Complex Zoning Issues Associated with the Adult Entertainment Industry

Types of Businesses, Checklist for a Local Study, and Court Cases

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In addition to many other sexually oriented business studies, the presenters are co-authors of a basic reference in the field:

Kelly, Eric Damian and Connie Cooper. 2000. *Everything You Wanted to Know about Regulation of Sex Businesses.* Planning Advisory Service Report. Chicago: American Planning Association.

Kelly, E. and Cooper, C. (2015) "From Perception to Reality" Chapter 13. *(Sub)Urban Sexscapes: Geographies and Regulation of the Sex Industry;* P.J. Magnin and C. Steinmetz, Eds. New York, NY. Routledge.

Eric Damian Kelly is the General Editor of a legal treatise that includes a detailed chapter on this subject:

Kelly, Eric Damian, Gen. Ed. 2015 (supplemented to date). *Zoning and Land Use Controls.* New York: Matthew Bender and Company. See Chapter 11, "Regulation of Sexually Oriented Businesses." Original author is Patrick Rohan. Available from Matthew Bender and Company, a Lexis-Nexis Company, www.bender.com

Types of Sex Businesses or Businesses with Sexually Oriented Materials

Off-Premises Retail

- Main-stream book and video stores are likely to have at least some materials that fall under typical definitions of "specified anatomical areas" and/or "specified sexual

activities." Male and female health books, marriage manuals, some art books and a variety of fiction may fall within common definitions of sexually oriented materialAny local ordinance restricting such materials must deal with the effect on such stores.

- "Percentage stores." Many local governments specify that regulations of sexually oriented businesses apply only to those with a specified percentage of defined materials; some businesses may attempt to circumvent those regulations by carrying large numbers of pencils, lollipops, gumballs or other low-cost items to constitute 50 percent of 60 percent of an inventory count, thus allowing the store to carry many sexually oriented items without being subject to such restrictions. On the other hand, there are some essentially mainstream stores that offer a measurable percentage of specified material on high shelves or in a back room without affecting the general perception that they are mainstream stores. Local ordinances must address both types of stores in some way.
- Sexually-oriented media stores. Although not common, there are stores that specialize in sexually oriented media – typically magazines, videos and DVDs. These are the classic "adult bookstores" or "adult video stores."

- Sex shops. Far more common today than truly sexually oriented media stores are stores that mix sex toys and, sometimes, wild lingerie and leather goods, with sexually oriented media. We have called these sex shops. Note that they may carry a relatively small percentage of specified media and thus not be considered sexually oriented businesses under some local ordinances. Unlike book or media stores with a small amount of such material, however, these stores are clearly selling sex and are often very unpopular with neighborhood groups as an inappropriate land-use in a neighborhood or community setting.Video arcades or viewing booths are NOT retail uses; they constitute a form of on-premises entertainment. However, it is a common practice in the industry to add these booths to bookstores as essentially accessory uses. Having any form of on-premises entertainment clearly increases the impact of the use, and such entertainment should be allowed only in appropriate locations.

On-Premises Entertainment

- Sexually oriented motion picture theaters. The number of such theaters is clearly declining and we are not aware of any new ones that have opened in recent years. Although local zoning ordinances still must allow for the location of such theaters under Renton, as a practical matter, the primary issue with such theaters is simply managing the operation of existing establishments. Some form of licensing is almost essential to provide management with the incentive to prevent sexual activity and other secondary problems on the premises. Note that regulations on such theaters must be drafted carefully to avoid including a mainstream theater that shows the occasional popular release with nudity or sexual activity.

- Nude and topless dancing. Any type of dancing on a stage is a form of on-premises entertainment. When nude or barely clothed dancers move off-stage for lap dancing and other activities, we believe that the business belongs in the "touching business" category, below. Of the businesses that clearly enjoy Constitutional protection, nude dancing is the one that has the greatest impacts on the community and that, coincidentally, appears to enjoy the least Constitutional protection. Licensing of the operations, the managers and the dancers is essential to an effective regulatory program, although the licensing ordinances must be carefully drafted to avoid Constitutional hazards related to "prior restraints."
- Video arcades or viewing booths. See discussion above. We do not believe that this particular time, place and manner of showing adult films enjoys Constitutional protection (provided that there are adequate "alternative avenues" to view such material), and there are a number of court cases in which communities have succeeded in significantly restricting them.

The "Touching" Businesses

- Lap dancing. Much of the revenue in the world of adult dancing comes from tips – and many of those tips come from "lap dances," "friction dances," "couch dances" and similar performances. We can find no cases holding that the Constitutional protection of nude dancing extends to lap dancing and we generally recommend banning it. However, a local government that decides to require that dancers remain on stage must recognize that doing so may substantially change how affected businesses operate and how many dancers can make a living from it.

- Non-certified massage establishments. Many communities have somewhat mysterious looking businesses that say "massage" or "girls – private rooms" or "spa" or something similar and that offer touching services for a fee. These are quite distinct from the many massage therapists who are certified by one of the national professional associations and/or licensed under state laws. There are many examples of these non-certified massage establishments serving as fronts for prostitution – or, in some cases, of the exchange of sexual gratification for money without meeting some of the technical requirements of state definitions of "prostitution." We strongly recommend that local governments limit the operation of massage establishments to those operated by medical professionals or licensed or certified massage therapists. There is no Constitutional right to a massage.
- Private dancing. Some establishments offer private dances in booths or back rooms. Some of these undoubtedly are limited to private dances. Others clearly involve touching, and police in more than one jurisdiction have documented acts of prostitution that begin with such performances. We believe that legitimate entertainment – of the type protected by the First Amendment – takes place before an audience in a room large enough to seat a good number of people. We thus generally recommend banning dances for a fee that take place out of the public eye.
- Lingerie modeling. Although not all lingerie modeling businesses allow touching, many do, and there are many risks in placing a customer in a private room with a scantily clad performer who may or may not keep those clothes on. See discussion of private dancing.

Checklist for a Local Study

Who should be Involved?

- Local Government Officials and Staff – Elected officials, planning commission, planning staff, legal staff, licensing officials, building inspections staff, police and health officials
- Neighborhood Residents – Residents of the neighborhood and other community activist groups should always be involved. It is important for citizens who are concerned about pornography to understand the legal context in which the city regulates these businesses.
- Sex Business Owners, Operators and Legal Counsel – Owners of sexually oriented businesses, operators of those businesses, and their legal counsel should be involved because, ideally, no regulation should be conceived without the input of those being regulated.
- Outside Experts – Outside experts can be of help because of the complexity of issues involved in such a study as well as making sure that the study is fair. It is important that the findings are accurate and have a sound foundation.

What Should the Study Include?

- Studies and ordinances from other governmental jurisdictions – We can always learn from someone else's efforts, so including studies and ordinances from other jurisdictions is a good start

- Local codes and ordinances, state statutes and court decisions – You must review local codes and ordinances, state statutes, and court decisions because they may already regulate the operations of sexually oriented businesses. An examination of the existing zoning regulations is the obvious starting point, but there are often other regulating entities.
- Reports from City Departments – The police department, health department, or another organization within city government may have prepared a report on some aspect of sexually oriented businesses in the past. The law department may have been involved in litigation affecting one or more such businesses.
- Onsite visits of business operations – Carrying out the study is going to involve on-site visits. These visits are the only way to find out what sexually oriented uses are really like in your city. The visits provide valuable information about the merchandise, operations, condition, and management of these uses.
- Interviews and meetings with owners, operators and legal counsel – Providing the opportunity for those potentially most affected by prospective regulations to have a chance to share their views is very important; these are the owners and operators and their legal counsel for adult business operations within your community.
- Comments from public meetings with residents and community groups – Residents can provide information on land use and operational issues they have experienced, as well as their perspective on what types of regulations they feel are appropriate.

- Study Findings – Upon completion "inventory and assessment" portion of the study, the preparation of findings is essential to capture what you have learned as a foundation for licensing and zoning provisions affecting the uses being regulated.
- Study Recommendations – Recommendations should build on the information presented in the "findings" section of the study. You can choose whether to make the recommendations very general or very specific nature.

Court Cases Cited (Directly or Indirectly) in Program

Obscenity

Note that obscene material is not protected by the Constitution. The Supreme Court has held that an item is "obscene" if:

> the average person, applying contemporary standards, would find that the work, taken as a whole, appeals to a prurient interest;
>
> the work depicts or describes, in patently offensive way, sexual conduct specifically defined by applicable state law; and
>
> the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

Basic Test of Protection under First Amendment

The basic constitutional principles used in evaluating the constitutionality of regulations affecting First Amendment-protected activity were set forth by the Supreme Court as a four-

part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), restated by the plurality in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), as follows:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Supreme Court Cases Upholding Zoning Regulations Applied to Sexually Oriented Businesses

Playtime Theatres, Inc. v. City of Renton, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986) (upheld zoning ordinance that restricted sexually oriented movie theaters to a relatively small industrial land area in the city).

Young v. American Mini-Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (upheld requirement for separation between two sexually oriented businesses and between such businesses and residential areas).

City of Los Angeles v. Alameda Books, Inc., 152 L. Ed. 2d 670, 122 S. Ct. 1728 (U.S. 2002), *remanded for further proceedings at* 295 F.3d 1024 (9th Cir. 2002) (upheld prohibition on operating two sexually oriented businesses in the same building; also upheld the City's reliance on a relatively old local study of secondary impacts).

Reed v. Town of Gilbert, 135 S. Ct. 2218, 192 L. Ed. 2d 236, (U.S. 2015), in which the Supreme Court unanimously found the sign ordinance of an Arizona town unconstitutional may affect this

line of cases, increasing the difficulty of defending ordinances regulating sex businesses. In *Renton* and *Alameda Books,* the Supreme Court essentially carved out an exception to its rule imposing "strict scrutiny" on content-based laws, making them very hard to defend. As explained in the program, under those cases a local government that decides to regulate sex businesses to mitigate negative secondary effects (rather than to censor the business) finds its ordinance subject to "intermediate scrutiny," thus giving it a level playing field in court. In the Gilbert case, give members of the Court jointed in Justice Thomas' majority opinion that said in part that any law with content-based distinctions is now subject to strict scrutiny. How that will actually be applied in cases involving the regulation of sex businesses is unclear some seven months after the Supreme Court decision.

Supreme Court Decisions affecting Nude Dancing

City of Erie v. PAP's A.M. dba Kandyland, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (U.S. 2000) (upheld local ordinance broadly banning nudity but at same time acknowledging that nude dancing is protected to some extent under the First Amendment); note Court struck down a local ordinance entirely banning live entertainment in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981).

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (upheld state law banning public nudity as applied to a sexually oriented business).

Cases Dealing with Sex Toys and Novelties

Reliable Consultants, Inc., v. Earle, 517 F.3d 738 (5th Cir. Tex. 2008), rev. en banc den. with dissenting opinion, 538 F.3d 355 (5th Cir. Tex. 2008), cited sodomy and birth control cases,

holding that use of the devices was a private matter and that retailers thus have the right to sell them [the skepticism is editorial, not from the original]. Cases holding that such devices are not entitled to any Constitutional protection include: *This That & the Other Gift & Tobacco, Inc. v. Cobb County*, 439 F.3d 1275 (11th Cir. Ga. 2006), reh. en banc den. 179 Fed. Appx. 685, 2006 U.S. App. LEXIS 24208 (11th Cir. 2006) (final resolution, relying heavily on earlier decision. *Chamblee Visuals, LLC v. City of Chamblee*, 270 Ga. 33, 506 S.E.2d 113 (1998). *Regalado v. State of Texas, 872 S.W.2d 7 (Tex. App. 1994), cert. denied, 513 U.S. 871 (1994); and* PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004), sustaining Miss. Code Ann. § 97-29-105.

Cases Establishing Requirement for the Availability of Sites

The requirement that there be a reasonable number of sites available for sexually oriented businesses is a sub-set of the requirement that, where local regulations significantly restrict protected speech, there be available "alternative avenues" for that speech. The root case for this doctrine is *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981), which struck down as unconstitutional a small New Jersey town's ordinance attempting to ban all live entertainment. In *Playtime Theatres, Inc. v. City of Renton,* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986), the Supreme Court established the principle that the "alternative avenues" test in such cases requires a showing of the availability of other sites for restricted businesses. Note that in that case the Court upheld a zoning ordinance that limited sexually oriented businesses to about 5 percent of land area of city, located in industrial area.

Topanga Press v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), *as amended, cert. denied* 511 U.S. 1030, 128 L. Ed. 2d 190, 114 S. Ct. 1537 (1994) (dealt in some depth with issue of what makes a site "available"). *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17 (2d Cir. N.Y. 2010)

held that the determination of the adequacy of available sites is to be made at the time that an ordinance is challenged, regardless of the adequacy when the ordinance was adopted.

Cases Dealing with Review Procedures

The basic principle established in the cases is that there must be an objective set of standards and a certain process through which sexually oriented businesses can be permitted or licensed. Clearly requirements for special use permits or rezonings fail that requirement, but the courts have gone far beyond that limitation in requiring that local processes be both certain and short – with effective appeal procedures built in.

Ordinances restricting speech before it occurs ("prior restraints") are generally subject to "strict scrutiny," which effectively reverses the "presumption of validity" and shifts the burden to the local government to prove that it has a valid purpose for adopting the regulations. *Near v. Minnesota,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). Clearly any sort of licensing or discretionary local review potentially falls in the category of "prior restraints."

The courts have established three basic rules that apply to such prior restraints:

1. The licensing or permitting ordinance must have clear, objective criteria to be used in determining whether the license or permit should issue (see *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (this case involved permits for newsracks on City sidewalks, but the principles are directly applicable to licensing ordinances for sex businesses);

2. There should be a firm time-limit imposed on the decision-maker to make a definitive decision -- not just to get the matter to hearing or before the decision-maker (see

FW/PBS v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990); *Baby Tam & Co., Inc., v. City of Las Vega*s, 199 F.3d 1111 (9th Cir. 2000); *East Brook Books v. City of Memphis,* 48 F.3d 220 (6th Cir. 1995), *reh'g denied, cert. denied,* 516 U.S. 909, 133 L. Ed. 2d 198, 116 S. Ct. 277 (1995)); and

3. There must be a clear system to obtain prompt judicial review of the decision (see *Kentucky Restaurant Concepts, Inc., v. City of Louisville*, 209 F. Supp. 2d 672 (D. Ky. 2002)). Note that the cited case and other suggest that simply providing an aggrieved party with access to the state courts is not adequate, where there is no guarantee that the matter will be resolved promptly in those cases; it will probably be necessary to issue some sort of temporary license pending appeal.

Studies of Sexually Oriented Businesses

Reference Studies

The best way for a community to establish that it has a "substantial governmental purpose" to regulate sexually oriented businesses and to show that an adopted ordinance is not "over-broad" is to use one or more relevant studies. The best studies are local in nature. The following references are provided because they may supplement local studies and may suggest methodologies and formats for the preparation of specific local studies.

Note: *Copies of these studies may still be available from American Planning Association, Planners Advisory Service. Some studies are available for purchase from the respective local governments. The surveys of Texas and Florida appraisers, as well as the Biloxi and Toledo*

studies are available in electronic form from the presenters. Many are also available on-line – put the title in a search engine.