

RESOLUTION NO. 3/3

RESOLUTION ESTABLISHING FINDINGS OF FACT THAT REGULATIONS OF SEXUALLY ORIENTED BUSINESSES ARE NECESSARY TO MINIMIZE THE SECONDARY ADVERSE EFFECTS OF SUCH BUSINESSES IN THE CITY OF CHESTERFIELD

BE IT RESOLVED by the City Council of the City of Chesterfield as follows:

LEGAL BACKGROUND

WHEREAS, the Chesterfield City Council has been provided with background information on sexually oriented businesses which, in summary fashion, is as follows:

1. The United States Supreme Court in its decisions of Young v. American Mini Theaters, 96 S.Ct. 2440 (1976), and City of Renton v. Playtime Theaters, 106 S.Ct. 925 (1986) has held that sexually oriented businesses engaged in the offering of adult fare characterized by an emphasis on matter depicting specified sexual activities or anatomical areas may not be completely prohibited from doing business within cities by municipal ordinances.
2. The Supreme Court has further held that municipalities may regulate sexually oriented businesses with lawfully enacted contentneutral time, place and manner zoning and licensing ordinances if said regulations are not merely a pretext for completely prohibiting within a City sexually oriented businesses based on the content of the material being offered.
3. The Supreme Court has concluded that lawful content neutral time, place and manner regulations may have as their focus the minimization of the adverse secondary effects on a community generated by the location and operation of a sexually oriented business within a community. Adverse secondary effects are defined as:
 - a. Increased incidence of crime,
 - b. Diminution of property values within the community and especially the values of those properties adjacent to or in close proximity to the sexually oriented business, and
 - c. Increased risk for the spread of sexually transmitted diseases.

FINDINGS OF FACT

WHEREAS, based on the legal background referenced herein, the Chesterfield City Council hereby makes the following Findings of Fact in connection with the regulation of sexually oriented businesses within the City:

1. That the City Council has reviewed and considered all the material and unsworn testimony presented before it in connection with the regulation of sexually oriented businesses within the City.
2. The City Council reviewed and studied the "Report of the (Minnesota) Attorney General's Working Group on Regulation of Sexually Oriented Businesses", dated June 6, 1989 referred to hereafter as the "Report".
3. The Report considered evidence from studies conducted in cities throughout the United States relating to sexually oriented businesses.

4. The Attorney General's Report, based upon the above referenced studies and the testimony presented to it has concluded "that sexually oriented businesses are associated with high crime rates and depression of property values". In addition, the Attorney General's Work 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".
5. The Report concludes that sexually oriented businesses have an impact on the neighborhoods surrounding them which is distinct from the impact caused by other commercial uses.
6. The Report concludes that residential neighborhoods located within close proximity to adult theaters, book stores, and other sexually oriented businesses experience increased crime rates (sex-related crimes in particular) , lowered property values, increased transiency, and decreased stability of ownership.
7. The Report concludes the adverse impacts which sexually oriented businesses have on surrounding areas diminish as the distance from the sexually oriented businesses increases.
8. The Report concludes that studies of other cities have shown that among the crimes which tend to increase either within or in the near vicinity of sexually oriented businesses are rapes, prostitution, child molestation, indecent exposure, and other lewd and lascivious behavior.
9. The Report concludes that the Phoenix, Arizona study confirmed that the sex crime rate was on the average 500 percent higher in areas with sexually oriented businesses.
10. The Report concludes that many members of the public perceive areas within which sexually oriented businesses are located as less safe than other areas which do not have such uses.
11. The Report concludes that studies of other cities have shown that the values of both commercial and residential properties either are diminished or fail to appreciate at the rate of other comparable properties when located in proximity to sexually oriented businesses.
12. The Report concludes that the Indianapolis, Indiana study established that professional real estate appraisers believe that adult uses have a negative effect on the value of both residential and properties within a one to three block area of the store.
13. The evidence supporting the need to protect minors and families from the criminal and other unlawful activities associated with the operation of sexually-oriented businesses is compelling. The provisions of this chapter are necessary to ensure that sexually-oriented uses in Chesterfield are conducted a reasonable distance away from places where minors regularly gather, often in large numbers.
14. In a family community, sexually-oriented businesses are not uniformly compatible with community standards, as defined during the numerous public hearings.
15. The City Council finds the development and urban characteristics of-Chesterfield are similar to those of the cities cited by the Reports when considering the effects of sexually oriented businesses and that the findings concerning the effects of sexually oriented businesses in other cities documented in the Reports are relevant to potential circumstances in the City of Chesterfield.
16. The City Council finds based upon the Report and the studies cited herein, that sexually oriented businesses have the potential for adverse secondary effects upon certain preexisting land uses within the City of Chesterfield and that in reliance on the data and conclusions made by the studies documented in the Report, it is not necessary for the City of Chesterfield to conduct its own independent study concerning the effects of sexually oriented businesses locating within the City.
17. The City Council is currently without sufficient ordinances comprehensively regulating the location of sexually oriented businesses within the City.

18. Pursuant to the United States Supreme Court case of City of Renton v. Playtime Theaters Inc., 106 S.Ct. 925 (1988), and others, it is clear that a permanent total prohibition against sexually oriented businesses would be unconstitutional.

19. The City Council finds that the location of sexually oriented businesses within the City of Chesterfield may have a potentially detrimental effect on the City by unnecessarily lowering property values within the City if said establishments were located in inappropriate areas.

20. The City Council finds there will be potentially increased crime within the City from inadequate regulations of sexually oriented businesses locating and operating within the City.

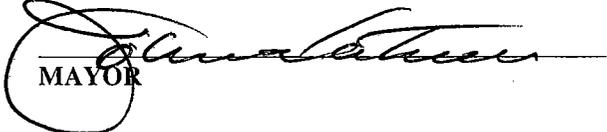
21. The City Council finds that contentneutral time, place and manner restrictions that regulate the zoning and licensing of sexually oriented businesses as well as public health regulations are necessary in the City of Chesterfield to minimize the potential adverse secondary effects which may accompany the location and operation of said businesses within the City but that said regulations should be drafted in such a manner as to allow for reasonable opportunity to open and operate sexually oriented businesses within the City while minimizing the secondary adverse effects.

22. It is not the intent of this chapter to unconstitutionally suppress any speak activities protected by the First Amendment of the United States Constitution nor the Missouri State Constitution, but to enact content-neutral ordinances which address the secondary effects of sexually-oriented businesses, as well as the health problems associated with such businesses.

DECISION

THEREFORE, BE IT RESOLVED that the City Council hereby directs the formulation of regulations which will serve to minimize the adverse secondary effects of sexually oriented businesses while providing said businesses a reasonable opportunity to locate and operate within the City of Chesterfield.

Passed and approved this 3rd day of January, 2005.


MAYOR

ATTEST:


CITY CLERK

Appendix F: Report of the Minnesota Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989)

Introduction

Many communities in Minnesota have raised concerns about the impact of sexually oriented businesses on their quality of life. It has been suggested that sexually oriented businesses serve as a magnet to draw prostitution and other crimes into a vulnerable neighborhood. Community groups have also voiced the concern that sexually oriented businesses can have an adverse effect on property values and impede neighborhood revitalization. It has been suggested that spillover effects of the businesses can lead to sexual harassment of residents and scatter unwanted evidence of sexual liaisons in the paths of children and the yards of neighbors.

Although many communities have sought to regulate sexually oriented businesses, these efforts have often been controversial and equally often unsuccessful. Much community sentiment against sexually oriented businesses is an outgrowth of hostility to sexually explicit forms of expression. Any successful strategy to combat sexually oriented businesses must take into account the constitutional rights to free speech which limit available remedies.

Only those pornographic materials which are determined to be "obscene" have no constitutional protection. As explained later in more detail, only that pornography which, according to community standards and taken as a whole, "appeals to the prurient interest" (as opposed to an interest in healthy sexuality), describes or depicts sexual conduct in a "patently offensive way" and "lacks serious literary, artistic, political or scientific value," can be prohibited or prosecuted. *Miller v. California*, 413 U.S. 15, 24 (1973).

Other pornography and the businesses which purvey it can only be regulated where a harm is demonstrated and the remedy is sufficiently tailored to prevent that harm without burdening First Amendment rights. In order to reduce or eliminate the impacts of sexually oriented businesses, each community must find the balance between the dangers of pornography and the constitutional rights to free speech. Each community must have evidence of harm. Each community must know the range of legal tools which can be used to combat the adverse impacts of pornography and sexually oriented businesses.

On June 21, 1988, Attorney General Hubert Humphrey III announced the formation of a Working Group on the Regulation of Sexually Oriented Businesses to assist public officials and private citizens in finding legal ways to reduce the impacts of sexually oriented businesses. Members of the Working Group were selected for their special expertise in the areas of zoning and law enforcement and included bipartisan representatives of the state Legislature as well as members of both the Minneapolis and St. Paul city councils who have played critical roles in developing city ordinances regulating sexually oriented businesses.

The Working Group heard testimony and conducted briefings on the impacts of sexually oriented businesses on crime and communities and the methods available to reduce or eliminate these impacts. Extensive research was conducted to review regulation and prosecution strategies used in other states and to analyze the legal ramifications of these strategies.

As testimony was presented, the Working Group reached a consensus that a comprehensive approach is required to reduce or eliminate the impacts of sexually oriented businesses. Zoning and licensing regulations are needed to protect residents from the intrusion of "combat zone" sexual crime and harassment into their neighborhoods. Prosecution of obscenity has played an important role in each of the cities which have significantly reduced or eliminated pornography. The additional threat posed by the involvement of organized crime, if proven to exist, may justify the resources needed for prosecution of obscenity or require use of a forfeiture or racketeering statute.

The Working Group determined that it could neither advocate prohibition of all sexually explicit material nor the use of regulation as a pretext to eliminate all sexually oriented businesses. This conclusion is no endorsement of pornography or the businesses which profit from it. The Working Group believes much pornography conveys a message which is degrading to women and an affront to human dignity. Commercial pornography promotes the misuse of vulnerable people and can be used by either a perpetrator or a victim to rationalize sexual violence. Sexually oriented businesses have a deteriorating effect upon neighborhoods and draw involvement of organized crime.

Communities are not powerless to combat these problems. But to be most effective in defending itself from pornography each community must work from the evidence and within the law. The report of this Working Group is designed to assist local communities in developing an appropriate and effective defense.

The first section of the report discusses evidence that sexually oriented businesses, and the materials from which they profit, have an adverse impact on the surrounding communities. It provides relevant evidence which local communities can use as part of their justification for reasonable regulation of sexually oriented businesses.

The Working Group also discussed the relationship between sexually oriented businesses and organized crime. Concerns about these broader effects of sexually oriented businesses underlie the Working Group's recommendations that obscenity should be prosecuted and the tools of obscenity seized when sexually oriented businesses break the law.

The second section of this report describes strategies for regulating sexually oriented businesses and prosecuting obscenity. The report presents the principal alternatives, the recommendations of the Working Group and some of the legal issues to consider when these strategies are adopted.

The goal of the Attorney General's Working Group in providing this report is to support and assist local communities who are struggling against the blight of pornography. When citizens, police officers and city officials are concerned about crime and the deterioration of neighborhoods, each of us lives next door. No community stands alone.

Summary

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses makes the following recommendations to assist communities in protecting themselves from the adverse effects of sexually oriented businesses. Some or all of these recommendations may be needed in any given community. Each community must decide for itself the nature of the problems it faces and the proposed solutions which would be most fitting.

(1) City and county attorneys' offices in the Twin Cities metropolitan area should designate a

prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

(2) The Legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecutor offices by making such cooperation a condition for receiving any such grant funds.

(3) The Attorney General should provide informational resources for city and county attorneys who prosecute obscenity crimes.

(4) Obscenity prosecutions should begin with cases involving those materials which most flagrantly offend community standards.

(5) The Legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion or receiving profit from prostitution and operation of a "disorderly house."

(6) The Legislature should consider the potential for a RICO-like statute with an obscenity predicate.

(7) Prosecutors should use the public nuisance statute to enjoin operations of sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or operating a disorderly house.

(8) Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.

(9) To reduce the adverse effects of sexually oriented businesses, communities should adopt zoning regulations which set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.

(10) To reduce adverse impacts from concentration of these businesses, communities should adopt zoning ordinances which set distances between sexually oriented businesses and between sexually oriented businesses and liquor establishments, and should consider restricting sexually oriented businesses to one use per building.

(11) Communities should require existing businesses to comply with new zoning or other regulation of sexually oriented businesses within a reasonable time so that prior uses will conform to new laws.

(12) Prior to enacting licensing regulations, communities should document findings of adverse secondary effects of sexually oriented businesses and the relationship between these effects and proposed regulations so that such regulations can be upheld if challenged in court.

(13) Communities should adopt regulations which reduce the likelihood of criminal activity related to sexually oriented businesses, including but not limited to open booth ordinances and ordinances which authorize denial or revocation of licenses when the licensee has committed offenses relevant to the operation of the business.

(14) Communities should adopt regulations which reduce exposure of the community and minors to the blighting appearance of sexually oriented businesses, including but not limited to regulations of signage and exterior design of such businesses, and should enforce state law requiring sealed wrappers and opaque covers on sexually oriented material.

Impacts of Sexually Oriented Businesses

The Working Group reviewed evidence from studies conducted in Minneapolis and St. Paul and in other cities throughout the country. 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.

Minneapolis Study

In 1980, on direction from the Minneapolis City Council, the Minneapolis Crime Prevention Center examined the effects of sex-oriented and alcohol-oriented adult entertainment upon property values and crime rates. This study used both simple regression and multiple regression statistical analysis to evaluate whether there was a causal relationship between these businesses and neighborhood blight.

The study concluded that there was a close association between sexually oriented businesses, high crime rates and low housing values in a neighborhood. When the data was reexamined using control variables such as the mean income in the neighborhood to determine whether the association proved causation, it was unclear whether sexually oriented businesses caused a decline in property values. The Minneapolis study concluded that sexually oriented businesses concentrate in areas which are relatively deteriorated and, at most, they may weakly contribute to the continued depression of property values.

However, the Minneapolis study found a much stronger relationship between sexually oriented businesses and crime rates. A crime index was constructed including robbery, burglary, rape and assault. The rate of crime in areas near sexually oriented businesses was then compared to crime rates in other areas. The study drew the following conclusions:

(1) The effects of sexually oriented businesses on the crime rate index is positive and significant regardless of which control variable is used.

(2) Sexually oriented businesses continue to be associated with higher crime rates, even when the control variables' impacts are considered simultaneously.

According to the statistical analysis conducted in the Minneapolis study, the addition of one sexually oriented business to a census tract area will cause an increase in the overall crime rate index in that area by 9.15 crimes per thousand people per year even if all other social factors remain unchanged.

St. Paul

In 1978, the St. Paul Division of Planning and the Minnesota Crime Control Planning board conducted a study of the relationship between sex-oriented and alcohol-oriented adult entertainment businesses and neighborhood blight. This study looked at crime rates per thousand and median housing values over time as indices of neighborhood deterioration. The study combined sex-oriented and alcohol-oriented businesses, so its conclusions are only suggestive of the effects of sexually oriented businesses alone. Nevertheless, the study reached the following important conclusions:

- (1) There is a statistically significant correlation between the location of adult businesses and neighborhood deterioration.
- (2) Adult entertainment establishments tend to locate in somewhat deteriorated areas.
- (3) Additional relative deterioration of an area follows location of an adult business in the area.
- (4) There is a significantly higher crime rate associated with two such businesses in an area than is associated with only one adult business.
- (5) Housing values are also significantly lower in an area where there are three adult businesses than they are in an area with only one such business.

Similar conclusions about the adverse impact of sexually oriented businesses on the community were reached in studies conducted in cities across the nation.

Indianapolis

In 1983, the City of Indianapolis researched the relationship between sexually oriented businesses and property values. The study was based on data from a national random sample of 20 percent of the American Institute of Real Estate Appraisers.

The Study found the following:

- (1) The appraisers overwhelmingly (80%) felt that an adult bookstore located in a neighborhood would have a negative impact on residential property values within one block of the site.
- (2) The real estate experts also overwhelmingly (71%) believed that there would be a detrimental effect on commercial property values within the same one block radius.
- (3) This negative impact dissipates as the distance from the site increases, so that most appraisers believed that by three blocks away from an adult bookstore, its impact on property values would be minimal.

Indianapolis also studied the relationship between crime rates and sexually oriented bookstores, cabarets, theaters, arcades and massage parlors. A 1984 study entitled "Adult Entertainment Businesses in Indianapolis" found that areas with sexually oriented businesses had higher crime rates than similar areas with no sexually oriented businesses.

- (1) Major crimes, such as criminal homicide, rape, robbery, assault, burglary and larceny, occurred at a rate that was 23 percent higher in those areas which had sexually oriented businesses.
- (2) The sex-related crime rate, including rape, indecent exposure and child molestation, was

found to be 77 percent higher in those areas with sexually oriented businesses.

Phoenix

The Planning Department of Phoenix, Arizona, published a study in 1979 entitled "Relation of Criminal Activity and Adult Businesses." This study showed that arrests for sexual crimes and the location of sexually oriented businesses were directly related. The study compared three areas with sexually oriented businesses with three control areas which had similar demographic and land use characteristics, but no sexually oriented establishments. The study found that,

(1) Property crimes were 43 percent higher in those areas which contained a sexually oriented business.

(2) The sex crime rate was 500 percent higher in those areas with sexually oriented businesses.

(3) The study area with the greatest concentration of sexually oriented businesses had a sex crimes rate over 11 times as large as a similar area having no sexually oriented businesses.

Los Angeles

A study released by the Los Angeles Police Department in 1984 supports a relationship between sexually oriented businesses and rising crime rates. This study is less definitive, since it was not designed to use similar areas as a control. The study indicated that there were 11 sexually oriented adult establishments in the Hollywood, California, area in 1969. By 1975 the number had grown to 88. During the same time period, reported incidents of "Part 1" crime (i.e., homicide, rape, aggravated assault, robbery, burglary, larceny and vehicle theft) increased 7.6 percent in the Hollywood area while the rest of Los Angeles had a 4.2 percent increase. "Part 11" arrests (i.e., forgery, prostitution, narcotics, liquor law violations and gambling) increased 3.4 percent in the rest of Los Angeles, but 46.4 percent in the Hollywood area.

Concentration of Sexually Oriented Businesses

Neighborhood Case Study

In St. Paul, there is one neighborhood which has an especially heavy concentration of sexually oriented businesses. The blocks adjacent to the intersection of University Avenue and Dale Street have more than 20 percent of the city's adult uses (4 out of 19), including all of St. Paul's sexually oriented bookstores and movie theaters.

The neighborhood, as a whole, shows signs of significant distress, including the highest unemployment rates in the city, the highest percentage of families below the poverty line in the city, the lowest median family income and the lowest percentage of high school and college graduates. (See 40-Acre Study on Adult Entertainment, St. Paul Department of Planning and Economic Development, Division of Planning, 1987, at 19.) It would be difficult to attribute these problems in any simple way to sexually oriented businesses.

However, it is likely that there is a relationship between the concentration of sexually oriented businesses and neighborhood crime rates. The St. Paul Police Department has determined that St. Paul's street prostitution is concentrated in a "street prostitution zone" immediately adjacent to the intersection where the sexually oriented businesses are located. Police statistics for 1986 show that, of 279 prostitution arrests for which specific locations could be identified, 70 percent (195) were within the "street prostitution zone." Moreover, all of the locations with 10 or more arrests for prostitution were within this zone.

The location of sexually oriented businesses has also created a perception in the community that this is an unsafe and undesirable part of the city. In 1983, Western State Bank, which is currently located across the street from an adult bookstore, hired a research firm to survey area residents regarding their preferred location for a bank and their perceptions of different locations. A sample of 305 people were given a list of locations and asked, "Are there any of these locations where you would not feel safe conducting your banking business?"

No more than 4 percent of the respondents said they would feel unsafe banking at other locations in the city. But 36 percent said they would feel unsafe banking at Dale and University, the corner where the sexually oriented businesses are concentrated.

The Working Group reviewed the 1987 40-Acre Study on Adult Entertainment prepared by the Division of Planning in St. Paul's Department of Planning and Economic Development. This study summarized testimony presented to the Planning Commission regarding neighborhood problems:

Residents in the University/Dale area report frequent sex-related harassment by motorists and pedestrians in the neighborhood. Although it cannot be proved that the harassers are patrons of adult businesses, it is reasonable to suspect such a connection. Moreover, neighborhood residents submitted evidence to the Planning Commission in the form of discarded pornography literature allegedly found in the streets, sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and under the present circumstances becomes available to minors even though its sale to minors is prohibited.

Testimony

The Working Group heard testimony that a concentration of sexually oriented businesses has serious impacts upon the surrounding neighborhood. The Working Group heard that 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 sexually oriented business. Neighbors report finding used condoms on their lawns 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 sexually oriented businesses. 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 propositioned by johns. The Flick theater caters to homosexual trade, and male prostitution has been noted in the area. 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 teenage son and daughter had been solicited on their way

to school and to work.

The Working Group heard testimony that in the Frogtown neighborhood, immediately north of the University-Dale intersection in St. Paul, there has been a change over time in the quality of life since the sexually oriented businesses moved into the area. The Working Group heard that the neighborhood used to be primarily middle class, did not have a high crime rate and did not have prostitution. St. Paul police officers testified that they believed the sexually oriented businesses caused neighborhood problems, particularly the increase in prostitution and other crime rates. Property values were suffering, since the presence of high crime rates made the area less desirable to people who would have the ability and inclination to improve their homes.

The Working Group made some inquiry to determine to what extent smaller cities outside the Twin Cities Metropolitan area suffered adverse impacts of sexually oriented businesses. The Working Group was informed by the chiefs of police of Northfield and Owatonna that neither city had adult bookstores or similar sexually oriented businesses. Police chiefs in Rochester and Winona stated that sexually oriented businesses in their communities operate in nonresidential areas. In addition, there is no "concentration" problem. In Rochester, there are two facilities in a shopping mall and a single bookstore in a depressed commercial/business neighborhood. The Winona store is located in a downtown business area. The police chiefs stated that they had no evidence of increased crime rates in the area adjacent to these facilities. They had no information as to the effect which these businesses might have on local property values.

Information presented to the Working Group indicates that community impacts of sexually oriented businesses are primarily a function of two variables, proximity to residential areas and concentration. Property values are directly affected within a small radius of the location of a sexually oriented business. Concentration may compound depression of property values and may lead to an increase in crime sufficient to change the quality of life and perceived desirability of property in a neighborhood.

The evidence suggests that the impacts of sexually oriented businesses are exacerbated when they are located near each other. Police officers testified to the Working Group that "vice breeds vice." When sexually oriented businesses have multiple uses (i.e., theater, bookstore, nude dancing, peep booths), one building can have the impact of several separate businesses. The Working Group heard testimony that concentration of sexually oriented businesses creates a "war zone" which serves as a magnet for people from other areas who "know" where to find prostitutes and sexual entertainment. The presence of bars in the immediate vicinity of sexually oriented businesses also compounds impacts upon the neighborhood.

The Attorney General's Working Group believes that regulatory strategies designed to reduce the concentration of sexually oriented businesses, insulate residential areas from them, and reduce the likelihood of associated criminal activity would constitute a rational response to evidence of the impacts which these businesses have upon local communities.

Sexually Oriented Businesses and Organized Crime

Infiltration of organized crime into sexually oriented businesses reinforces the need for prosecution of obscenity and requires specific regulatory or law enforcement tools. The Working Group attempted to assess both the present and potential relationship between organized crime and sexually oriented businesses.

The Working Group heard testimony from a witness who had been prosecuting obscenity cases for the

past thirteen years that many sexually oriented businesses have out-of-town absentee owners. If the manager of a local business is prosecuted on an obscenity charge, his testimony may make it possible to pierce the corporate veil and identify the true owners.

The Working Group heard testimony that an organized crime entity may operate somewhat like a franchisor. In order to stay in business, the local manager of a sexually oriented business may have to pay fees to organized crime. The makers and wholesalers of pornographic materials are also likely to be involved with organized crime.

The Working Group conducted additional research to assess the relationship between sexually oriented businesses and organized crime. The Working Group was informed by prosecutors of obscenity that there were many ways in which organized crime entities could derive a benefit from sexually oriented businesses. There is a large profit margin in pornography. The presence of coin-operated peep booths provides an opportunity to launder money. Cash obtained from illegal activities, such as prostitution or narcotics, can be explained as the income of peep booths. Cash income can also escape taxation, in violation of law.

Although it is clear that organized crime is involved to some degree in the pornography industry, various sources reach different conclusions as to the depth and extent of this involvement. Part of the difference in assessment is based on differences in the way the term "organized crime" is defined. Authorities who restrict their definition of organized crime to the highly organized ethnic hierarchy known as La Cosa Nostra (LCN) tend to find fewer links than those who define the term to include other organized criminal enterprises. Where there has been intensive law enforcement and prosecution, it is more likely that linkage between sexually oriented businesses and organized crime figures will be evident.

The Working Group has adopted the definition of organized crime contained in Minnesota's Report of the Legislative Commission on Organized Crime (1975). The Working Group is concerned about the relation between sexually oriented businesses and any "organized criminal conspiracy of two or more persons that is continuous in nature, involves activity generally crossing jurisdictional lines and results in third-party profit." The threat from organized crime includes, but is not limited to involvement of national crime enterprises such as LCN.

[1]

Recent federal indictments of James G. Hafiz in Indiana for perjury and of *Harry v. Mohney* in Michigan for tax evasion suggest a possible connection between organized crime and a Minnesota pornography business. Hafiz, a Minnesota resident who is an agent of Beverly Theater, Inc., the

[2]

company which operated the Faust Theater in St. Paul, has been linked to Mohney, a major pornographer based in Michigan. The indictments allege that Mohney caused the incorporation of the company which operated the Faust, that a corporation owned by Mohney paid for improvements to the Faust and that Mohney is, in fact, the owner of numerous sexually oriented businesses, including the Faust. (See *United States v. Hafiz*, Indictment, No. IP 88-102-CR (S. D. Ind., Sept. 15, 1988); *United States v. Mohney*, Indictment No. 88-50062 (E.D. Mich. Sept. 9, 1988).)

Mohney, in turn, has been linked with national organized crime enterprises. A 1977 report of the United States Justice Department stated:

It is believed that Harry V. Mohney of Durand, Michigan, is one of the largest dealers in pornography in the United States. . . He is alleged to have close association with the LCN Columbo and the LCN DeCavalcante, both of which are very influential in pornography in the eastern United States. In Michigan,

Mohney is known to hire individuals with organized crime associations to manage his businesses. His businesses and corporations consist of 60 known adult bookstores, massage parlors, art theaters, adult drive-in movies, go-go type lounges and pornographic warehouses in Michigan, Indiana, Illinois, Kentucky, Tennessee, Wisconsin Iowa, Ohio and California. He is involved in the financing and production of pornographic movies, magazines, books and newspapers. He also directs the importation and distribution of his own and other pornographic publications to retail and wholesale outlets throughout the United States and Canada. . . He has a working relationship with DeCalvalcante's representative Robert DiBernardo and has met with Vito Giacalone and Joseph Zerilli of the LCN Detroit. He has to cater to both to operate in Michigan.

U.S. Justice Dep't, *Organized Crime Involvement in Pornography*, reprinted in the Attorney General's Comm'n on Pornography (hereinafter "Pornography Commission"), 2 Final Report at 1229-30 (1986).

Organized crime has the potential to infiltrate Minnesota's pornography industry. Evidence on a national level highlights the vulnerability of sexually oriented businesses to criminal control. A number of sources have reported that there is a connection between organized crime and the pornography industry.

The Pornography Commission reported that the Washington, D.C., Metropolitan Police Department determined that traditional organized crime was substantially involved in and did essentially control much of the major pornography distribution in the United States during the years 1977 and 1978." 2. Final Report at 1044-45. The Washington, D.C., study "further concluded that the combination of the large amounts of money involved, the incredibly low priority obscenity enforcement had within police departments and prosecutors' offices in an area where manpower intensive investigations were essential for success, and the imposition of minimal fines and no jail time upon random convictions resulted in a low risk and high profit endeavor for organized crime figures who became involved in pornography." *Id.* at 1045.

The FBI concluded in 1978:

Information obtained . . . points out the vast control of the multi-million dollar pornography business in the United States by a few individuals with direct connections with what is commonly known as the organized crime establishment in the United States, specifically, La Cosa Nostra. . . Information received from sources of this bureau indicates that pornography is [a major] income maker for La Cosa Nostra in the United States behind gambling and narcotics. Although La Cosa Nostra does not physically oversee the day-to-day workings of the majority of pornography business in the United States, it is apparent that they have "agreements" with those involved in the pornography business in allowing these people to operate independently by paying off members of organized crime for the privilege of being allowed to operate in certain geographical areas.

Id. at 1046 (quoting Federal Bureau of Investigation report Regarding the Extent of Organized Crime Development in Pornography 6 (1978)).

A brief survey of 69 FBI field offices conducted in 1985 found that about three-quarters of those offices could not verify that traditional organized crime families were involved in the manufacture or distribution of pornography. Several offices did, however, report some involvement by members and associates of organized crime. *Id.* at 1046-47.

Stanley Ronquest, Jr., a supervisory FBI special agent for traditional organized crime at FBI headquarters in Washington, D.C., was interviewed by Attorney General staff. Ronquest stated that

LCN has not been directly involved in the pornography industry in the last ten years. However, a former FBI agent told the Pornography Commission:

In my opinion, based upon twenty three years of experience in pornography and obscenity investigations and study, it is practically impossible to be in the retail end of pornography industry [today] without dealing in some fashion with organized crime either the mafia or some other facet of non-mafia never-the-less [sic] highly organized crime.

Id. at 1047-48.

Thomas Bohling of the Chicago Police Department Organized Crime Division, Vice Control Section, told the Pornography Commission that "it is the belief of state, federal and local law enforcement that the pornography industry is controlled by organized crime families. If they do not own the business outright, they most certainly extract street tax from independent smut peddlers." *Id.* at 1048 (emphasis in original).

The Pornography Commission stated that it had been advised by Los Angeles Police Chief Daryl F. Gates that "organized crime families from Chicago, New York, New Jersey and Florida are openly controlling and directing the major pornography operations in Los Angeles." *Id.*

The Pornography Commission was told by Jimmy Fratianno, described by the Commission as a member of LCN, "that large profits have kept organized crime heavily involved in the obscenity industry." *Id.* at 1052. Fratianno testified that "95% of the families are involved in one way or another in pornography. ... It's too big. They just won't let it go." *Id.* at 1052-63.

The Pornography Commission concluded that "organized crime in its traditional LCN forms and other forms exerts substantial influence and control over the obscenity industry. Though a number of significant producers and distributors are not members of LCN families, all major producers and distributors of obscene material are highly organized and carry out illegal activities with a great deal of sophistication." *Id.* at 1053.

The Pornography Commission reported that Michael George Thevis, reportedly one of the largest pornographers in the United States during the 1970's was convicted in 1979 of RICO (Racketeer Influenced and Corrupt Organizations) violations including murder, arson and extortion. The Commission also reported examples of other crimes associated with the pornography industry, including prostitution and other sexual abuse, narcotics distribution, money laundering and tax violations, copyright violations and fraud. *Id.* at 1056-65.

Although the Pornography Commission report has been criticized for relying on the testimony of unreliable informants in drawing its conclusions finding links between pornography and organized crime (See Scott, Book Reviews, 78 J. Crim. L. & Criminology 1145, 1158-59 (1988)), its conclusions find additional support in recent state studies.

The California Department of Justice recently reported that:

California's primacy in the adult videotape industry is of law enforcement concern because the pornography business has been prone to organized crime involvement. Immense profits can be realized through pornography operations, and until recently, making and distributing pornography involved a relatively low risk of prosecution. But more aggressive law enforcement efforts and turmoil within the pornography business has destabilized the smooth flow of easy money

for some of its major operations....

As long as control over pornography distribution is contested, and organized crime figures continue their involvements in the business, the pornography industry will remain of interest to law enforcement officials statewide.

Bureau of Organized Crime and Criminal Intelligence, Department of Justice, State of California, Organized Crime in California 1987: Annual Report to the California Legislature at 59-62 (1988).

The Pennsylvania Crime Commission similarly determined in a 1980 report that most pornography stores examined were affiliated or owned by one of three men who had ties with "nationally known pornography figures who are members or associates of organized crime families." Pennsylvania Crime Commission, *A Decade of Organized Crime: 1980 Report* at 119.

For example, Reuben Sturman, a leading pornography industry figure based in Cleveland, was reported by the FBI in 1978 to have built his empire with the assistance of LCN member DiBernardo. Federal Bureau of Investigation Report Regarding the Extent of Organized Crime Involvement in Pornography (1978). Sturman, who reportedly controls half of the \$8 billion United States pornography industry, was recently indicted by a federal grand jury in Las Vegas for racketeering violations and by a federal grand jury in Cleveland for income tax evasion and tax fraud. *Newsweek*, August 8, 1988, at 3.

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, including distribution of obscenity and support of prostitution. Prosecution can increase the risk and reduce the profit margin of conducting illegal activities. It may also disclose organized crime association with local pornography businesses and increase the costs of criminal enterprise in Minnesota.

In addition to prosecution, forfeiture of property used in the illegal activities related to sexually oriented businesses can cut deeply into profits. Regulation to permit license revocation for conviction of subsequent crimes may also expose and increase control over criminal enterprises related to sexually oriented businesses.

Prosecutorial and Regulatory Alternatives

The regulation of many sexually oriented businesses, like other businesses dealing in activity with an expressive component, is circumscribed by the First Amendment of the United States Constitution.^[3] Nonetheless, the First Amendment does not impose a barrier to the prosecution of obscenity, which is not protected by the First Amendment, or to reasonable regulation of sexually oriented businesses if the regulation is not designed to suppress the content of expressive activity and is sufficiently tailored to accomplish the regulatory purpose.

The Working Group believes that communities have more prosecutorial and regulatory opportunities than they may currently recognize. The purpose of this section of the Report is to identify and recommend enforcement and regulatory opportunities. Of course, each community must decide on its own how to balance its limited resources and the wide variety of competing demands for such resources.

I. Obscenity Prosecution

Obscene material is not protected by the First Amendment. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973). The sale or distribution of obscene material in Minnesota is a criminal offense. The penalty was recently increased to up to one year in jail and a \$3,000 fine for a first offense, and up to two years

in jail and a \$10,000 fine for a second or subsequent offense within five years. Minn Stat. § 617.241,
[4]
subd. 3 (1988).

The Working Group believes that Minnesota's obscenity statutes are adequate to prosecute and penalize the sale and distribution of obscene materials. However, historically, widespread obscenity prosecution has not occurred.

The Working Group believes this is not because the sale or distribution of obscene publications in Minnesota is rare, but because prosecutors have been reluctant to bring obscenity charges, because of limited resources, difficulties faced when prosecuting obscenity, and because obscenity has historically been considered a victimless crime.

Obscenity, however, should no longer be viewed as a victimless crime.^[5] There is mounting evidence that sexually oriented businesses are, as described earlier in this report, often associated with increases in crime rates and a decline in the quality of life of neighborhoods in which they are located. Further, as discussed previously, when there is no prosecution of obscenity, large cash profits make pornographic operations very attractive to members of organized crime. The Working Group thus believes that prosecution of obscenity, particularly cases involving children, violence or bestiality, should assume a higher priority for law enforcement officials.

In addition, many of the difficulties faced when prosecuting obscenity can be addressed by adequate training and assistance. In order to prove that material is obscene, a prosecutor must prove:

- (i) that the average person, applying contemporary community standards[,] would find that the work, taken as a whole, appeals to the prurient interest in sex;
- (ii) that the work depicts sexual conduct . . . in a patently offensive manner; and
- (iii) that the work, taken as a whole, lacks serious literary, artistic political, or scientific value.

Minn. Stat. § 617.241, subd. 1(a)(i-iii) (1988). This statutory standard was drawn to be consistent with constitutional standards set forth in *Miller, supra*.

To be sure, prosecutors face a number of hazards in prosecuting obscenity. They include inadequate training in this specialized area of law, attempts by defense attorneys to remove jurors who find pornography offensive, the offering into evidence of polls and surveys through expert testimony to prove tolerant community standards, efforts to guide jurors with jury instructions favorable to the defense, and discouragement with unsuccessful prosecutions.

But the hazards can be overcome. Alan E. Sears, former executive director of the U.S. Attorney General's Commission on Pornography, has stated:

Prosecutors can successfully obtain obscenity convictions in virtually any jurisdiction in the United States. In order to obtain a conviction, it is incumbent upon a prosecutor to prepare well, know the law, not fall into the "one case syndrome" trap, obtain a representative jury through proper voir dire, keep the focus of the trial on the unlawful conduct of the defendant, and obtain legally sound instructions.

The Working Group heard testimony from prosecutors who have pursued obscenity cases nationally regarding effective ways to prosecute obscenity cases. Materials can be bought or rented, rather than seized under warrant. In the absence of survey data, community standards can be left to the wisdom of the jury. In that case, experts should be prepared to testify if the defense attempts to make a statistical case that the material is not obscene. Prosecution of obscenity is also likely to be most effective if initial prosecutions focus on materials which are patently offensive to the community, such as those involving children, violence or bestiality.

The experience of other cities has demonstrated that vigorous and sustained enforcement of obscenity statutes can sharply reduce or virtually eliminate sexually oriented businesses. Cincinnati, Omaha, Atlanta, Charlotte, Indianapolis and Fort Lauderdale were cited to the Working Group as examples of

[6] cities which have successful programs of obscenity prosecution. The Working Group encourages prosecutors to take advantage of increasing training opportunities and other assistance for obscenity prosecutions and to reassess the desirability of increased enforcement. The Working Group is pleased to note that county attorneys and law enforcement groups in Minnesota have recently held forums and seminars on obscenity law enforcement and prosecution. The U.S. Justice Department's [Child Exploitation and Obscenity Section] offers assistance to local prosecutors, including sample pleadings,

[7] indictments, search warrants, motions, responses and trial memoranda.

Recommendations

- (1) City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.**
- (2) The Legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecuting offices by making such cooperation a condition of receiving any such grant funds.**
- (3) The Attorney General should provide informational resources for city and county attorneys who prosecute obscenity crimes.**
- (4) Obscenity prosecutions should concentrate on cases that most flagrantly offend community standards.**

II. Other Legal Remedies

A. RICO/Forfeiture

In addition to traditional criminal prosecutions, use of RICO statutes and criminal and civil forfeiture actions may also prove to be successful against obscenity offenders. By attacking the criminal organization and the profits of illegal activity, such actions can provide a strong disincentive to the establishment and operation of sexually oriented businesses. For example, the federal government and a

number of the twenty-eight states which have enacted racketeer influenced and corrupt organization (RICO) statutes include obscenity offenses as predicate crimes. Generally speaking, to violate a RICO statute, a person must acquire or maintain an interest in or control of an enterprise, or must conduct the affairs of an enterprise through a "pattern of criminal activity." That pattern of criminal activity may include obscenity violations, which in turn can expose violators to increased fines and penalties as well as forfeiture of all property acquired or used in the course of a RICO violation. These statutes generally enable prosecutors to obtain either criminal or civil forfeiture orders to seize assets and may also be used to obtain injunctive relief to divest repeat offenders of financial interests in sexually oriented businesses. See 18 U.S.C. §§ 1961-68 (West Supp. 1988). RICO statutes may be particularly effective in dismantling businesses dominated by organized crime, but they may be applied against other targets as well.

The Working Group believes that Minnesota should enact a RICO-like statute that would encompass increased penalties for using a "pattern" of criminal obscenity acts to conduct the affairs of a business entity. Provisions authorizing the seizure of assets for obscenity violations should be considered, but the limitations imposed by the First Amendment must be taken into account.

It has been argued that a RICO or forfeiture statute based on obscenity crime violations threatens to "chill protected speech" because it would permit prosecutors to seize non-obscene materials from distributors convicted of violating the obscenity statute. American Civil Liberties Union, *Polluting The Censorship Debate: A Summary And Critique Of The Final Report Of The Attorney General's Commission On Pornography* at 116-117 (1986).

However, a narrow majority of the United States Supreme Court recently held that there is no constitutional bar to a state's inclusion of substantive obscenity violations among the predicate offenses for its RICO statute. *Sappenfield v. Indiana*, 57 U.S.L.W. 4180, 4183-4184 (February 21, 1989). The Court recognized that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." *Id.* at 4184. But the Court ruled that, "the mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedent." *Id.* The Court specifically upheld RICO provisions which increase penalties where there is a pattern of multiple violations of obscenity laws.

However, in a companion case, the Court also invalidated a pretrial seizure of a bookstore and its contents after only a preliminary finding of "probable cause" to believe that a RICO violation had occurred. *Fort Wayne Books, Inc. v. Indiana*, 57 U.S.L.W. 4180, 4184-4185 (February 21, 1989). The Court explained there is a rebuttable presumption that expressive materials are protected by the First Amendment. That presumption is not rebutted until the claimed justification for seizure of materials, the elements of a RICO violation, are proved in an adversary proceeding. *Id.* at 4185.

The Court did not specifically reach the fundamental question of whether seizure of the assets of a sexually oriented business such as a bookstore is constitutionally permissible once a RICO violation is proved. The Court explained:

[F]or the purposes of disposing of this case, we assume without deciding that bookstores and their contents are forfeitable (like other property such as a bank account or yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the state's obscenity laws.

Id. at 4185. The Working Group believes that a RICO statute which provided for seizure of the contents of a sexually oriented business upon proof of RICO violations would have the potential to significantly

curtail the distribution of obscene materials.

Although Minnesota does not have a RICO statute, it does have a forfeiture statute permitting the seizure of money and property which are the proceeds of designated felony offenses. Minn. Stat. § 609.5312 (1988). But, this statute does not permit seizure of property related to commission of the offenses most likely to be associated with sexually oriented businesses. Obscenity crimes are not among the offenses which justify forfeiture. Although solicitation or inducement of a person under age 13 (Minn. Stat. § 609.322, subd. 1) or between the ages of 16 and 18 to practice prostitution (Minn. Stat. § 609.322, subd. 2) are included among the offenses which could justify seizure of property, many crimes involving prostitution are outside the reach of the present Minnesota forfeiture law.

The following crimes are not included among the crimes which can justify seizure of property and profits: solicitation, inducement, or promotion of a person between the ages of 13 and 16 to practice prostitution (Minn. Stat. § 609.322, subd. 1A); solicitation, inducement or promotion of a person 18 years of age or older to practice prostitution (Minn. Stat. § 609.322, subd. 3); receiving profit derived from prostitution (Minn. Stat. § 609.323); owning, operating or managing a "disorderly house," in which conduct habitually occurs in violation of laws pertaining to liquor, gambling, controlled substances or prostitution (Minn. Stat. § 609.33).

Although its reach would be much more limited, the legislature should also consider providing for forfeiture of property used to commit an obscenity offense or which represents the proceeds of obscenity offenses. Under the holding in *Fort Wayne Books, Inc. v. Indiana*, such forfeiture could not take place, if at all, until it was proved that the underlying obscenity crimes had been committed.

There are no comparable constitutional issues raised by enacting or enforcement of forfeiture statutes based on violations of prostitution, gambling, or liquor laws. The legislature may require sexually oriented businesses which violate these laws to forfeit their profits. The Working Group believes that such an expansion of forfeiture laws would give prosecutors greater leverage to control the operation of those businesses which pose the greatest danger to the community.

Recommendations

(1) The legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion or receiving profit from prostitution and operation of a "disorderly house."

(2) The legislature should consider the potential for a RICO-like statute with an obscenity predicate.

B. Nuisance Injunctions

Minnesota law enforcement authorities may obtain an injunction and close down operations when a facility constitutes a public nuisance. A public nuisance exists when a business repeatedly violates laws pertaining to prostitution, gambling or keeping a "disorderly house." The Minnesota public nuisance law permits a court to order a building to be closed for one year. Minn. Stat. §§ 617.80-.87 (1988).

Nuisance injunctions to close down sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or disorderly conduct are potentially powerful regulatory devices. The fact that a building in which prostitution or other offenses occur houses a sexually oriented business does not shield the facility from application of nuisance law based on such offenses. *Arcara v. Cloud Books, Inc.*, 478 U.S.697, 106 S.Ct. 3172 (1986) (First Amendment does not shield adult bookstore from application of New York State nuisance law designed in part to close places of prostitution).

Although the Working Group believes that nuisance injunctions with an obscenity predicate would be effective in controlling sexually oriented businesses, such provisions would probably be unconstitutional under current U.S. Supreme Court decisions. Six Supreme Court justices joined in the *Arcara* result, but two of them—Justices O'Connor and Stevens—concurd with these words of caution:

If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Because there is no suggestion in the record or opinion below of such pretextual use of the New York nuisance provision in this case, I concur in the Court's opinion and judgment.

Arcara, supra, 478 U.S. at 708, 106 S.Ct. at 3178.

In an earlier case, *Vance v. Universal Amusement*, 445 U.S. 308, 100 S.Ct. 1156 (1980), the Court ruled unconstitutional a Texas public nuisance statute authorizing the closing of a building for a year if the building is used "habitual[ly]" for the "commercial exhibition of obscene material." *Id.* at 310 n.2, 100 S. Ct. at 1158 n.2.

The Court's recent holdings in *Sappenfield* and *Fort Wayne Books, Inc.* give no indication that the Court would now look more favorably upon an injunction to close down a facility which sold obscene materials. The Court assumed without deciding that forfeiture of bookstore assets could be constitutional in a RICO case. But, in making this assumption, the Court distinguished forfeiture of assets under RICO from a general restraint on presumptively protected speech. The court approved the reasoning of the Indiana Supreme Court that, "The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *Fort Wayne Books, Inc.* at 4185. The Court assumed that RICO provisions could be upheld on the basis that "adding obscenity-law violations to the list of RICO predicate crimes was not a mere rule to sidestep the First Amendment." *Id.* Without the relationship to proceeds of crime, a remedy which closed a facility for obscenity violations would be far less likely to withstand constitutional scrutiny.

Recommendations

(1) Prosecutors should use the public nuisance statute to enjoin operations of sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or operating a disorderly house.

III. Zoning

Zoning ordinances can be adopted to regulate the location of sexually oriented businesses without violating the First Amendment. Such ordinances can be designed to disperse or concentrate sexually oriented businesses, to keep them at designated distances from specific buildings or areas, such as churches, schools and residential neighborhoods or to restrict buildings to a single sexually oriented

usage. Because zoning is an important regulatory tool when properly enacted, the Working Group believes a careful explanation of the law and a review of potential problems in drafting zoning ordinances may be helpful to communities considering zoning to regulate sexually oriented businesses.

A. Supreme Court Decisions

The U.S. Supreme Court upheld the validity of municipal adult entertainment zoning regulations in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S. Ct. 926 (1986). [8]

In *Young*, the Court upheld the validity of Detroit ordinances prohibiting the operation of theaters [9] showing sexually explicit "adult movies" within 1,000 feet of any two other adult establishments. The ordinances authorized a waiver of the 1,000-foot restriction if a proposed use would not be contrary to the public interest and/or other factors were satisfied. *Young, supra*, 427 U.S. at 54 n.7, 96 S. Ct. at 2444 n.7. The ordinances were supported by urban planners and real estate experts who testified that concentration of adult-type establishments "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." *Id.* at 55, 96 S. Ct. at 2445. A "myriad" of locations were left available for adult establishments outside the forbidden 1,000-foot distance zone, and no existing establishments were affected. *Id.* at 71 n.35, 96 S. Ct. at 2453 n.35.

Writing for a plurality of four, Justice Stevens upheld the zoning ordinance as a reasonable regulation of the place where adult films may be shown because (1) there was a factual basis for the city's conclusion that the ordinance would prevent blight; (2) the ordinance was directed at preventing "secondary effects" of adult-establishment concentration rather than protecting citizens from unwanted "offensive" speech; (3) the ordinance did not greatly restrict access to lawful speech, and (4) "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 63 n.18, 71 nn.34, 35, 96 S. Ct. at 2448-49 n.18, 2452-53 nn.34, 35.

Justice Stevens did not expressly describe the standard he had used, but it was clear that the plurality would afford non-obscene sexually explicit speech lesser First Amendment protection than other categories of speech. However, four dissenters and one concurring justice concluded that the degree of protection afforded speech by the First Amendment does not vary with the social value ascribed to that speech. In his concurring opinion, Justice Powell stated that the four-part test of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968), should apply. Powell explained:

Under that test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interest, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedom is no greater than is essential to the furtherance of that interest."

427 U.S. at 79-80, 96 S. Ct. at 2457 (citation omitted) (Powell, J., concurring).

Perhaps because Justice Stevens' plurality opinion did not offer a clearly articulated standard of review, post-*Young* courts often applied the *O'Brien* test advocated by Justice Powell in his concurring opinion. Many ordinances regulating sexually oriented businesses were invalidated under the *O'Brien* test. See R.M. Stein, *Regulation of Adult Businesses through Zoning After Renton*, 18 Pac. L.J. 351, 360 (1987) ("consistently invalidated"); S.A. Bender, *Regulating Pornography Through Zoning: Can We "Clean*

Up" Honolulu?, 8 U. Haw. L. Rev. 75, 105 (1986) (ordinances upheld in only about half the cases).

Applying *Young*, the Eighth Circuit Court of Appeals invalidated a zoning ordinance adopted by the city of Minneapolis. *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983). In *Alexander*, the challenged ordinance had three major restrictions on sexually oriented businesses: distancing from specified uses, prevention of concentration and amortization. It prohibited a sexually oriented business from operating within 600 feet of districts zoned for residential or office-residences, a church, state-licensed day care facility and certain public-schools. It forbade an adults-only facility from operating within 500 feet of any other adults-only facility. Finally, the ordinance required existing sexually oriented entertainment establishments to conform to its provisions by moving to a new location, if necessary, within four years.

The Eighth Circuit ruled that the Minneapolis ordinance created restrictions too severe to be upheld under the *Young* decision. It would have required all five of the city's sexually oriented theaters and between seven and nine of the city's ten sexually oriented bookstores to relocate and would have required these facilities to compete with another 18 adult-type establishments (saunas, massage parlors and "rap" parlors) for a maximum of 12 relocation sites. The effective result of enforcing the ordinance would be a substantial reduction in the number of adult bookstores and theaters, and no new adult bookstores or theaters would be able to open, the Court concluded. *Alexander, supra*, 698 F.2d at 938.

In *Renton, supra*, the United States Supreme Court adopted a clearer standard under which regulation of sexually oriented businesses could be tested and upheld. The Court upheld an ordinance prohibiting adult movie theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school.

Justice Rehnquist, writing for a Court majority that included Justices Stevens and Powell, stated that the *Renton* ordinance did not ban adult theaters altogether and that, therefore, it was "properly analyzed as a form of time, place and manner regulation." *Id.* at 46, 106 S. Ct. at 928. When time, place and manner regulations are "content-neutral" and not enacted "for the purpose of restricting speech on the basis of its content," they are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication," Rehnquist stated. *Id.* He found the *Renton* ordinance to be content-neutral because it was not aimed at the content of films shown at adult theaters. Rather, the city's "predominant concerns" were with the secondary effects of the theaters. *Id.* at 47, 106 S. Ct. at 929 (emphasis in original). Once a time, place or manner regulation is determined to be content-neutral, "[t]he appropriate inquiry . . . is whether the . . . ordinance is designed to serve a substantial governmental interest and allows for reasonable avenues of communication," Rehnquist wrote for the Court. *Id.* at 50, 106 S. Ct. at 930.

The Supreme Court found that *Renton's* "interest in preserving the quality of urban life" is a "vital" governmental interest. The substantiality of that interest was in no way diminished by the fact that *Renton* "relied heavily" on studies of the secondary effects of adult entertainment establishments by Seattle and the experiences of other cities, Rehnquist added. *Id.* at 51, 106 S. Ct. at 930-31.

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. 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*.

Id. at 51-52, 106 S. Ct. at 931.

Rehnquist's inquiry then addressed the means chosen to further *Renton's* substantial interest and inquired into whether the *Renton* ordinance was sufficiently "narrowly tailored."

His comments on *Renton's* means to further its substantial interest suggest that municipalities have a wide latitude in enacting content-neutral ordinances aimed at the secondary effects of adult-entertainment establishments. He quoted the *Young* plurality for the proposition that:

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 experiment with solutions to admittedly serious problems.

Id. at 52, 106 S. Ct. at 931 (quoting *Young, supra*, 427 U.S. at 71, 96 S.Ct. at 2453).

As to the "narrowly tailored" requirement, Rehnquist found that the *Renton* ordinance only affected theaters producing unwanted secondary effects and, therefore, was satisfactory. *Id.*

The second prong of *Renton's* "time place, manner" inquiry—the availability of alternative avenues of communication—was satisfied by the district court's finding that 520 acres of land, or more than five percent of *Renton*, were left available for adult-entertainment uses, even though some of that developed area was already occupied and the undeveloped land was not available for sale or lease. A majority of the Court found:

That [adult theater owners] 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 . . . In our view, the First Amendment requires only that *Renton* refrain from effectively denying [adult theater owners] a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Id. at 54, 106 S. Ct. at 932.

B. Standards and Need for Legal Zoning

Unlike *Young*, the *Renton* case spells out the standards by which zoning of sexually oriented businesses should be tested. *Renton* and several lower court decisions rendered in its wake suggest that the two most critical areas by which the ordinances will be judged are (1) whether there is evidence that ordinances were enacted to address secondary impacts on the community, and (2) whether there are enough locations still available for sexually oriented businesses so that zoning is not just a pretext to

[10]

eliminate pornographic speech.

This section first describes some of the legal considerations which communities must keep in mind in drafting zoning ordinances for sexually oriented businesses. Then, some suggestions are provided, based on evidence reviewed by the Working Group, of types of zoning which can be enacted to reduce the secondary effects of sexually oriented businesses.

1. Documentation to Support Zoning Ordinances

Sexually oriented speech which is not obscene cannot be restricted on the basis of its content without running afoul of the First Amendment. The justification for regulating sexually oriented businesses is based on proof that the zoning is needed to reduce secondary effects of the businesses on the community.

Since Renton, a number of adult entertainment zoning ordinances have been invalidated for failure of the enacting body to document the need for zoning regulations. Thus, one court invalidated a zoning ordinance because there was "very little, if any, evidence of the secondary effects of adult bookstores . . . before the City Council." *11126 Baltimore Boulevard, supra*, 684 F. Supp. at 895; *see also Tollis Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) (ordinance construed to prohibit single showing of adult movie in zoned area; invalidated for failure to present evidence of secondary effects of single showing); *but see Thames Enterprises v. City of St. Louis*, 851 F.2d 199, 201-02 (8th Cir. 1988) (observations by legislator of secondary effects sufficient).

On the other hand, it is not necessary for each municipality to conduct research independent of that already generated by other cities. The Renton court held that evidence of the need for zoning of sexually oriented businesses can be provided by studies from 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* at 51, 106 S. Ct. at 931. *See also SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988) (public testimony from experts, supporters and opponents and consideration of studies by Detroit, Boston, Dallas and Los Angeles sufficient evidence of legitimate purpose).

The first section of this report summarizes evidence from various cities documenting the secondary effects of sexually oriented businesses. Following Renton, it is intended that local communities will make use of this evidence in the course of assembling support for reasonable regulation of sexually oriented businesses.

2. Availability of Locations for Sexually Oriented Businesses

Courts also evaluate whether zoning of sexually oriented businesses is merely a pretext for prohibition by reviewing the alternative locations which remain for a sexually oriented business to operate under the zoning scheme. A municipality must "refrain from effectively denying . . . a reasonable opportunity to open and operate" a sexually oriented business. *Renton, supra*, 476 U.S. at 54, 106 S. Ct. at 932.

Access may be regarded as unduly restricted if adult entertainment zones are unreasonably small in area or if the number of locations is unreasonably few. There is no set amount of land or number of locations constitutionally required. The Renton court found that 620 acres of "accessible real estate," including land "criss-crossed by freeways"- more than five percent of the entire land area in *Renton* - was sufficient. 475 U.S. at 53, 106 S.Ct. at 932. The *Young* court found the availability of "myriad" locations sufficient. 427 U.S. at 72 n.35, 96 S.Ct. at 2453 n.35.

Whether .058 square miles constituting .23 of 1 percent of the land area within the city's central business zone is sufficient is not clear. *See Alexander v. The City of Minneapolis (Alexander II)*, No. 3-88-808, slip op. at 22 (D. Minn. May 22, 1989) (less than 1% of land area could be valid if "ample actual opportunities" for relocation exist); *Christy v. City of Ann Arbor*, 824 F.2d 489, 490, 493 (6th Cir. 1987) (remanding for a determination of excessive restriction). *See also 11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland*, 684 F. Supp. 884 (D. Md. 1988) (20 alternative locations sufficient); *Alexander v. City of Minneapolis*, 698 F.2d 936, 939 n.7 (8th Cir. 1983) (pre-Renton; 12 relocation sites for at least 28 existing adult establishments not sufficient).

The sufficiency of sites available for adult entertainment uses may be measured in relation to a number

of factors. See, e.g., *Alexander II, supra*, slip op. at 22-23 (insufficient if relocation site owners refuse to sell or lease); *International Food & Beverage Systems, Inc.*, 794 F.2d 1520, 1526 (11th Cir. 1986) (suggesting number of sites should be determined by reference to community needs, incidence of establishments in other cities, goals of city plan); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1209 (5th Cir. 1982) (pre-Renton case striking zoning regulation restricting adult theaters to industrial areas that were "largely a patchwork of swamps, warehouses, and railroad tracks . . . lack[ing] access roads and retail establishments").

However, the fact that land zoned for adult establishments is already occupied or not currently for sale or lease will not invalidate a zoning ordinance. *Renton, supra*, 475 U.S. at 53-54, 106 S. Ct. at 932; but see *Alexander II, supra*, slip op. at 22-23 (reasonable relocation opportunity absent where owners refuse to sell or rent). There is no requirement that it be economically advantageous for a sexually oriented business to locate in the areas permitted by law.

3. Distance Requirements

Another factor that may be examined by some courts is the distance requirement established by an adult entertainment zoning ordinance. In *SDJ, Inc. v. Houston*, 837 F.2d 1268 (5th Cir. 1988), the Court was asked to invalidate a 760-foot distancing requirement on the ground that the city had not proved that 760 feet, as opposed to some other distance, was necessary to serve the city's interest.

The Court found that an adult entertainment zoning ordinance is "sufficiently well tailored if it effectively promotes the government's stated interest" and declined to "second-guess" the city council. *Houston, supra*, 837 F.2d at 1276.

Courts have sustained both requirements that sexually oriented businesses be located at specified distances from each other, see *Young, supra*, (upholding distance requirement of 1000 feet between sexually oriented businesses), and requirements that sexually oriented businesses be located at fixed distances from other sensitive uses, see *Renton, supra*, (upholding distance requirement of 1000 feet between sexually oriented businesses and residential zones, single-or-multiple family dwellings, churches, parks or schools).

The Working Group heard testimony that when an ordinance establishes distances between sexually oriented uses, an additional regulation may be needed to prevent operators of these businesses from defeating the intent of the regulation by concentrating sexually oriented businesses of various types under one roof, as in a sexually oriented mini-mall. The city of St. Paul has adopted an ordinance preventing more than one adult use (e.g., sexually oriented theater, bookstore, massage parlor) from locating within a single building. A similar ordinance was upheld in the North Carolina case of *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980).

The experience with multiple-use sexually oriented businesses at the University-Dale intersection suggests that these businesses have a greater potential for causing neighborhood problems than do single-use sexually oriented businesses. Following *Renton*, it is suggested that lawmakers document the adverse effects which the community seeks to prevent by prohibiting multiple-use businesses before enacting this type of ordinance.

4. Requiring Existing Businesses to Comply with New Zoning

Zoning ordinances can require existing sexually-oriented businesses to close their operations provided they do not foreclose the operation of such businesses in new locations. Under such provisions, an existing business is allowed to remain at its present location, even though it is a non-conforming use, for a limited period.

The Minnesota Supreme Court has explained the theory this way:

The theory behind this legislative device is that the useful life of the nonconforming use corresponds roughly to the amortization period, so that the owner is not deprived of his property until the end of its useful life. In addition, the monopoly position granted during the amortization period theoretically provides the owner with compensation for the loss of some property interest, since the period specified rarely corresponds precisely to the useful life of any particular structure constituting the nonconforming use.

Naegele Outdoor Advertising Co. v. Village of Minnetonka, 162 N.W.2d 206, 213 (Minn. 1968).

Such provisions applied to sexually oriented businesses have been said to be "uniformly upheld." *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1071 (N.D. Tex. 1986), *aff'd*, *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) (citing cases).

As detailed in the first section of this report, there are significant secondary impacts upon communities related to the location of sexually oriented businesses. These impacts are intensified when sexually oriented businesses are located in residential areas or near other sensitive uses and when sexually oriented businesses are concentrated near each other or near alcohol oriented businesses. The Working Group believes that evidence from studies such as those described in the first section of this report and anecdotal evidence from neighborhood residents and police officers should be used to support the need for zoning ordinances which address these problems.

Recommendations

- (1) Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.**
- (2) To reduce the adverse effects of sexually oriented businesses, communities should adopt zoning regulations to set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.**
- (3) To reduce adverse impacts from concentration of sexually oriented businesses, communities should adopt zoning ordinances which set distance requirements between liquor establishments and sexually oriented businesses and should consider restricting sexually oriented businesses to one use per building.**
- (4) Communities should require existing businesses to comply with new zoning or other regulation pertaining to sexually oriented businesses within a reasonable time so that prior uses will conform to new laws.**

IV. Licensing and Other Regulations

Licensing and other regulations may also be used to reduce the adverse effects of sexually oriented businesses. The critical requirements which communities must keep in mind are that regulations must be narrowly crafted to address adverse secondary effects, they must be reasonably related to reduction of these effects and they must be capable of objective application. If these standards can be met, licensing and other regulatory provisions may play an important role in preventing unwanted exposure to sexually oriented materials and in reducing the crime problems associated with sexually oriented businesses.

It is clear that failure to act upon a license application for a sexually oriented business cannot take the place of regulation. Without justification, denial or failure to grant a license is a prior restraint in violation of the First Amendment. *Parkway Theater Corporation v. City of Minneapolis*, No. 716787, slip. op. (Henn. Co. Dist. Ct., Sept. 24, 1975). An ordinance providing for license revocation of an adult motion picture theater if the licensee is convicted of an obscenity offense is also likely to be held unconstitutional as a prior restraint of free speech. *Alexander v. City of St. Paul*, 227 N.W.2d 370 (Minn. 1975). The Alexander court stated:

[W]hen the city licenses a motion picture theater, it is licensing an activity protected by the First Amendment, and as a result the power of the city is more limited than when the city licenses activities which do not have First Amendment protection, such as the business of selling liquor or running a massage parlor.

Id. at 373 (footnote omitted); *see also Cohen v. City of Daleville*, 695 F. Supp. 1168, 1171 (M.D. Ala. 1988) (past sale of obscene material cannot justify revocation of license).

However, the courts have permitted communities to deny licenses to sexually oriented businesses if the person seeking a license has been convicted of other crimes which are closely related to the operation of sexually oriented businesses.

In *Dumas v. City of Dallas*, *supra*, the court reviewed a requirement that a license applicant not have been convicted of certain crimes within a specified period. Five of the enumerated crimes were held to be not sufficiently related to the purpose of the adult entertainment licensing ordinance because the city had made no findings on their justification. The invalid enumerated offenses were controlled substances act violations, bribery, robbery, kidnapping and organized criminal activity. The court upheld requirements that the licensee not have been convicted of prostitution and sex-related offenses. *Id.* at 1074. If a community seeks to require that persons with a history of other crimes be denied licenses, clear findings must first be made which justify denial of licenses on that basis.

The Dumas court also invalidated portions of the licensing ordinance permitting the police chief to deny a license if he finds that the applicant "is unable to operate or manage a sexually oriented business premises in a peaceful and law abiding manner" or is not "presently fit to operate a sexually oriented business." Neither provision satisfied the constitutional requirement that "any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority." *Id.* at 1072. *See also Alexander II, supra*, slip op. at 16 (unconstitutionally vague to define regulated bookstores as those selling "substantial or significant portion" of certain publications); *11126 Baltimore Boulevard, supra*, 684 F. Supp. at 898-99 (striking ordinance allowing zoning officials to deny permit if adult entertainment establishment is not "in harmony" with zoning plan, does not "substantially impair" master plan, does not "adversely affect" health, safety and welfare and is not "detrimental" to neighborhood because such standards are "subject to possible manipulation and arbitrary application").

A number of courts have upheld ordinances requiring that viewing booths in adult theaters be open to

discourage illegal and unsanitary sexual activity. *See, e.g., Doe v. City of Minneapolis*, 693 F. Supp. 774 (D. Minn. 1988).

Licensing provisions and ordinances forbidding massage parlor employees from administering massages to persons of the opposite sex have withstood equal protection and privacy and associational right challenges. *See Clampitt v. City of Ft. Wayne*, 682 F. Supp. 401, 407-408 (N.D. Ind. 1988) (equal protection); *Wiggins, Inc. v. Fruchtman*, 482 F. Supp. 681, 689-90 (S.D. N.Y. 1979), *aff'd*, 628 F.2d 1346 (2d Cir. 1980), *cert. denied*, 449 U.S. 842, 101 S. Ct. 122. However, some courts have found same-sex massage regulations to be in violation of Title VII of the Civil Rights Act of 1964. *See Stratton v. Drumm*, 445 F. Supp. 1305, 1310-11 (D. Conn. 1978); *Cianciolo v. Members of City Council*, 376 F. Supp. 719, 722-24 (E.D. Tenn. 1974); *Joseph v. House*, 353 F. Supp. 367, 374-75 (E.D. Va.), *aff'd sub nom. Joseph v. Blair*, 482 F.2d 575 (4th Cir.), *cert. denied*, 416 U.S. 955, 94 S. Ct. 1968 (1974). *Contra, Aldred v. Duling*, 538 F.2d 637 (4th Cir. 1976).

Although the Working Group expressed strong concern about the operation of prostitution under the guise of massage parlors, this type of regulation is not advisable because legitimate therapeutic massage establishments could find their operations curtailed. Prostitution may be better controlled through prosecution and use of post-conviction actions such as forfeiture or enjoining a public nuisance.

In 1985, a court upheld an ordinance making it unlawful to display for commercial purposes material "harmful to minors" unless the material is in a sealed wrapper and, if the cover is harmful to minors, has an opaque cover. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). Last year, the legislature enacted a state law similarly prohibiting display of sexually explicit material which is harmful to minors unless items are kept in sealed wrappers and, where the cover itself would be harmful to minors, within opaque covers. Minn. Stat. § 617.293 (1988). This law has the potential to protect minors from exposure to sexually oriented materials. Communities also have considerable discretion to regulate signage so that the exterior of sexually oriented businesses does not expose unwitting observers to sexually explicit messages.

Recommendations

- (1) Prior to enacting licensing regulations, communities should document findings of adverse secondary effects of sexually oriented businesses and the relationship between these effects and proposed regulations so that such regulations can be upheld if challenged in court.**
- (2) Communities should adopt regulations which reduce the likelihood of criminal activity related to sexually oriented businesses, including but not limited to open booth ordinances and ordinances which authorize denial or revocation of licenses when the licensee has committed offenses relevant to the operation of the business.**
- (3) Communities should adopt regulations which reduce exposure of the community and minors to the blighting appearance of sexually oriented businesses including but not limited to regulations of signage and exterior design of such businesses and should enforce state law requiring sealed wrappers and opaque covers on sexually oriented material.**

Conclusion

There are many actions which communities may take within the law to protect themselves from the adverse secondary effects of sexually oriented businesses. Prosecution of obscenity crimes can play a vital role in decreasing the profitability of sexually oriented businesses and removing materials which violate community standards from local outlets. Forfeiture and injunction to prevent public nuisance should be available where sexually oriented businesses are the site of sex-related crimes and violations of laws pertaining to gambling, liquor or controlled substances. These actions will remove the most egregious establishments from communities.

Zoning can reduce the likelihood that sexually oriented businesses will lead to neighborhood blight. Licensing can sever the link between at least some crime figures and sexually oriented businesses. Regulation and enforcement can protect minors from exposure to sexually explicit materials.

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses believes that prosecution, seizure of profits, zoning and regulation of sexually oriented businesses should only be done in keeping with the constitutional requirements of the First Amendment. Rational regulation can be fashioned to protect both our communities and our constitutional rights.

[1]

Hafiz was acquitted of the perjury charges. St. Paul Pioneer Press, Jan. 11, 1989 at 10A.

[2]

The City of St. Paul bought out the Faust for \$1.8 million, closing the entertainment complex on March 7, 1989.

[3]

The First Amendment provides: "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, or to petition the government for redress of grievances." The constitutional guarantee of freedom of speech, often the basis for challenges to regulation of sexually oriented businesses, restricts state as well as federal actions. See, e.g., *Fiske v. Kansas*, 27 U.S. 380, 47 S.Ct. 655 (1927).

[4]

The prior penalty was a fine only – up to \$10,000 for a first offense and up to \$20,000 for a second or subsequent offense. Minn. Stat. § 617.241, subd. 3 (1986). Obscenity arrests are so infrequent that incidents involving possible violations of section 617.241 are not separately compiled by the Minnesota Bureau of Criminal Apprehension. See *Bureau of Criminal Apprehension, 1987 Minnesota Annual Report on Crime, Missing Children and Bureau of Criminal Apprehension Activities*.

[5]

Two blue ribbon commissions have reached different conclusions regarding the harmfulness of sexually explicit material to individuals. A presidential Commission on Obscenity and Pornography concluded in 1970 that there was no evidence of "social or individual harms" caused by sexually explicit materials and, therefore, "federal, state and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed." *The Report of the Comm'n on Obscenity and Pornography* at 57-8 (Bantam Paperback ed. 1970). However, in 1986, the Attorney General's Commission on Pornography concluded that "sexually violent materials . . . bear . . . a causal relationship to antisocial acts of sexual violence [and that] the evidence supports the conclusion that substantial exposure to [nonviolent] degrading material increases the likelihood for an individual [to] commit an act of sexual violence or sexual coercion." Attorney General's Comm'n on Pornography, 1 *Final Report* at 326, 333 (1986).

[6]

Memorandum to Jim Bellus, executive assistant to St. Paul Mayor George Latimer (prepared by St. Paul Department of Planning and Economic Development (July 5, 1988); see also Waters "The Squeeze on Sleaze," *Newsweek*, Feb. 1, 1988, at 45 ("After more than 10 years of Levin heavy fines and making arrests, Atlanta has won national renown as 'the city that cleaned up pornography.'").

[7]

The Address of the [Child Exploitation and Obscenity Section] is U.S. Justice Department, 10th & Pennsylvania Ave. N.W., Room 2216, Washington, D.C. 20530. Its telephone number is 202-[514]-5780. Assistance is also available from [Community Defense Counsel, 15333 N. Pima Rd., Suite 165 Scottsdale, AZ 85260; cdc@communitydefense.org which makes available "The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney." Its telephone number is 480-444-0020. The National Obscenity Law Center, another private organization is located at 475 Riverside Drive, Suite 239, New York, N.Y. 10115. It publishes an Obscenity Law Bulletin and the "Handbook on the Prosecution of

Obscenity Cases." Its telephone number is 212-870-3222; mim@moralityinmedia.org].

[8]

The only reported Minnesota court case reviewing an adult entertainment zoning ordinance is *City of St. Paul v. Carlone*, 419 N.W.2d 129 (Minn. App. 1988) (Upholding facial constitutionality of St. Paul ordinance).

[9]

The ordinances also prohibited the location of an adult theater within 600 feet of a residential area, but this provision was invalidated by the district court, and that decision was not appealed. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62 n.2, 96 S.Ct. 2440, 2444 n. 2 (1976).

[10]

Of 11 recent post-*Renton* adult-entertainment zoning decisions by federal courts, five invalidated ordinance, three upheld ordinances and three ordered a remand to district court for further proceedings. Zoning ordinances were struck in *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1987) (city council failed to offer evidence suggesting neighborhood decline would result); *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987) (no evidence presented to legislative body of secondary harmful effects); *Ebel v. Corona*, 767 F.2d 636 (9th Cir.) (lack of effective alternative locations); *11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland*, 684 F. Supp. 884 (D. Md. 1988) (insufficient evidence of secondary effects presented to legislative body; special exception provisions grant excessive discretionary authority to zoning officials); and *Peoples Tags, Inc. v. Jackson County Legislature*, 636 F.Supp. 1345 (W.D. Mo. 1986) (improper legislative purpose to prevent continued operation of adult-entertainment establishment). Zoning ordinances were upheld in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (6th Cir. 1988); and *S & G News Inc. v. City of Southgate*, 638 F.Supp. 1060 (E.D. Mich. 1986), *aff'd without published opinion*, 819 F.2d 1142 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1013 (1988) (remand for determination of excessive restrictions); *International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986) (remand for reconsideration in light of *Renton, supra*; nude bar ordinance); and *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1986) (remand, in part, for determination of and availability).

FOR EDUCATIONAL USE ONLY

(Cite as: 475 U.S. 41, 106 S.Ct. 925)

89 L.Ed.2d 29, 54 USLW 4160, 12 Media L. Rep. 1721
Briefs and Other Related Documents

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] KeyCite Notes



- ◊92 Constitutional Law
 - ◊92V Personal, Civil and Political Rights
 - ◊92k90 Freedom of Speech and of the Press
 - ◊92k90.4 Obscenity and Pornography
 - ◊92k90.4(4) k. Motion Pictures. Most Cited Cases

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] KeyCite Notes



- ◊92 Constitutional Law
 - ◊92V Personal, Civil and Political Rights
 - ◊92k90 Freedom of Speech and of the Press
 - ◊92k90.4 Obscenity and Pornography
 - ◊92k90.4(4) k. Motion Pictures. Most Cited Cases

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] KeyCite Notes 

- ◊92 Constitutional Law
 - ◊92V Personal, Civil and Political Rights
 - ◊92k90 Freedom of Speech and of the Press
 - ◊92k90.4 Obscenity and Pornography
 - ◊92k90.4(4) k. Motion Pictures. Most Cited Cases
(Formerly 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] KeyCite Notes 

- ◊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

(Cite as: 475 U.S. 41, *41, 106 S.Ct. 925)

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.

(Cite as: 475 U.S. 41, 106 S.Ct. 925)

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

(Cite as: 475 U.S. 41, 106 S.Ct. 925, **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

(Cite as: 475 U.S. 41, *41, 106 S.Ct. 925, **925)

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

(Cite as: 475 U.S. 41, *42, 106 S.Ct. 925, **925)

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**

(Cite as: 475 U.S. 41, *42, 106 S.Ct. 925, **926)

E. Barrett Prettyman, Jr., argued the 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**

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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**

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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**

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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.

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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

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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.

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The Court of Appeals for the Ninth Circuit reversed. The Court of

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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

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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).
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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:
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"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...."

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"... 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 "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. 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

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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

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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

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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.

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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 untrammelled 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

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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

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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

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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

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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

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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

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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

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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

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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

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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**

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reason to regulate such establishments; it does not mean, however, that such regulations are content neutral. ***57**

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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

_____ (Cite as: 475 U.S. 41, *57, 106 S.Ct. 925, **934) _____

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

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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**

(Cite as: 475 U.S. 41, *58, 106 S.Ct. 925, **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

(Cite as: 475 U.S. 41, *59, 106 S.Ct. 925, **935)

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

"[I]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

"[I]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

(Cite as: 475 U.S. 41, *60, 106 S.Ct. 925, **935)

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

"[I]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

(Cite as: 475 U.S. 41, *60, 106 S.Ct. 925, **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

(Cite as: 475 U.S. 41, *61, 106 S.Ct. 925, **936) _____

the ordinance imposed upon constitutionally protected expression.

(Cite as: 475 U.S. 41, *61, 106 S.Ct. 925, **936) _____

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 experiences of *62

(Cite as: 475 U.S. 41, *62, 106 S.Ct. 925, **936) _____

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

(Cite as: 475 U.S. 41, *62, 106 S.Ct. 925, **936) _____

(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

(Cite as: 475 U.S. 41, *62, 106 S.Ct. 925, **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

(Cite as: 475 U.S. 41, *63, 106 S.Ct. 925, **937)

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

————— (Cite as: 475 U.S. 41, *64, 106 S.Ct. 925, **937) —————

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

————— (Cite as: 475 U.S. 41, *64, 106 S.Ct. 925, **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

————— (Cite as: 475 U.S. 41, *65, 106 S.Ct. 925, **938) —————

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.

106 S.Ct. 925, 475 U.S. 41, 89 L.Ed.2d 29, 54 USLW 4160, 12 Media L. Rep. 1721

Briefs and Other Related Documents ([Back to top](#))

- [1985 WL 669603](#) (Appellate Brief) Second Supplemental Brief of Appellees (Nov. 06, 1985)
- [1985 WL 669601](#) (Appellate Brief) Supplemental Brief of Appellees (Oct. 30, 1985)
- [1985 WL 669599](#) (Appellate Brief) Reply Brief of Appellants (Oct. 25, 1985)

- 1985 WL 669613 (Appellate Brief) Brief of American Booksellers Association, Inc., Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., National Association of College Stores, Inc., and the Freedom to Read Foundation, as Amici Curiae, in Support of Appellees (Aug. 15, 1985)
- 1985 WL 669614 (Appellate Brief) Brief of the American Civil Liberties Union and the American Civil Liberties Union of Washington as Amici Curiae in Support of Appellees (Aug. 15, 1985)
- 1985 WL 669597 (Appellate Brief) Brief of Appellees (Aug. 14, 1985)
- 1985 WL 669612 (Appellate Brief) Brief of the Outdoor Advertising Association of America, Inc. and the American Advertising Federation as Amici Curiae in Support of Appellees (Jul. 15, 1985)
- 1985 WL 669611 (Appellate Brief) Brief of the Freedom Council Foundation Amicus Curiae, in Support of Appellants (Jul. 03, 1985)
- 1985 WL 669595 (Appellate Brief) Brief for Appellants (Jun. 28, 1985)
- 1985 WL 669608 (Appellate Brief) Motion to File Brief Amicus Curiae and Brief Amicus Curiae of the National League of Cities, the National Association of Counties, the International City Management Association, the United States Conference of Mayors, the Council of State Governments, and the American Planning Association in Support of Appellants (Jun. 28, 1985)
- 1985 WL 669609 (Appellate Brief) Brief Amicus Curiae of Jackson County, Missouri, in Support of the Petitioners (Jun. 28, 1985)
- 1985 WL 669610 (Appellate Brief) Motion for Leave to File, and Brief Amicus Curiae of the National Institute of Municipal Law Officers (Jun. 28, 1985)
- 1985 WL 669605 (Appellate Brief) Brief of Amici Curiae City of Whittier, California and Other Joining California Cities in Support of Appellants' Jurisdictional Statement (Mar. 29, 1985)
- 1985 WL 669607 (Appellate Brief) Motion to File Brief Amicus Curiae and Brief Amicus Curiae of the National League of Cities, the National Association of Counties, the International City Management Association, the United States Conference of Mayors, the Council of State Governments, and the American Planning Association in Support of a Plenary Hearing and Reversal of the Decision Below (Mar. 29, 1985)
- 1985 WL 669592 (Appellate Brief) Reply Brief (Mar. 28, 1985)
- 1985 WL 669604 (Appellate Brief) Brief of Amici Curiae Washington and Utah Attorneys General in Support of Appellants (Mar. 28, 1985)

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(Cite as: 282 F.Supp.2d 673)

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] KeyCite Notes 

- ◀92 Constitutional Law
 - ◀92V Personal, Civil and Political Rights
 - ◀92k90 Freedom of Speech and of the Press
 - ◀92k90.4 Obscenity and Pornography
 - ◀92k90.4(1) k. In General. Most Cited Cases

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] KeyCite Notes 

- ◀92 Constitutional Law
 - ◀92V Personal, Civil and Political Rights
 - ◀92k90 Freedom of Speech and of the Press
 - ◀92k90(3) k. Limitations on Doctrine in General. Most Cited Cases

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] KeyCite Notes



⇨ 92 Constitutional Law

⇨ 92V Personal, Civil and Political Rights

⇨ 92k90 Freedom of Speech and of the Press

⇨ 92k90.4 Obscenity and Pornography

⇨ 92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

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] KeyCite Notes



⇨ 92 Constitutional Law

⇨ 92V Personal, Civil and Political Rights

⇨ 92k90 Freedom of Speech and of the Press

⇨ 92k90.4 Obscenity and Pornography

⇨ 92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

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] KeyCite Notes



⇨ 92 Constitutional Law

⇨ 92V Personal, Civil and Political Rights

⇨ 92k90 Freedom of Speech and of the Press

⇨ 92k90.4 Obscenity and Pornography

⇨ 92k90.4(3) k. Entertainment in General; Telecommunications. Most Cited Cases

⇨ 414 Zoning and Planning KeyCite Notes



⇨ 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] KeyCite Notes



↔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.

 KeyCite Notes

[7]

↔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] KeyCite Notes

↔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] KeyCite Notes

↔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] KeyCite Notes

↔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] KeyCite Notes

↔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] KeyCite Notes

↔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**

————— (Cite as: 282 F.Supp.2d 673, *675) —————

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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**

————— (Cite as: 282 F.Supp.2d 673, *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

(Cite as: 282 F.Supp.2d 673, *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 with the 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

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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 judgment 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

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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

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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

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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

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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

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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 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

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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,

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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