyond a simple prohibition against nudity.

(Appellants'/Cross Appellees' Resp. & Reply Br. 22-23 (emphasis in original).)

We break no new ground in rejecting Lollipop's argument. It is well-established that a nudity ordinance that imposes a minimum requirement of G-strings and pasties is narrowly tailored under *O'Brien*. *See* Pap's A.M., 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion) ("The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey ***886** the dancer's erotic message."); Barnes,

501 U.S. at 587, 111 S.Ct. 2456 (Souter, J., concurring in the judgment) ("Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message."); *id.* at 572, 111 S.Ct. 2456 (plurality opinion) ("Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose."); *cf. Peek-A-Boo Lounge*, 337 F.3d at 1274 (suggesting that the ordinance at issue, which did not leave erotic dancers free to perform wearing G-strings and pasties in any location in the county, was not narrowly tailored).

So too, the First Amendment does not prevent a city from limiting the venues where dancers may communicate their erotic message. An ordinance that "does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise," is narrowly tailored. *Wise Enters.*, 217 F.3d at 1365. And an ordinance that defines those locations by reference to the presence of establishments that serve alcohol does not unduly restrict the ability to communicate an erotic message. *See Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 948 (11th Cir.1982) ( "[N]ude entertainment necessarily involves a substantial degree of conduct, and ... any artistic or communicative elements present in such conduct are not of a kind whose content or effectiveness is dependent upon being conveyed where alcoholic beverages are served."). Thus, both the requirement that dancers wear G-strings and pasties in all adult theaters, and the additional requirement of clothing somewhat more modest[FN36] within 500 feet of establishments that serve alcohol, are narrowly tailored under *O'Brien*.

FN36. Lollipop's characterizes the additional required clothing as a "modest bikini," (Appellant's Initial Br. 46), or a "full bathing suit [ ]" (Appellant's Reply Br. 23). The City disputes this characterization, observing that "[a] 'modest bikini' certainly does not expose half of the lower female breast and two thirds of the buttocks." (Appellee's Initial Br. 52-53.) Regardless of whether the term "modest" accurately describes Ordinance 03-375's precise requirements, which are quoted above, *see supra* note 12, the City of Daytona Beach could impose those requirements within 500 feet of establishments that serve alcohol.

## IV. *Conclusion*

Accordingly, we hold that all of the City's ordinances challenged in this lawsuit are constitutional. We AFFIRM the district court's decision upholding the City's zoning ordinances; we REVERSE the district court's decision striking down Ordinances 81-334, 02-496, and 03-375; and we REMAND for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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