Eric Damian Kelly and Connie Cooper

"everything you always wanted to know about regulating sex businesses xxx"

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The work, of course, is ours, and the findings and conclusions in the report are ours, not those of our clients, friends or colleagues. Except where otherwise noted, the views expressed in this report represent our combined and synthesized judgment. As that statement suggests, work on this project has been the best form of collegial undertaking—and one of the most interesting imaginable.

Chapter 5 of this report was adapted from Chapter 11 of Zoning and Land Use Controls*, edited by Eric Damian Kelly (New York: Matthew Bender & Co.) and is used with permission. The original source contains extensive statutory and case citations. For those without access to the complete 10-volume set of* Zoning and Land Use Controls*, the individual chapter can be purchased at http://www.bender.com.*

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Foreword

A WARNING

THE FOLLOWING PAS REPORT CONTAINS GRAPHIC ADULT MATERIAL!

This report contains explicit language. We include that language and some suggestive, but not explicit, illustrations to educate, not to titillate. To understand approaches to regulating the business of sex, it is essential to understand the business. The first chapters in this report focus on pornography and its evolution in society and businesses dealing in pornography and sexually oriented materials. We use words here that we do not use in ordinary conversation and that you have probably never seen in a technical report from a national organization, but this report is about the sex business and the sex business is about sex. If explicit discussion of sex in a technical report makes you uncomfortable, you may want to give this report to someone else to read. It is consciously explicit.

THE SCOPE OF THIS REPORT

In this report, we examine civil, not criminal regulation of lawful sex businesses and businesses carrying lawful sexually oriented material.

In this report, we examine civil, not criminal regulation of lawful sex businesses and businesses carrying lawful sexually oriented material.

By civil regulation, we mean zoning, licensing, and other non-criminal ordinances. To the extent that there may be drugs, prostitution, or other illegal acts associated with a sex business that bring in police and criminal enforcement actions, the enforcement of the related criminal laws goes beyond the focus of this report.

Lawful sex businesses discussed in this report include:

- mainstream video stores and newsstands with adult material;
- adult or XXX bookstores;
- adult or XXX video stores;
- adult or XXX motion picture theaters;
- sex shops, a classification that we have developed;
- video arcades containing video-viewing booths, also called peep shows;
- nude or topless dancing establishments;
- lap- and table-dancing establishments;
- lingerie modeling and other encounter businesses; and
- sexually oriented massage studios and other touching businesses.

Note that we do not necessarily recommend that all of the businesses listed above should be permitted to operate in your jurisdiction. These are simply businesses that many jurisdictions allow to operate openly under existing laws and ordinances. We discuss how to distinguish sexually oriented businesses from:

- mainstream bookstores, most of which carry a variety of marriage manuals, self-help books, art books, and other media that would technically fall within the definition of sexually oriented material under many local ordinances;
- mainstream video stores that stock adult-rated general-release movies;
- mainstream movie theaters that show adult-rated general-release movies; and
- massage facilities operated by certified massage therapists.

This report deals with the following to the extent that they may arise as local land-use issues, but the regulatory issues involved in these business are largely not place specific and thus are largely beyond the scope of this report. Those businesses are:

- outcall and escort services, which are regulated legal adult businesses in some jurisdictions but which are difficult to effectively regulate civilly; and
- sex businesses on the Internet, which are not controllable locally.

This report does not deal with:

- prostitution, which is illegal in 49 states and parts of Nevada

The old adage concerning the definition of pornography is "I can't define it, but I know it when I see it." That will not work when you are trying to draft effective regulations for dealing with the sex businesses.

DEFINING PORNOGRAPHY TODAY

The old adage concerning the definition of pornography is "I can't define it, but I know it when I see it." That will not work when you are trying to draft effective regulations for dealing with the sex businesses we have listed above and that we describe in more detail in Chapter 2 of this report. Toward that end, we are here providing a comment about definitions of sexually oriented materials, performances, and services, and pornography as they currently exist in zoning ordinances. As the discussion that follows shows, we believe there should be an evolution in these definitions because, without that, definitions themselves may cause problems with effective enforcement of regulations for lawful sex businesses. (For more definitions, see the sidebar on the following pages and Chapter 7.)

The definitions typically used in zoning ordinances refer to businesses that offer materials or performances that show "specified anatomical areas" or "specified sexual activities." Many of the ordinances we reviewed, defined these terms in the following manner:

> *Specified anatomical areas* shall mean:
>
> (a) Less than completely and opaquely covered:
> (i) Human genitals, pubic region;
> (ii) Buttock; and
> (iii) Female breast, below a point immediately above the top of the areola; and
>
> (b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Specified sexual activities shall mean:

(a) Human genitals in a state of sexual stimulation or arousal; and/or

(b) Acts of human masturbation, sexual stimulation or arousal; and/or

(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

We find these rather commonly used definitions far too broad, encompassing a variety of artistic materials, marriage manuals, and other self-help books and even materials presented in mainstream movies and magazines. Other than the "turgid" male genitals, virtually all of the areas and acts included in the above definition can be seen, at least occasionally, on network television, and all can be seen on popular, unrestricted cable channels like HBO and Showtime, as well as in general-release theaters.

For purposes of this report, we find it more useful to refer to "soft-core" and "hard-core" pornography. Although these terms are used commonly, they are often used without clear definitions. Both are evolving concepts, as the concise history that appears in Chapter 1 will make abundantly clear. In 2000, the year in which we are writing this report, we provide the following examples to illustrate the differences between soft-core pornography and hard-core pornography as we currently understand them and as we use the terms in this report. We use illustrations that describe movies, videos, and photos rather than text because those are the more common contexts in which the issue arises today; we believe, however, that the visual examples can be transferred to text-related ones where appropriate.

Today, visual soft-core pornography can include:

- full female frontal nudity;
- full male frontal nudity;
- full rear nudity;
- simulated sexual intercourse;
- actual sexual intercourse where the genitals cannot be seen (which has the effect of simulated intercourse); and
- visible contact between the hands of one person and the genitals of another, regardless of the genders of the participants.

Visible touching of the genitals is the most recent addition to this category; the last one to join this category before that was full male frontal nudity.

Basic hard-core pornography clearly includes everything found in soft-core pornography, adding one or more of the following:

- erect male organ;
- contact of the mouth of one person with the genitals of another;
- penetration of a finger or male organ into any orifice in another person;
- open female labia;
- penetration of a sex toy (usually a dildo) into an orifice, sometimes assisted by another person;
- male homosexual activities beyond casual touching; and
- the aftermath of male ejaculation.

GLOSSARY

We use the following terms frequently enough in this report that it may help the reader to have ready reference to them. Note that there is a full set of recommended definitions for local ordinances included in Chapter 7; although there is some overlap between the two lists, the list in Chapter 7 includes a more complete set of use-related definitions. If a term is defined elsewhere in this list, it has been set in italics.

adult business Many communities refer to a *sex business* as an "adult business." Because there are other adults-only products and businesses—alcohol, tobacco, and legal gambling being prominent examples—we prefer the more specific definition of *sex business*.

adult arcade A term used in some local ordinances to describe a physical arrangement of one or more *video-viewing booths*.

bookstore We use this term as a limiting term in this report to describe a store that primarily sells books and other print media. For reference, see also the definitions for *sex shop* and *media*.

cabaret A term often used to describe an establishment that has a combination of live entertainment and alcoholic or other refreshments.

hard-core [pornography] In the visual media, hard-core typically includes elements of *soft core* and adds to that one or more of the following: erect male organ; contact of the mouth of one person with the genitals of another; penetration of a finger or male organ into any orifice in another person; open female labia; penetration of a sex toy (usually a dildo) into an orifice, sometimes assisted by another person; the aftermath of male ejaculation. Most hard-core material includes one or more *money shots.* The definition is discussed in context in Chapter 1.

lap dancing "Just riding on a guy's lap." See description in Chapter 2.

media Anything printed or written, or any picture, drawing, photograph, motion picture, film, videotape or videotape production, or pictorial representation, or any electrical or electronic reproduction of anything that is or may be used as a means of communication. Media includes but shall not necessarily be limited to books, newspapers, magazines, movies, videos, sound recordings, cd-roms, digital video discs, other magnetic media, and undeveloped pictures.

money shot Industry term for a visual depiction of male ejaculation, discussed in Chapters 1 and 2.

obscenity or **obscene** These terms are applied in this report—and in the industry in general—to material that is illegal in the United States, generally because it fails to meet contemporary community standards or contains no redeeming social value. Compare to the definition of *pornography.* This definition is discussed in context in Chapter 1 and further explained in Chapter 5.

pornography This term is used in this report, in the industry, and among scholars who study it, as a generic term that includes sexually oriented, *soft-core* and *hard-core* material. It is used as a descriptive term, not as a judgmental one. The use of the term has changed over the years; for a discussion of the definition and a brief history, see Chapter 1.

public display The act of exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others, or from any portion of the person's store or property where items and material other than sexually oriented *media* are offered for sale or rent to the public. Note that there is a good deal of material which may be inappropriate for public display but that is otherwise entirely legal and not a public policy concern; see *soft core; specified anatomical areas*

sadomasochistic practices Flagellation or torture by or upon a person clothed or naked, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed or naked.

GLOSSARY (continued)

sex business An inclusive term used to describe collectively: adult cabaret; adult motion picture theater; adult media store; bathhouse; massage shop; modeling studio; and/or sex shop. This collective term does not describe a specific land use and should not be considered a single-use category. This business is described in some depth in Chapter 2.

sex shop This is the authors' definition of a business that meets any of the following tests:

- It offers for sale items from any two of the following categories: sexually oriented *media*; *sexually oriented toys or novelties*; lingerie; leather goods marketed or presented in a context to suggest their use for sadomasochistic practices; and the combination of such items constitutes more than 10 percent of the stock-in-trade of the business or occupies more than 10 percent of the gross public floor area of the business; or
- More than 5 percent of the stock-in-trade of the business consists of *sexually oriented toys or novelties*; or
- More than 5 percent of the gross public floor area of the business is devoted to the display of *sexually oriented adult toys or novelties*.
- It advertises or holds itself out in any forum as "XXX," "adult," "sex," or otherwise as a *sex business* other than an adult media outlet, adult motion picture theater, or adult cabaret.

sexually oriented toys or novelties Instruments, devices, or paraphernalia either designed as representations of human genital organs or female breasts, or designed or marketed primarily for use to stimulate human genital organs.

soft-core [pornography] In the visual media, soft core today may include full frontal nudity of men or women, full rear nudity, simulated sexual intercourse, actual sexual intercourse where the genitals are not visible and limited forms of contact between the hands of one person and the genitals of another. Soft core, as it is understood in the United States in the year 2000, does not include penetration or erect male organs; see *hard core*. This definition is discussed in context in Chapter 1.

specified anatomical areas As commonly used, this term includes: (1) less than completely and opaquely covered: human genitals, pubic region, buttock and female breast below a point immediately above the top of the areola; and (2) human male genitals in a discernibly turgid state, even if completely and opaquely covered. Note that using this definition includes a good deal of *soft core* material, a fact which makes it inappropriate for describing materials in most sex businesses, although it may still be useful to define what materials should be allowed on public display.

specified sexual activities Sexual conduct, being actual or simulated, normal or perverted acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact, in an act of apparent sexual simulation or gratification, with a person's clothed or unclothed genitals, pubic area or buttocks, or the breast of a female; or any sadomasochistic abuse or acts including animals or any latent objects in an act of apparent sexual stimulation or gratification.

video store We use this term as a limiting term in this report to describe a store that primarily sells or rents videos. (See also *media; sex shop*.)

video-viewing booth Any booth, cubicle, stall, or compartment that is designed, constructed, or used to hold or seat patrons and is used for presenting motion pictures or viewing publications by any photographic, electronic, magnetic, digital, or other means or *media* (including, but not limited to, film, video or magnetic tape, laser disc, cd-rom, books, magazines, or periodicals) for observation by patrons therein. A video-viewing booth shall not mean a theater, movie house, playhouse, or a room or enclosure or portion thereof that contains more than 150 square feet.

There are at least two levels of hard-core pornography. The first includes five of the six representations above and can now be found on pay-per-view channels in hotel rooms, on some cable channels, and in a few magazines available in some airport and other mainstream newsstands. The second level, true hard core, adds the sixth and last key element—"the money shot," showing male ejaculation (Williams 1999, citing Ziplow 1977).

Given current trends, it is certainly possible that some of the mass distribution hard-core material will begin to include money shots. Other activities, however, seem likely to remain part of the hard-core material that is available only through the sex business that we would label "extreme hard core." Those include:

- sexual activities involving bondage, sadism, and masochism;
- activities involving interaction between humans and animals.

Hard-core pornography . . . remains primarily a product of the sex industry, which now includes videos, pay-per-view movies, and Internet sites, as well as the traditional media of magazines and movies.

Although the courts have not made the distinctions that we make here, we believe that society has. And while the trade seems to draw a line at the "money shot" now, reserving it for materials available only through adult outlets, the trend is such that it may logically join penetration as part of the more generally available hard core. While parents may wish to protect children from even soft-core pornography, and society is likely to help them do so, it is so widely available in mainstream channels that we do not feel that soft-core pornography is a land-use issue; when it is available on network television and in general release (even if R-rated) films, it is an access issue, not a land-use one.

Hard-core pornography, in contrast, remains primarily a product of the sex industry, which now includes videos, pay-per-view movies, and Internet sites, as well as the traditional media of magazines and movies. Where the sale or rental of hard-core pornography is available in a retail outlet or otherwise becomes place specific, or where sexually oriented entertainment is available to the public on site, in a theater or other venue, the activity becomes a land-use issue. The focus of this report is on the land-use characteristics and impacts of the activity rather than on the content of the performance or the materials. That approach is consistent with the approach of the courts, which have generally held that regulations of sex businesses must be justified by studies showing possible "secondary impacts" of the land use.

Some pornography is obscene, and, as we explain in Chapter 5, obscenity lacks First Amendment protection and is generally illegal to sell or distribute—but legal to own. What is obscene? As we explain in Chapter 5, the U.S. Supreme Court has held that the definition of obscenity is generally a matter of "contemporary community standards" as determined by a jury—but work that has socially redeeming value, or as the Court has held, work that, taken as a whole, includes any "serious literary, artistic, political, or scientific value" will not be found obscene.

WHO IS THE AUDIENCE FOR THIS REPORT?

We hope that active users of this report will include local planners, municipal counsel, code enforcement personnel, police, public health officials licensing clerks, planning commissioners, and the public officials who enact codes and ordinances regulating sexually oriented uses in their communities. Although our focus is local, the material in this report should provide useful guidance to those interested in addressing some of these regulatory issues through state legislation.

A key component of this report focuses on the sex business itself, not just the regulatory schemes for addressing it. It is essential to understand a business before attempting to regulate it. It has been our experience that few planners and public officials concerned with sex business regulation have any real familiarity with the sex business. Even the notion of treating the sex business as a single entity is misleading, because it is really many businesses, with many different characteristics and different impacts on communities. We have found police officers and prosecuting attorneys in some communities who understand the grayer edges of the business, but far too few local planning professionals and public officials understand the business. We hope that this report will help to increase the understanding of the business by those who regulate it.

HOW DO WE KNOW?

In the past three years of our research for this report, we have gotten to know the industry better than many of its customers. We have visited dozens of adult businesses in Kansas City, Biloxi, Rochester, New Orleans, Atlanta, New York City, Palm Beach County, and in other cities, including some in other countries. We have met with sex business owners and managers. We have examined the sex toys, tried the viewing booths, watched lap dancing and, perhaps most important, watched other customers in these businesses. We have viewed police camera tapes of "dancers" performing in a booth a type of performance that we chose not to witness live. We have toured up-scale establishments and seedy ones, well-managed operations that serve as informal "neighborhood watch" coordinators, and poorly managed ones with soiled mattresses and tissues littering video-viewing booths. We have learned from operators and their attorneys that well-managed and successful sex businesses, like quality business in other fields, support effective regulation because it reduces community conflicts with their businesses and thus reduces the risk of community backlash against them. So now we're going to tell you everything you wanted to know about regulating lawful sex businesses.

We have toured up-scale establishments and seedy ones, well-managed operations that serve as informal "neighborhood watch" coordinators, and poorly managed ones with soiled mattresses and tissues littering video-viewing booths.

ORGANIZATION AND CONTENT

This report falls in three general parts.

Chapter 1 through 5 are educational chapters, intended to inform the planning and policy-making process that ultimately implements regulations for sex businesses and other land uses. We suggest that you read all five of these chapters sequentially as you begin (or begin again) the process of reviewing or developing a set of regulations for sex businesses in your community.

Chapters 6 through 8 are “how to” chapters, intended for use by the staff planners and lawyers who prepare local studies and draft ordinances dealing with sex businesses. These chapters should be used as checklists as you engage the process of creating or amending regulations for sex businesses. There is no new learning in these chapters—it simply organizes the learning from the first five chapters in a way that is useful as the basis for a work program.

Chapter 9 summarizes all of our recommendations from the report and is intended for use in summarizing the report as part of the record at legislative hearings or even in court. It provides a sort of “executive summary,” but we have consciously not placed it at the beginning because we believe that reading only the summary is inadequate.

Here are brief descriptions of the individual chapters that follow.

Chapter 1. From Fanny Hill *to Voyeur Dorm: the Social Evolution of Pornography*. This background chapter provides a philosophical, political, and practical history of pornography in society. Because pornography is something defined by society and not an absolute, it is important to understand how society came to its present definitions—and where it is probably headed.

Chapter 2. Understanding the Sex Business: Classifying Types of Businesses that Offer Sexually Oriented Products and Services. Chapter 2 describes sex businesses as they actually operate. The material in this chapter is based both on our own field work and on secondary sources. In this chapter, we explain the land-use classification system that we recommend for sex businesses.

Chapter 3. What Do Formal Studies Show About the Impacts of Sex Businesses on Communities? This chapter summarizes nine sex studies in communities across the country. Some are famous, some are thorough, and all are interesting. Included in this chapter are the results of our own Kansas City study—based both on field work and on an unprecedented door-to-door survey around the businesses—and a new survey of appraisers in Rochester, New York. From this chapter, we draw important findings and conclusions that lay the foundation for many of our regulatory recommendations.

Chapter 4. How Local Governments Regulate Sex Businesses. We can always learn from others, and this chapter includes a comprehensive review of the methods that 21 different local governments use to regulate sex businesses. Although we believe that the recommendations in this report provide a better regulatory model than any of the individual communities cited, it is useful to consider the choices that other communities made—before our report was available. Some of our own recommendations, of course, are based on ideas that we gained from particular communities—although most are synthesized from our learning from the studies and the field work.

Chapter 5. Major Legal Issues in the Regulation of Sex Businesses. This chapter is intended as an educational one for planners. It also provides good background for local government attorneys who are only generally familiar with this complex field. It cites and discusses all of the major cases in the field and outlines the major principles that govern the regulation of sex businesses, which, like the regulation of signs, takes place at the intersection of the First Amendment and local regulation.

Chapter 6. How to Prepare a Study of Sexually Oriented Businesses. This is the "how-to" chapter on preparing your own local study of sex businesses. Although the courts have allowed local governments to use studies from other communities, a community that performs its own study will have a better factual, practical, and legal basis for developing a regulatory program than one that does not. In this chapter, we guide you through the process of designing and conducting such a study.

Chapter 7. How to Prepare Zoning Regulations for Sexually Oriented Businesses. This chapter includes a model set of definitions and a work program for creating viable zoning regulations for sex businesses—and then for checking them to be sure that they are defensible. The chapter discusses both the assignment of sex businesses to zoning districts and the establishment of separation requirements between sex businesses and a variety of other uses.

Chapter 8. How to Prepare a Licensing Ordinance for Sexually Oriented Businesses. This chapter complements Chapter 7 by focusing on the cre-

ation of a licensing ordinance for sex businesses. As we explain in Chapters 2 and 3, many of the issues that concern residents and communities about sex businesses are operating issues, not land-use issues; through a licensing ordinance, a community can directly address those operating issues.

Chapter 9. Recommendations. In this chapter, we summarize our findings, conclusions, and lessons learned, and make specific recommendations. We anticipate that you will use this chapter in preparing findings on which to ground an ordinance, for defending an ordinance in court, or as a "refresher."

CHAPTER 1

Fanny Hill to Voyeur Dorm:

The Social Evolution of Pornography

WHY A HISTORY? It is important to understand that the sex business is big business, an old business, and a business that has evolved as values in society have changed. This is not a marginal part of society that we should ignore. It has been around for a long time, and it will be around for a long time. You, the reader, may or may not patronize these businesses, but the chances are excellent that some of your friends, colleagues, and neighbors do. Sex businesses play a role in a modern community and have a place in that community. As we will show in this report, that place is not next to the elementary school, but it is also not next to the junkyard. We hope that when you have read this report, you will understand the sex business well enough to make informed decisions about its place in your community.

The sex business is big business, an old business, and a business that has evolved as values in society have changed.

Pornography is a socially constructed concept. As Lynn Hunt (1996, 11) notes:

> Pornography was not a given; it was defined over time and by the conflicts between writers, artists and engravers on the one side and spies, policemen, clergymen and state officials on the other.

Hunt traces the history of pornography back half a millennium:

> In early modern Europe, that is, between 1500 and 1800, pornography was most often a vehicle for using the shock of sex to criticize religious and political authorities. (p. 10)

As the history that follows shows, the evolution of pornography has followed societal change. In particular, pornography has been shaped by—and has arguably shaped—a series of technological revolutions: the printing press; the 8-millimeter movie camera; the VCR; and the Internet. In fact, at least one author is convinced that the sex industry contributed substantially to the choice of VHS over Betamax technology, to the wide acceptance of VCRs, and to the explosive growth of graphic capabilities of the Internet (Lane 2000).

The Kinsey Institute for Research in Sex, Gender, and Reproduction, Inc.

This is an adult bookstore in 1958. The chances are good that works like Lady Chatterley's Lover, Fanny Hill, *and* The Pearl *were somewhere on these shelves. Had they been published in 1958,* Lolita, Catcher in the Rye, *and* Naked Lunch *would also probably have been available only in an adult bookstore. Now all are available from Amazon.com and other major bookstores. And several of these works are now considered classics of twentieth century literature.*

PORNOGRAPHY AND CENSORSHIP IN EUROPE

The concept of pornography evolved with Western modernity as Europe emerged from the Middle Ages (Hunt 1996, 10-11). Although the material classified as pornography was created by writers, poets, and artists, it was defined as pornography by censors. The Catholic Church may have unintentionally helped the cause of pornography by publishing its "Index of Forbidden Books," beginning in the sixteenth century and comprehensively compiled by Paul IV in 1559 (Findlen 1996, 55). In defining and identifying early pornography, scholars still refer to the Catholic lists and lists of materials kept under restricted access in major French and British libraries.

Lynn Hunt (1996, 12) identifies episodes of censorship by the French police in the early eighteenth and nineteenth centuries; during each period, police apparently maintained a list of immoral books. Hunt says that the earliest use of the word "pornography" that she has found in extensive reviews of the literature (dating at least to 1500) is in an 1806 bibliography of suppressed books, compiled by the Frenchman Peignot. Hunt credits the evolution of pornography as a genre to a combination of the availability of the printing press and the definition provided by public censorship. Paula Findlen (1996) also traces the concept to the sixteenth century:

> All cultures produce some form of sexually explicit art and literature. But not every culture distinguishes the erotic from the pornographic, nor is pornography defined in the same way in every instance. Pornography, a repository of multiple meanings with constantly shifting boundaries, emerged from the literature and imagery that purported to recount the lives of prostitutes . . . . This genre flourished in the erotic and obscene writings of sixteenth century authors…. (p. 52-53)

PORNOGRAPHY AND CENSORSHIP IN THE NEW WORLD

By the eighteenth century, attacks on pornography coincided with attacks on novels in general; both novels and pornography were associated with "libertinism" (Hunt 1996, 36-37). Late in the eighteenth century or early in the nineteenth, hard-core pornography became a commercial enterprise and lost many of its political connotations, at least in England and France. According to Frederick Lane (2000), one of the benchmarks of that change was the publication of John Cleland's *Fanny Hill: Memoirs of a Woman of Pleasure*; the 20 guineas that he received for its publication secured his release from debtors' prison—where he had written it. Lane's account of the book's publishing history notes the progress of the book's and some various publishers' success. Although religious groups controlled the early printing presses in the United States, by the early nineteenth century, an independent printer in this country had reproduced *Fanny Hill*; at least one publisher and two booksellers were prosecuted for printing and distributing the book. By 1846, however, another publisher produced the book in New York, apparently achieving great financial success and entirely avoiding legal penalties.

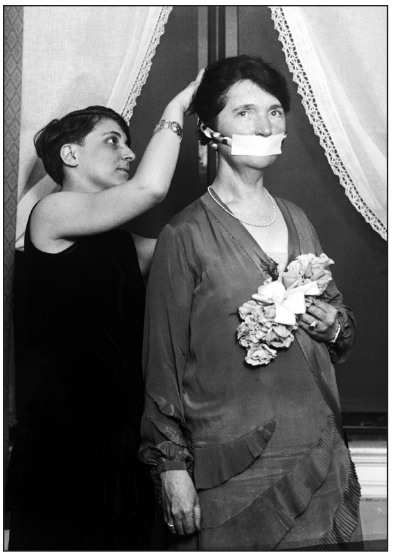
Lane goes on to contend that the success of *Fanny Hill* and other mid-nineteenth century sexually oriented works led to efforts to regulate this new industry. Anthony Comstock became the leader of that movement, helping first to lead a crusade for the passage of an anti-obscenity law in New York State. Comstock joined forces with the YMCA, which was involved in a campaign against vice in general. With funding from the YMCA or its leaders, Comstock became head of the nongovernmental New York Society for the Suppression of Vice. In that capacity, he began

"confrontational raids" on sellers of pornography in New York. From that political base, Comstock became involved in the efforts to strengthen federal regulation of obscenity, which resulted in the passage of an 1873 law, An Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use. Apparently as part of a political deal and the law's passage, Comstock was made a "special agent" of the U.S. Post Office to enforce the law. During his 42 years of service in that post, the law became known as the "Comstock law." He was a ruthless enforcer:

> By January 1874, less than a single year after his initial appointment, Comstock reported that he had confiscated and destroyed "134,000 pounds of 'books of improper character' along with 194,000 pictures and sundries, like 60,300 'rubber articles' and 5,500 'indecent' playing cards." In 1913, just two years before his death, Comstock boasted that he had destroyed more than 160 tons of obscene literature and had convicted enough individuals to fill nearly 61 passenger cars with 60 seats each. (Lane 2000, 15; internal citations omitted)

Comstock's war attacked more than erotic material—the law and the man also opposed the distribution of contraceptive devices, leading Comstock to what turned into his final battle—against Margaret Sanger, social reformer and pioneer of the birth-control movement. Although public outcry led federal prosecutors to drop charges against her, charges against her husband on similar grounds were pending when he died in 1915, the same year that Comstock died.

During the remainder of the twentieth century, none of the controversies that we have encountered regarding the sex business have focused on the content of books that are not illustrated. Undoubtedly, there are those in society who remain concerned with James Joyce's *Ulysses*, Vladimir Nabokov's *Lolita*, J. D. Salinger's *Catcher in the Rye*, and D.H. Lawrence's *Lady Chatterley's Lover*, and more who would be concerned if they read items like the much re-issued *Fanny Hill* and *The Pearl*. Although we have seen some sexually oriented paperbacks, usually by "Anonymous," in some of the shops that we visit, they appear to constitute a very small part of the sexually oriented inventory available in the industry. All of the specific titles just named can be found in the major national book chains, as well as in the catalog of a traditionally conservative national book club. Those and other titles would meet our definition of hard core if filmed literally and explicitly, and yet they seem not to be at the heart of controversy today. In short, we do not believe that text-oriented books are a major factor in contemporary definitions of the sex business.



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Comstock's war attacked more than erotic material—the law and the man also opposed the distribution of contraceptive devices, leading Comstock to what turned into his final battle—against Margaret Sanger, social reformer and pioneer of the birth-control movement.

STAG FILMS

About the time of Comstock's death, technology was creating the opportunity for a new form of pornography—the stag film. Linda Williams (1999) traces the origins of sexually oriented movies to stag films from as early as 1910 to 1915. She contrasts the modern sex movies with early stag films in several ways:

> [Stag films include a] male film spectator who is encouraged to talk to, and even to reach his hands into the screen; a female film body who spreads her legs and (and labia) for the eye and hand behind the camera. (p. 76)

The form and content of the stag film remained essentially unchanged for more than 50 years—a single, relatively short reel (usually 10 to 15 minutes in length), amateur participants, and heterosexual intercourse

Jungle Virgin (1936), also known as Jaws of the Jungle *was "stark realism" indeed. The credited cast (those "demons on a rampage") included Gukar as the Rejected Suitor, Cliff Howell as the Narrator, Minta as The Girl, Teeto as The Boy, and, of course, Walla as The Ape.*

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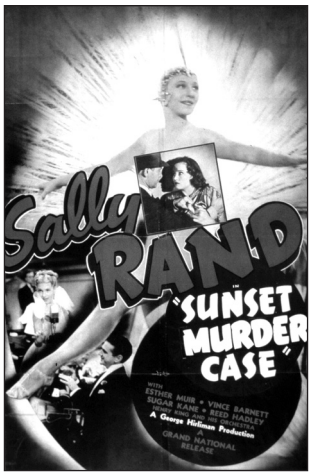
Sally Rand, whose fan dance made a splash at the 1933 Chicago World's Fair, starred in The Sunset Murder Case *(1938). Her exotic dance in the film, according to a critic at the All Movie Guide (www.allmovieguide.com) was "by 1990s standards. . .about as erotic as a plastic shower curtain." The movie was known as* The Sunset Strip Case *(no pun intended, we're sure) on the grind house circuit.*



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(albeit in a variety of positions and locations). The production of stag films was a "cottage industry." Most of the stag films were shown first in the region in which they were produced, and then only slowly in other regions or countries. The industry received an important boost in 1923, when Kodak introduced a 16mm camera, projector, and film (Lane 2000, 21-22).

MAINSTREAM CINEMAS AND EARLY "INDEPENDENT" FILM MAKERS

Stag films were not the sole source of early sex in cinema. According to a history of the sexually oriented film industry (Muller and Faris 1996), *Grindhouse*:

> Prior to [1931], movies eagerly depicted all sorts of sex, vice and general moral corruption, from "exposes" of white slavery, like *Traffic in Souls* (Universal, 1913) to grandiose epics that featured nubile Christians lashed naked to the stake (Cecil B. DeMille's *Sign of the Cross*) to all-out orgies (Eric von Stroheim's *The Merry Widow* and *The Wedding March*). (p. 13)

In 1931,the mainstream motion picture industry created the Motion Picture Producers and Distributors Association of America (MPPDAA). It defined pornography through its Production Code Administration office, often simply called "the Hays office" after the MPPDAA's first president, Will Hays. Hays published an early list of "don'ts and be carefuls," dealing with both sex and violence. The code was revised in 1934 under pressure from the private Legion of Decency and its leader, Martin Quigley; their boycott of Philadelphia theaters caused a 40 percent revenue loss in one week, persuading the industry to accept their proposed standards, which imposed much greater restrictions on sex than on violence (Lane 2000, 21-22; Muller and Faris 1996, 14).

According to *Grindhouse*, into the breach created by the new limits imposed on mainstream films came a group of "former carnival operators, con men, roadshow hucksters" who created the new adult industry and called themselves "the Forty Thieves"—producing, directing and distributing x-rated movies. In some cases, the "distribution" amounted to a member of the informal group taking a film on the road and physically showing it in "tiny grindhouses" along the way:[2]

> J.D. Kendis, one of the original Forty Thieves, helped create the basic recipe for exploitation chefs in his 1931 production *Guilty Parents*. Patrons left thirsty by [Prohibition] were shown lots of drinking, either in swanky urban social clubs or in grungy rural roadhouses. Fallen women presided over gaming dens, wearing filmy negligees. The heroine, typically a corn-fed blonde, had her hands full fending off the heavy-petting wolf who lived to corrupt her. (p. 19)

Although these producers were operating decades before Supreme Court Justice Brennan injected the concept of redeeming social value into the distinction between what is and is not obscene, they seemed to anticipate such a rule and often hung their sexual images on educational themes—themes like avoiding venereal disease, maintaining sex hygiene, and "exposing the vice rackets" (Muller and Faris 1996, 20-33). Other early themes included "naked natives" and "sex-crazed dope fiends." Stars in this period even included Hedy Lamarr.

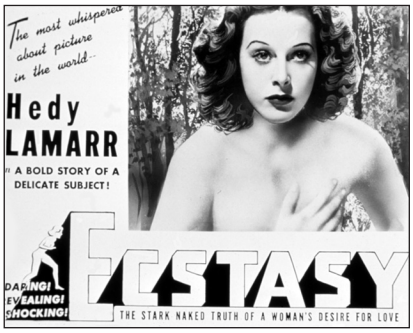
MAGAZINES FEATURE NUDITY

Although sexually explicit novels had become widely available by late in the nineteenth century, publications with explicit pictures had received

limited distribution because of the fear of prosecution during the Comstock era. In the post-Comstock era, illustrated works evolved rapidly:

> The magazine industry was particularly aggressive in its use of sexual imagery and themes. In 1931, The American Sunbathing Association began publishing the *Nudist* (later renamed *Sunshine & Health*) and a number of so-called "art photography" publications followed. And in 1933, *Esquire* magazine was founded by 29-year-old Arnold Gingrich, who hit upon the then provocative combination of top-notch writing, risqué cartoons, and drawings of scantily clad women. Despite a rather high cover price of 50 cents (particularly for a nation in the throes of a depression), *Esquire* went on to sell more than 10 million copies in its first three years. (Lane 2000, 22-23)

The 1940s saw even more strict censorship and the evolution of "cheesecake." (According to the Random House unabridged dictionary (2d ed.), cheesecake was also called "leg art" and "consisted of photographs featuring scantily clothed attractive women.") Cheesecake was available in burlesque films and early "peep shows," coin-operated machines that each showed a short film loop for a coin (Muller and Faris 1966, 34-37). The 1940s also brought an expansion of the pornography industry as it served troops abroad with girlie magazines and pornographic films (Lane 2000, 26).



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Ecstasy *(1933) meant Hedy Lamarr taking a midnight nude swim. In the plot, she plays a sexually frustrated young wife who finds fulfillment in the arms of a roadway engineer. Her husband commits suicide, and she ends up "happy and contented. . ., the result of her secret liaison being the little baby in her arms" (www.allmovieguide.com). The film gets a four-star rating on the All Movie Guide site.*

PORNOGRAPHY GOES MAINSTREAM IN THE 1950s, 1960s, AND 1970s

Hugh Hefner redefined sex and the media in the 1950s. He had started as promotion manager on one of the sunbathing magazines that evolved from the 1940s. In 1952, he quit that job and took a less demanding position with a children's magazine, giving him time to work on his own publication. He raised $10,000 from friends and acquaintances, spent $500 of that to buy the rights to his first centerfold—a pin-up photo of Marilyn Monroe—and added to that illustration some articles that he wrote himself and a variety of public domain material by well-known writers. The result was the first issue of *Playboy*, which sold more than 50,000 copies when it came out in 1950. He published 175,000 copies of the first-year anniversary issue and 400,000 of the second-year anniversary issue (Lane 2000, 23-24). Hefner's blend of nudity (initially consisting only of bare female breasts) and sophistication brought sexually oriented materials into the mainstream.

Although other men's magazines soon offered sexually oriented photos of females to a mass audience, Hefner's Playboy Enterprises dominated this part of the business for nearly two decades. He added the Playboy clubs, with scantily clad hostesses in "bunny" outfits, in 1960 (Lane 2000, 26). His major competitors entered the field in 1969 (*Penthouse*) and 1974 (*Hustler*).

Playboy and *Penthouse* remain mainstream, relatively soft-core magazines—featuring full frontal nudity and, at least in *Penthouse,* erect male organs, but no penetration. *Penthouse* has also long featured letters that graphically define a variety of sex acts that would meet our definition of hard core if illustrated. *Hustler* is a grittier but still relatively mainstream and soft-core publication. Other publications found in airports and larger newsstands feature more explicit poses by female models—often including open labia—but still remain essentially soft core. *High Society* has begun including both penetration and "money shots" (ejaculation) and has now disappeared from airport newsstands. All of these are available through the mail and in major bookstores and newsstands. Although "I

The Office Party (1968) promised "the funniest, wickedest orgy ever filmed!" Makes you wonder how many had been filmed before this. The previous effort of the director, Whit Boyd, was Spiked Heels and Black Nylons *(1967).*

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While we were glad to find this poster for I Want More *(1970) in our research, we would have preferred to offer you the poster under the movie's other title,* Sock It To Me with Flesh *(really), which certainly dates the era in which this movie was made.*

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buy *Playboy* for the articles" is a sort of a pat male joke, it is not a joking matter to major publishers. *Playboy* and *Esquire*, which are no longer "on the edge" in this business, have both supported major fiction writers early in their career and later. It is important to consider that fact in the context of the Supreme Court's determination in its decisions to protect "All ideas having even the slightest redeeming social importance." It is also important to realize that both of these publications took risks on significant new authors before the leading Supreme Court decision (described below).

The 1950s also saw the broad release of a number of nude films, including *Adam and Eve*.[3] *The Garden of Eden*, a movie set in a nudist colony and focused on how the nudist colony was seeking to gain the respect of the community, was shown in 36 states. New York's ban on it was struck down by the state's own high court (Lane 2000, 26).

Muller and Faris (1996) note that, at this same time, "many grindhouses became 'art houses,'" showing imported movies that often included "frank, sexual content" and sexy stars like Sophia Loren. One early chain of art houses grew up in Ohio, created by its owner as much to keep noisy children out as to facilitate showing more adult fare. A landmark in the 50s was the release of Roger Vadim's *And God Created Woman*, starring Brigitte Bardot—with her clothes ripped off in several scenes. Condemned and banned, it played to large audiences.

The decision of the U.S. Supreme Court that defined obscenity grew directly out of this era. *Roth v. United States*, 54 U.S. 476 (1957), brought before the court consolidated appeals of New York State's ban of the film version of *Lady Chatterley's Lover* (1955) and an appeal of the criminal conviction of the manager of one of the Ohio theaters, who was convicted for showing *The Lovers* (1959), a Louis Malle film starring Jeanne Moreau. Although the Court's position has changed on some issues arising in *Roth*, it reaffirmed a key holding from that case in *Miller v. California*, 413 U.S. 15 (1973):

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. (*Roth v. U.S.*, at 484-85; position affirmed in *Miller v. California*)

Although this provided a philosophically solid definition of obscenity, broadly protecting First Amendment rights, it created a loophole large enough to handle the average local sanitation truck:

> But the ironic effect of Brennan's clarification was that, subsequent to this ruling, all sorts of surprising works were discovered to be not without some "nugget" of social, historical, or even aesthetic worth. The *Roth* decision, then, marked "the opening of the floodgates" to U.S. publication of all the long-suppressed classics—*My Secret Life* (1888) and D. H. Lawrence's *Lady Chatterley's Lover* (1929) in 1959, John Cleland's *Fanny Hill* in 1966—as well as newer works, such as Pauline Reage's *The Story of O* and Henry Miller's *The Tropic of Cancer*. (Williams 1999, 89, citing Kendrick 1987, 202-04)

In 1966, the Supreme Court, in *Attorney Gen'l of Mass.*, 383 U.S. 413 (1966), held squarely that *Memoirs of Fanny Hill* (which had been widely available for a century) was not obscene. A year later, the court handed down the first of some 30 opinions reversing obscenity convictions with-

out opinions. The first of those decisions, *Redrup v. New York*, 386 U.S. 767 (1967), held that two books, *Lust Pool* and *Shame Agent* were not obscene. The dismissal of those obscenity convictions brought the nation essentially to the polar opposite of the terrors of the Comstock years—to a position where there seemed little prospect of using criminal laws to suppress most sexually oriented material (Lane 2000, 26-33).

Two years after the Court's decision in *Roth*, Russ Meyer, a former *Playboy* photographer, seized the opportunity offered by bringing nudity back into mainstream cinema and released *The Immoral Mr. Teas*. He made the film for $24,000 and made a million-dollar profit on the investment (Lane 2000, 26). Meyer's work demonstrated to film-goers what Hefner had shown magazine "readers"—that nudity could be presented in the mainstream with some taste and style. In that context, the 1960s also saw the growth of drive-in movies, featuring sexy and suggestive movies without nudity—movies like Mamie Van Doren and Mel Torme in *Girls Town*, and one that introduced full nudity—Jayne Mansfield in *Promises, Promises*.

Sexually oriented movies began to move into the mass market in 1967 with the showing of a Swedish import, *I Am Curious Yellow*, in what Williams calls "exploitation theaters," noting that "the theaters showing such films became the testing ground and, ultimately, the outlet for hard-core material once exclusive to the illegal stags" (Williams 1999, 96). Although this and other early sexually oriented movies shown in theaters apparently emphasized female breasts and buttocks, commonly called "T&A" in the trade, the 1972 opening of Gerard Damiano's *Deep Throat* in an exploitation theater marked a new era:

> [F]or the first time, cinematic works containing hard-core action were reviewed by the entertainment media and viewed by a wide spectrum of the population, including, most significantly, women. . . . For the first time in the history of the American cinema, a penis central to the action of a story appeared "in action" on the big screen of a legitimate theater. . . . The audience was clearly no longer the much-maligned "raincoat brigade," nor was attendance furtive. (Williams 1999, 98-99, 100)

Other x-rated pictures that achieved wide circulation in that period included *Behind the Green Door* (1972) and *The Devil in Miss Jones* (1973). Other, less significant titles from this period that received wide distribution included a Danish movie, *Without a Stitch* (1968) and another U.S. entry, *The Curious Female* (1969). *Emmanuelle* (1974) has been cited as "the film that really blazed the trail from grindhouse to multiplex" (Muller and Farris 1996, 146). This was a watershed period, which marked the "golden age" of adult theaters, with some 1,200 to 1,300 screens around the country showing primarily x-rated fare (Lane 2000, 52).

This same period saw the magazine industry become even more explicit, with the addition of Bob Guccione's *Penthouse*, which he founded in London and brought to the U.S. in 1969. Guccione's photographs showed models who were more directly sexual and less "girl next door" than Hefner's, and Guccione broke major ground in mainstream media when, in 1971, he first showed a centerfold's pubic hair (Lane 2000, 28-29). Larry Flynt, who already owned adult nightclubs in Cincinnati, used $100,000 to launch the much raunchier—and consciously less sophisticated—*Hustler* in 1974 (Lane 2000, 29).

This period saw the peak circulation for the slick magazines that brought sex into the mainstream. *Playboy's* peak year was 1972, when it sold 7 million copies. Industry figures for 1977 showed that total circula-

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According to Linda Williams in Hardcore: Power, Pleasure and the "Frenzy of the Visible" *(University of California Press, 1999), the release of* Deep Throat *meant that "a penis . . . appeared 'in action' on the big screen of a legitimate theater. The audience was clearly no longer the much-maligned 'raincoat brigade,' nor was attendance furtive." And "most significantly," women made up part of the audience for the film.*

tion of the top 10 men's magazines was 16 million, generating circulation revenue of $400 million; of that circulation, *Playboy* accounted for 5 million copies, *Penthouse* for another 4.6 million, and *Hustler*, then only three years old, for 3 million copies (Cook 1978).

This wide availability of relatively explicit, sexually oriented material helped to shape the nation's view of sex and sexually oriented material, but the illustrations in these publications also essentially illustrated what had become acceptable in the mass market. The evolution of the photos in these magazines from bare female breasts to full frontal nudity and, later, open labia and male genitals reflected changes in social acceptance.

In 1973, the Supreme Court established the current (as of 2000) test of obscenity in *Miller v. California*, which was quoted above. Although later interpretations of the decision by courts and prosecutors have allowed the sexual revolution in the media to continue, early reactions to the decision included self-censorship, avoidance of shipping potentially obscene materials across state lines (to avoid federal prosecution), and an increase in the participation of organized crime in pornography (Lane 2000, 32). Enforcement was selective, however, according to one source, focusing then (as many ordinances do now) on "public" displays and ignoring sales of *Penthouse* and *Playboy* magazines kept under the counter in opaque covers, despite the fact that nothing in *Miller* suggests that such a distinction can be made (Lane 2000, 32-33). The last serious attention focused by the federal government on the issue of pornography was the formation of the so-called Meese Commission in 1986. Actually called the Attorney General's Commission on Pornography, the commission came to be known by the name of President Reagan's Attorney General Edwin Meese, who chaired and hand-picked the commission. Stacked with anti-pornography witnesses, the commission finally made no substantive legislative recommendations and may even have contributed to the distribution of pornography with its government-financed publication of an appendix with extensive excerpts from contemporary pornography. Although the commission's report did lead Presidents Reagan and Bush to launch the prosecutions of a number of business people involved in the distribution of pornography, the circulation of video tapes increased from about 75 million in 1985, the year before the commission's report, to 490 million seven years later, at the end of the Bush Presidency (Lane 2000, 106-08).

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There have been many attempts to censor pornography over the years. Here, a movie theater expresses regret that police have seized More Language of Love. *Note, however, that the theater is still showing* Language of Love. *Regulating pornography is so fraught with First Amendment issues that any regulation needs careful consideration.*

ANOTHER TECHNOLOGICAL REVOLUTION FOR PORNOGRAPHY

Two technological innovations changed the industry and helped to define its current form. The first, and the most highly identified one within the sex industry, was the "peep booth":

> The true economic potential of the peep show booth was not fully realized until 1971, when Sturman teamed with Swede Lasse Braun to produce the ubiquitous "peep booths," a simple combination of coin-operated projector, a small screen and a lockable door. By the early 1970s, Sturman was distributing booths to adult bookstores and sex shops in virtually every state in the country. In a typical arrangement, Sturman would offer to provide a shop owner with one or more booths for free, in exchange for half the receipts the booth generated; customers were generally charged 25 cents for 30 seconds to two minutes of viewing. The booths proved phenomenally popular: By some estimates, peeps grossed $2 billion during the 1970s alone, roughly four times the amount earned during the same decade by such full-length adult movies as *Deep Throat* and *Behind the Green Door*.
>
> …

> By building and distributing thousands of what were essentially miniature movie theaters, Sturman can be credited with doing for adult films what Hefner did for adult magazines: he created an industry. The demand for sexually explicit films to stock the booths created enormous opportunities for film makers interested in making such films, which in turn created a demand for actors. (Lane 2000, 48-49)

The second technological innovation is one that is familiar to most consumers in the United States—the relatively low-cost home VCR. As Lane (2000, 32-33) notes:

> In 1973 . . . the only way to make money with a sexually explicit film was to show it in a theater or other public place, which made sexually explicit films disproportionately vulnerable to community censors. On top of everything else, despite the efforts of the Pussycat Theater to clean up the image of adult theaters, most local planners considered adult theaters to be a blight on the community.
>
> What adult film makers needed was a means of distribution that offered the same relative anonymity employed by adult magazines. They got their wish in 1975, when Sony released its videocassette recorder. . . .
>
> The pornography industry was quick to recognize the economic potential of video. . . .

A veteran of the adult film industry began to make x-rated tapes in 1977 and probably had a dozen competitors within six months. By 1985, the x-rated home video market (counting both sales and rentals) had grown to $1 billion, a figure that Lane (2000, 50-51) estimates probably tripled by 1995—to $3.1 billion.

Rental videos offered consumers some significant advantages over movie theaters—primarily the option to watch them in the privacy of the home.

Sales and rentals of sexually oriented videotapes totaled more than $4.2 billion in 1997 (Rivero 1998), surpassing the total revenues of the adult industry 20 years earlier (Cook 1978). In addition to rental and sale videotapes, pay-per-view (PPV) movies have taken a part of the adult film market, although they may also have expanded it. In 1999, the total PPV market was estimated to have grossed a billion dollars, of which more than a third ($349 million) was paid for adult fare; where both hard-core and soft-core products are available, the hard-core outsells soft-core two to one (Neel 2000).

Due to the popularity of the video market, there has been a resulting decline in the number of adult theaters and, undoubtedly, in their volume of business. The peak number of adult theaters in the nation had shrunk from 1,200 in the early 1970s, to 780 in 1978 (Cook 1978), a year or so into the movement of several adult film producers into the VHS format. We were unable to document the number of adult movie theaters remaining in the country in 2000, but press accounts over the last several years have reported events like the closing of the last adult theater in the South Bay area of San Diego and one of only two remaining in the city (Klimko 1998); the closing of one of two remaining adult theaters in Orange County, California (Grad 1995); and the closing of Seattle's last x-rated theater (Talerico 1998).

SEX GOES ELECTRONIC

Sex began to go electronic with video games in the 1980s. The first significant video game was Atari's "Pong," a simple video ping-pong game

A MIDWESTERN SEX ENTREPRENEUR

Ruben Sturman of Ohio began distributing sex magazines in the 1950s and over the next 30 years built one of the largest pornography empires in the nation's history. In 1991, *Time* estimated that Sturman's empire grossed roughly $1 million per day "from the sale of lewd magazines, videos and marital aids." According to porn industry chronicler Luke Ford, Sturman's personal fortune was estimated to be as high as $200 million to $300 million. (Source: Lane 2000, 48; internal citations omitted)

BETAMAX VS. VHS: HOW PORN TURNED THE TIDE

In the early days of VCRs, there were two formats—Sony's Betamax and VHS. According to Koerner (2000), "The adult industry's decision in the early 1980s to release their videos in the VHS format, for example, is credited with dooming Sony's rival Betamax machine." Van Scoy (2000) traces that market shift to a decision by Sony not to license use of the Betamax technology to adult industry producers. The story is certainly consistent with Lane's (2000) description of the role of pornography in developing technology.

that could be played through a hook-up to one's television. That game was developed by Atari, which gained capital and market strength when it was purchased by Warner in 1975. By 1982, a company known as American Multiple Industries came out with sexually explicit games for the Atari (Lane 2000, 56-57).

From video games, it wasn't a long jump to personal computers. Long before the World Wide Web, there were bulletin board systems (BBSs); users typically gained access by using a modem to dial a modem on the bulletin board. An early BBS entrepreneur developed Exec-PC BBS, which was one of the first to feature images—including images of nudity and sexual activity. Early BBS systems would allow customers to upload images in exchange for downloading others; other customers paid (Lane 2000, 64-67). According to Koerner (2000):

> As soon as Americans learned to dial into primitive electronic bulletin board systems, scores of them began swapping naughty pictures. It wasn't long before surfers were paying monthly fees of $30 and up for the privilege of viewing X-rated material, as well as ordering their erotic needs—steamy videos, "marital aids," latex corsets—in the comfortable anonymity of cyberspace.

These dial-up bulletin boards were slow and cumbersome. The Web and several technical innovations changed all of that. First, researchers at the University of North Carolina, beginning in 1979, found ways to speed traffic over the Internet through a set of programs known as Usenet (Lane 2000, 66). Further expanding the usefulness of the Internet for pornography and other forms of e-commerce were the evolution of the World Wide Web system of creating identifiable "addresses" for documents or sites on the web and the related creation of Hypertext Markup Language (HTML), a protocol for embedding that address information in other documents. Finally, sites and documents became accessible to ordinary users with the development of Mosaic, the first graphic Internet browser; developed at the University of Illinois, the program provided the basis for Netscape (Lane 2000, 68-69).

"We all know the adult entertainment industry drives the Internet."

—Larry Bell, Chief Operating Officer Strictly Hosting.com

With these innovations, access to graphic materials—including pornography—on the Web became relatively easy. Entrepreneurs and customers were both there to take advantage of it.

In the early to mid-1990s, up to 80 percent of all Internet traffic was adult related, and service providers smelled money. Larry Bell, chief operations officer for Florida-based ISP, Strictly Hosting.com, notes that his company was not created to cater to adult clients. "But it went that direction because of demand," he says. "We all know the adult entertainment industry drives the Internet." Eighty percent of Strictly Hosting's business comes from adult sites, which require the highest-speed connections to transmit their bandwidth-gulping material (Koener 2000).

The business has continued to grow, although there are now other significant forms of e-commerce. Koerner (2000), citing market studies, estimates that consumers spent $970 million visiting porn Web sites in 1998 and that purchases of novelties, videos, and other items from adult sites accounted for 8 percent of total expenditures on e-commerce, or about $1.4 billion and about the same amount as consumers spent on books purchased over the Web.

Like the sex businesses that we visited, Internet porn attracts lots of people. According to Nielsen NetRatings, 17.5 million surfers visited porn sites from their homes in January [2000], a 40 percent increase compared with four months earlier. The top E-Porn site—PornCity.

net—boasted more unique visitors in January than ESPN.com, CDNOW, or barnesandnoble.com (Koerner 2000).

Internet entrepreneurs include Seth Warshavsky, founder of IEG (Internet Entertainment Group), which had estimated revenues of $50 million in 1998 with as much as a 35 percent profit margin; the company may be best known to the general public as the host of "Club Love," the site which first offered the nude photos of radio's "Dr. Laura" (Lane 2000, 243-47). Material at the end of Chapter 2 tells other Internet porn success stories.

When residents of a community choose to access pornographic—or political—sites on the Internet, the matter is not a land-use concern and is, under the Commerce Clause of the U.S. Constitution, beyond the legal—as well as the practical—control of local governments. When the originating site, however, is located in a community, it may have significant land-use implications. Many of those sites are, of course, existing adult entertainment establishments that simply have a new outlet for performances. The availability of inexpensive Web Cams and related software, however, has essentially allowed anyone with a computer to become a porn producer if that is what they want to do. Directories of home Web Cam sites help those interested in amateur pornography find these new sites (Lane 2000, 249-58).

A dialog modeled on those of "the Car Talk guys" appears in Chapter 2 of this report in which we exchange conflicting views on whether a local government has any interest in regulating an individual or a couple who chooses to photograph sexual or other activities in a private home and to make those available over the Internet or some other medium. Some sex businesses that started as home-based businesses are hardly what one would call amateur operations. Danni's Hard Drive and Persian Kitty's Web directory (see sidebar) are both sizable Web businesses, and both began as home-based businesses (Lane 2000, 99, 213).

A significant land-use issue as regards the operations of a home-based business has recently arisen in connection with Voyeur Dorm, a very suburban-looking house in a suburban neighborhood, but one that features five or six young "college-aged women" living in full view of several dozen Web cams that constantly broadcast their activities to paid subscribers of a Web site (Huettel 1999). On November 6, 2000, as this publication was in the final editing process, a federal district judge, in *Voyeur Dorm L.C. v. City of Tampa,* Case No. 8:99-cv2180-T-24F (U.S. M. Dist. Fla. 2000), accepted the arguments of the City of Tampa that Voyeur Dorm was an adult business that was barred by local zoning from locating in a residential neighborhood.

The judge's reasoning in the case suggests that sexually oriented broadcasts can only originate from a site zoned to allow live entertainment, an approach that does not make sense; following that to its logical extreme would require that mail-order warehouses all be zoned for retail and that movie studios all be zoned to allow on-premises entertainment. The approach is not logical in the adult industry, either, because many of the land-use (or secondary) impacts of sex businesses relate to activities of customers visiting the establishments. While, as Connie urges in the sidebar in Chapter 2, a house used like Voyeur Dorm clearly may have impacts on the neighborhood that are greater than those of the average middle-class family that might otherwise occupy the house, it will not have the same impacts as a nude bar or adult movie theater. The decision is important, however because it shows that both cities and courts may choose to treat cottage pornographers as real sex businesses and force them out of residential areas.

SEX ENTREPRENEURS ON THE INTERNET

The following statistics are provided in Frederick Lane's *Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age.* (New York, London: Routledge 2000).

- Internet entrepreneurs in the sex industry include Beth Mansfield, a Tacoma, Washington, homemaker and mother of two whose "Persian Kitty" directory of adult Web sites had estimated revenues of $1 million in 1997.
- A stripper named Danni Ashe developed a Web business called Danni's Hard Drive and was grossing $4 million per year by 1999.
- A home-based, Web-based, sex business run by a Tulane University graduate grossed $10,000 per month with expenses of about $3,500, allowing her to quit her regular job.
- Total estimated revenues for the on-line sex industry were $2 billion in 1999.

It is impossible to predict all of the ways in which Internet pornography will raise land-use issues. It is clear, however, that many communities need to think about the issue and probably to make provision in their zoning ordinances for regulating the dispersal of pornographic material on the Internet from a host site in the community.

LESSONS LEARNED

1. Pornography is defined by society and shaped by the times; it is not an absolute.
2. Pornography and society have evolved together.
3. Technological change, such as mass printing, photography, movies, video cassettes, and the Internet, have facilitated the distribution of pornography, but there is significant evidence that the demand for pornography has actually facilitated several of those technological developments—notably the home movie camera, the VHS videocassette and related player, and the graphics capabilities of the Internet.
4. Pornography has existed for centuries and has been available to mass markets since printing presses came under the control of individuals not affiliated with a governmental agency or religious institution.
5. Today, the demand for pornography is large and growing.
6. Pornography is widely available through mail-order, the Internet, and cable systems and pay-per-view systems in hotel rooms. It is impractical for any local government to think of "banning" or "stamping out" pornography within its borders (it is also unconstitutional, which is the subject of Chapter 5).

Notes

1. See, for example, Lynn Hunt, ed., *The Invention of Pornography*, and other materials cited in bibliography.
2. For the story of Dwain Esper, who took his films on the road, see Muller and Faris (1996), page 20-23.
3. According to the All Movie Guide (www.allmovie.com), "the budget and quality of the Mexican *Adam and Eve* was once summed up by exploitation distributor David F. Friedman: 'it couldn't have cost more than margaritas and the deluxe combination dinner for four in any good Los Angeles Mexican restaurant.' Since the film only covers the first three chapters in Genesis, from the birth of Adam and Eve to their fall from grace, no more than two actors were required. Unknown Carlos Baena was Adam, while former Miss Universe Christiane Martel was Eve. Not a word of dialogue is spoken in the film's 76 minutes; for the American release, a pompous English-language narration was slapped on. The film's chief selling angle was the near-nudity of Christiane Martel, who admittedly looks great in fig leaves."

CHAPTER 2

Understanding the Sex Business:

Classifying Types of Businesses that Offer Sexually Oriented Products and Services

THE SEX BUSINESS IS NOT ONE BUSINESS BUT MANY. There are a number of ways in which it can be classified. The simplest distinction is that between retail businesses and entertainment businesses, which, incidentally, is the same distinction that most communities make between liquor stores and bars (take-out and on-premise consumption).

Creating classifications for businesses on the basis of the products or services they offer will lead to more effective and more direct regulation.

The retail businesses that need to be considered in classifying sex businesses include:

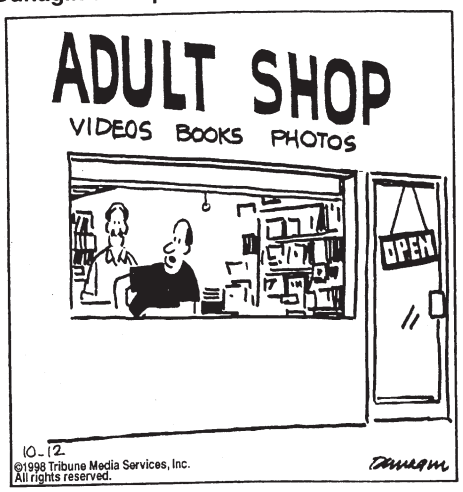
- mainstream bookstores, newsstands, and video stores with some sexually oriented materials;
- percentage stores—stores with a significant and noticeable percentage of adult-oriented materials but also carrying substantial inventories of non-adult material, generally identified as video stores, bookstores, or newsstands, rather than as adult businesses; and
- adults-only or sexually oriented outlets, including adult media outlets and sex shops.

The on-premise entertainment businesses that need to be considered in classifying sex businesses include:

- movie theatres;
- video-viewing booths, mini booths, preview booths;
- live entertainment on stage;
- participatory entertainment booths; and
- touching and encounter businesses.

The classification of businesses relies, in part, on the types of products or services they offer. The following sections describe those products and services. It is our hope that creating classifications for businesses on the basis of the products or services they offer will lead to more effective and more direct regulation of those activities that each community seeks to control.

Dunagin's People



"That newspaper rack next door is killing us!"

MAINSTREAM BUSINESSES WITH SOME HARD-CORE MATERIAL

Bookstores

Most mainstream bookstores include art books, marriage manuals, male and female sexual health guides, and other materials that would easily fall within the traditional definition of "sexually oriented materials," that include "specified body parts" and/or "specified sexual acts." Most of the art books and health guides would be excluded from our definition of "explicit sexual material," but some marriage guides would still fall within that, because they provide "how-to" illustrations and descriptions.

Although many bookstores, and most major ones, devote a small percentage of shelf space to such material, bookstores are a desirable land-use, not an undesirable one. Some conservative groups have objected to the appearance of any books containing nudity on the shelves of mainstream stores; that position, however, has no legal support (see Chapter 5) and appears to have too little political support to be worthy of serious discussion. Thus, we have excluded bookstores from the definitions of sexually oriented businesses by defining "sexually oriented bookstores" (and other media outlets) to be those that include more than 10 percent "explicit sexual material." Our opinion is that mainstream bookstores generally carry less than 5 percent of such material; in drafting the definitions, however, we wanted to create a limit that would be enough above the actual content in most stores that there would be no reason for an enforcement officer ever to attempt to count or otherwise measure the material.

Newsstands

Like bookstores, general newsstands are likely to have a certain amount of material that falls under the traditional definition of "sexually oriented material" and some that falls even under our more narrow definition, which focuses on hard-core materials. There is a broad range of sexually oriented magazines that include basic hard-core photos (see Chapter 1 discussion), often without the "money shot." Unlike *Playboy, Penthouse* and *Cosmopolitan*, which are generally considered soft-core and are widely available in convenience stores and airports, these other magazines are often found only in major newsstands. Thirty years ago, our impression of the sex business (of which we each had far less knowledge than we do now) was that much of it consisted of sexually oriented magazines, placed in a separate rack or on high shelves in newsstands. As with bookstores, newsstands typically are neutral in impact, and there is little reason to deal with them under regulations focusing on sex businesses. For newsstands that have very limited inventories of explicit sexual material and that should be treated just as any other mainstream newsstand, we have used the same 10 percent factor that we have used for bookstores.

Some newsstands, however, began a practice that has now extended to the video business—stocking larger quantities of explicit sexual material but offering it in a separate room, usually at the rear of the store. That type of store is discussed below.

Video Stores

Mainstream video stores are likely to contain a certain amount of material that falls within at least the soft-core category. Several award-winning movies of the last decade or more have featured full frontal nudity of both genders and barely disguised sexual intercourse. Even the major chains, which for a time had appeared to avoid carrying even those mainstream titles, now carry at least soft-core material on high shelves. There are certainly video stores that are like the bookstores inasmuch as they stock a certain amount of material that would fall within typical definitions of sexually oriented

material. As with bookstores, carrying such limited quantities of even explicit sexual material mixed in with the general inventory does not create a land-use or regulatory problem of any concern. For video stores that have very limited inventories of explicit sexual material and should be treated just as any other mainstream video store, we have used the same 10 percent factor that we have used for bookstores and newsstands.

As we indicated under the description of newsstands, a number of video stores have adopted the practice of including relatively large quantities of sexually explicit material in back rooms, with a variety of access controls. This type of store is discussed below.

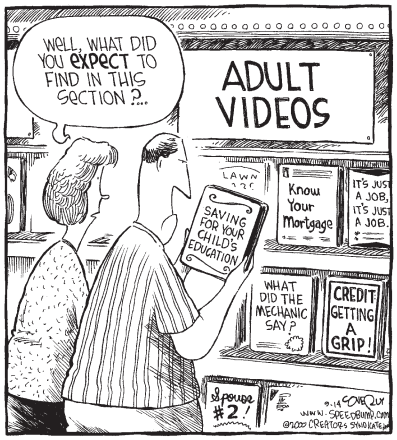
MIXED-RETAIL OUTLETS

Mainstream Retail Stores with Back Rooms of Sexually Explicit Material

During our fieldwork on sexually oriented businesses, we have found both newsstands and mainstream video stores with back rooms containing significant quantities of explicit sexual material. In the stores that we observed, space devoted to the explicit sexual material has ranged from 10 percent of the total floor area up to nearly 50 percent. On a pure item count, the percentage of the inventory devoted to explicit sexual material has been generally consistent with the percentage of the floor area devoted to it—that is, ranging from 10 percent to nearly half the inventory. In many of the video stores, regardless of space devoted to these adult videos, the rental rates for the hard-core materials are higher than the rates for other materials, so it is possible in some cases that the back rooms account for more than half of a business's gross sales.

In Kansas City, based on the number of customers whom we observed in various establishments, it is our strong impression that three mainstream video stores with large back rooms of hard-core material are responsible for the circulation of as much explicit sexual material in their neighborhoods as several of the sex businesses in their neighborhoods. However, in neighborhood surveys around three such stores, not a single neighborhood resident identified one of the mainstream video stores as a problem to the neighborhood. In fact, we consistently saw families with children in the front parts of those stores, all of which carried a broad inventory of current and classic movies of general interest. We have found such stores in every community in which we have looked for them—usually with little difficulty.

What is interesting about these stores with back rooms—even large ones—is that they are not troublesome land uses. As noted above, our neighborhood surveys in Kansas City found that video stores with large quantities of material in a back room created no neighborhood protests or objections, and we believe that the same findings would apply to newsstands. (See the summary of the Kansas City study in Chapter 3.) Our regulatory recommendations (see Chapter 7) essentially treat as mainstream media stores businesses that have back rooms for sexually oriented books and videos where the room containing such material material constitutes less than 40 percent of the floor area of the store and such material constitutes less than 40 percent of the store's inventory. For these stores, we also recommend some level of access controls to the sexually oriented media. Although such back rooms are often separated from other parts of the store only with a curtain, café door, or L-shaped entryway, we liked the design of two Kansas City video stores that controlled access to such room with a locked door, released by a button situated high above the door knob or by store personnel through a remote unlocking device. It is important to note that our recommendation to treat these businesses as mainstream media stores only applies if they do not carry sexual novelties and do not devote more than the designated percentage of floor area or inventory to sexually oriented media.



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Connie Cooper

A "percentage store" will carry a wide range of materials to keep from being classified as a sex business. We recommend treating only "media" stores (e.g., video stores, bookstores) as percentage shops. When a percentage store uses items like Beanie Babies as part of its stock, it creates an additional problem—attracting children into a store that carries sexually oriented materials.

Retail Percentage Stores

Some stores are clearly mainstream retail stores that happen to carry some sexually oriented material. Some stores are clearly adults-only stores (see below). Many stores fall in between, carrying a large quantity of sexually explicit material but also carrying a good deal of other inventory. These stores are often referred to as "percentage" stores because they carry sexually oriented material but fall below the designated percent used to be classified as a sex business. Local zoning and licensing ordinances must provide definitions or guidelines for determining whether a store with mixed inventory should be treated as a sex business or as a mainstream retail store.

When we began our Kansas City study, the city used a "preponderance of the stock in trade" as its criterion for distinguishing between restricted, adult-oriented stores and mainstream stores, and used an item count as its unit of measure. In order to fall below the definition of "preponderance," which at that time was less than 50 percent, many stores that qualified as percentage stores carried large quantities of the following items:

- Beanie Babies, which retail in the $5 to $10 range (interestingly, the two adult stores that carried them actually seemed to have a significant trade in them)
- Shelves of old paperbacks (e.g., every paperback edition of Zane Grey novels) or old library books, not organized by author, title, subject, or anything else
- One copy each of dozens of recently published magazines
- New Age tapes and greeting cards
- Plastic protractors and other items that we remember using in about 7th grade
- Pencils, each of which was counted as a single item by the inspectors
- Inexpensive novelties and gag gifts

Although Kansas City only considered the percentage of inventory devoted to non-adult versus adult merchandise, the amount of investment was markedly different. The retail value of the non-adult items ranged from $10 (Beanie Babies) to 5 cents or so, compared to retail value of the sexually explicit books and tapes that ranged from $20 and up. For example, one store had hundreds of pencils. Sixty of those pencils, which might retail for 10 or 20 cents each, would balance 59 adult videos, with a retail value of $20 to $40 each; grossing up the figures, an investment in $9 worth of pencils provides the inventory necessary to remain a "percentage store" with $1,200 worth of adult videos.

On the other hand, simply using a percentage of floor area as the basis of measure is also not adequate. We have found many sex businesses located in transitional, low-rent commercial areas. If a local government uses a percentage of floor area alone as the criterion for determining whether a business is sexually oriented for zoning purposes, an operator can simply lease twice as much space as he or she intends to use, leaving much of the space stocked very sparsely with low-value inventory.

Note that it is also important to define what is to be included in the computations. Most communities include sexually oriented books and magazines in the definition of sexually oriented materials, and most also include videos. Oklahoma City separately regulates stores with sexually oriented devices and novelties (Oklahoma City Ordinance 20,792 (1997)).

Such devices are specifically defined in the North Carolina statute as "any artificial or simulated specified anatomical area or device or paraphernalia that is designed principally for specified sexual activities but shall not mean any contraceptive device" (North Carolina Statutes, Section 14-202.10(9) (1997)).

Under the Kansas City approach, we treated stores with sex toys and novelties and stores that mixed explicit sexual material with lingerie, leather goods, and sex toys as "sex shops" and thus automatically treated them as a sex business (see below). Under our recommended regulatory approach, the only stores treated as "percentage" stores would be media outlets—newsstands, video stores, and bookstores. Using such criteria, it is, of course, necessary to count only the media items. Communities that choose to allow a broader variety of goods in percentage stores or other outlets that feature explicit sexual materials but that qualify as non-adult uses for zoning purposes should consider the discussion of "sex shops" below.

Note that the physical separation of the inventory is very important. One of the stores in Kansas City that bothered neighbors and other local residents a lot was a well-managed store that featured Beanie Babies in a window display and that in fact carried a large stock of Beanie Babies; upon entering the store, however, one was immediately confronted with displays of very racy lingerie and sex toys. Parents complained that the Beanie Babies enticed children to want to enter the store, but the merchandising of the store then confronted the families with unacceptable wares. In contrast, the mainstream video stores with back rooms typically display the latest Hollywood fare or family-oriented movies in the front, with the availability of adult materials identified only by a discrete sign by the door to the back room. In such stores, it is extremely unlikely that anyone will accidentally encounter such material, even if the access controls are limited or ineffective. Clearly the difference between the open display and potential for accidental encounters on the one hand, and the limited display in a controlled space is very important to parents and others who object to the availability of the materials.

We do not recommend that local ordinances treat percentage stores as standard land uses. Our recommended classifications move from the mainstream stores, with no sex toys and under 10 percent sexually oriented material to adult-oriented media outlets (for those retail outlets carrying only media) and sex shops (for those that feature sex toys or a combination of sexually oriented goods). We include a conditional classification in between, allowing a media store that elects to have an access-controlled back room to be treated as a mainstream media store. We have described the percentage stores because we have observed it in the field and many local ordinances permit such businesses to exist and treat them simply as bookstores under local ordinances.

ADULTS-ONLY OR SEXUALLY ORIENTED RETAIL OUTLETS

Adult Media Outlets

Bookstores, video stores, or newsstands that focus on explicit sexual materials are obviously quite different from those that simply carry a large inventory of such materials in a back room. Because most "adult bookstores" that we have visited included sex toys and other products that turn them into what we consider "sex shops," and because many also include video-viewing booths (discussed below), we have seen very few true adults-only media outlets. Someone may operate an adults-only bookstore or x-rated video store somewhere, but most of the hard-core media outlets that we have visited have included more than just media items, by mixing in lingerie, sex novelties, and perhaps bondage devices.

IMPRESSIONS

The sex businesses that we have visited range from those as sleazy as our worst expectations to some that were glitzy. Most, of course, fell somewhere in between. We have come to know some family operations. A young woman introduced herself to us as the person who would inherit her family's adult theater; her father told us with pride it had allowed him to put his children through college, buy his house, and buy two commercial buildings. Those were small operators—we have also met big ones who need accountants to track their income and taxes.

Each store has its own clientele. The grungy ones tend to attract grungy customers, but the make-up of the clientele at other stores was more complex. One of the best-maintained and best-merchandised stores that we visited in one community clearly catered to a gay clientele of modest income; a nearby store that was less attractive but better managed had a parking lot that often included late model, up-scale vehicles—some occupied by couples. There are stores that attract couples, and others that attract only men. Some of the sex shops that emphasize lingerie and novelties are clearly merchandised for—and succeed in attracting—women.

We watched a 20-something couple in one percentage store exchange a Beanie Baby (which the clerk handled cheerfully) and buy a hard-core video and a sex toy all in the same transaction. We watched pairs of women giggling as they examined sex toys and videos.

We visited operations where we felt safer inside the stores than on the streets outside; one manager told us that she regularly called the police to run off the prostitutes who hung out in a laundry across the street. We found a store around the corner from a city hall and told city officials that we knew several adult operators who would consider that store an embarrassment to the industry.

Eric Damian Kelly

Sex shops carry a good variety of sex toys, condoms of various colors, shapes, and packaging, adult videos, bondage devices, and revealing lingerie.

Sex Shops

During our studies of sex businesses, we have found an astonishing array of sexually oriented books, magazines, pamphlets, and videos readily available. In particular, we have found large quantities of videos available in establishments that drew no comment at all in our neighborhood surveys and were not named in the public meetings in which we participated.

In contrast, two of the establishments drawing the most complaints from neighbors in Kansas City (First Amendment and Priscilla's), both in an open meeting that we attended and in response to our neighborhood survey, were what we classified as "sex shops." These businesses carried a good variety of sex toys, condoms of various colors, shapes and packaging, adult videos, bondage devices, and revealing lingerie. Interestingly, one of the establishments had only a small number of adult magazines and a very small selection of adult videos, displayed with only the spines showing in a relatively inauspicious location within the store. Both of these establishments appeared to us to be exceptionally clean and very well managed; each, however, was located in close proximity to residential land uses.

One of Connie's claims to fame during all of our research is creating the sex shop classification of sexually oriented business. We define a sex shop as a retail operation that offers for sale items from any two of the following categories: adult media; sexually-oriented toys or novelties; lingerie; leather goods marketed or presented in a context to suggest their use for sadomasochistic practices; and the combination of such items constitutes more than a certain percentage of the store's operation, etc.

Some sex shops are clearly merchandised for women. They tend to emphasize lingerie, sex toys likely to be of interest to women, gag gifts, and novelties. Such stores are typically staffed by women. Probably not surprisingly, they tend to be among the cleanest and best-merchandised establishments in the business. Most customers we have seen in such stores have been women, sometimes alone, sometimes in pairs or threes, and, occasionally, with a male companion. Most of the products available in these stores are available in other sex shops or media outlets, but these stores clearly provide a more comfortable shopping environment for people who may not normally patronize adults-only businesses. Because most local ordinances do not count lingerie, gag gifts, and body lotions as adult inventory in determining whether a store is to be regulated as an adult business, many of these businesses can operate in neighborhood retail zones; note, however, that in our recommendations we classify most of these types of businesses as sex shops, which we recommend allowing only in more intense commercial zones.

SEXUALLY ORIENTED ENTERTAINMENT

Movie Theatres—The Land Use Is the Medium

Two of the leading cases in the field of regulation of sexually oriented business deal with movie theaters. (See Chapter 5 for the implications of the decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).)

From these two Supreme Court cases, it is clear that where the First Amendment and zoning meet, a movie theater is quite different from a retail store handling adult materials. With a movie theater, the land use is the medium—the only logical use of a movie theatre is to show movies, and any attempt to treat an adult movie theater differently from other movie theatres can have the impact of removing the availability of the message entirely—if the theater cannot regularly show adult movies, there may be no other theater in the community that does so.

HEALTH SCIENCE AND "SEX TOYS"

Although some states have attempted to classify many sex toys and novelties as "obscene devices" (see the discussion in Chapter 5), many people view them otherwise. Betty Dodson has sold many copies of a book called *Sex for One: the Joy of Self-loving* (Crown 1996), which includes detailed instructions on self-pleasure, both with and without such devices. Two of the court cases that have dealt with (and struck down) "obscene device" statutes included thoughtful discussions of the use of the devices. We include excerpts from them because they provide a perspective on the legitimate purposes of the devices. The cases involved statutes that attempted to ban devices like "vibrators, clitoral stimulators, vacuum pumps, and massagers" (*State v. Brenan*, 2000 La. LEXIS 1271, at 29). The same court noted that the Food and Drug Administration has even published regulations concerning powered vaginal muscle stimulators and genital vibrators.

The court continued with this scholarly examination of the evolution of vibrators:

"From a historical perspective, the creation of the vibrator has its roots in the field of medicine. *See* Natalie Angier, *In the History of Gynecology, a Surprising Chapter*, N.Y. Times, Feb. 23, 1999, at D5 (discussing historian Dr. Rachel Maines's work, *The Technology of Orgasm: 'Hysteria,' the Vibrator, and Women's Sexual Satisfaction* (Johns Hopkins Press, 1999) (Maines's work traces the development of the vibrator in the 19th century as a matter of accepted historical fact.)). Vibrators were marketed to the medical community as an aid in treating pelvic hypermia, or congestion of the genitalia. At least two dozen models of vibrators were available to the medical profession. Notwithstanding their reputation as a naughty novelty item, vibrators remain an important tool in the treatment of anorgasmic women who may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships. Margaret Ramage, *Management of Sexual Problems*, British Medical Journal, November 28, 1998, at 1509; Marilyn Elias, *Late-life love Sexuality*, Harvard Health Letter, November, 1992, at 1. Likewise, penis vacuum constriction devices or "pumps" as well as penile rings are frequently used in the treatment of men suffering from erectile dysfunction. Keith Hawton, *Integration of Treatments for Male Erectile Dysfunction*, The Lancet, Jan. 03, 1998, at [Pg 16] 7-8. There are many medical and health journals which discuss sex therapy and the medical uses of sexual devices in the course of treatment of sexual dysfunction." (at 34-35)

When an Alabama statute forbidding the sale of obscene devices was tested in the courts, an assistant attorney general was quoted in the *Birmingham News* (19 February 1999) as saying that there is no "fundamental right for a person to buy a device to produce an orgasm." The court apparently agreed with the assistant attorney general, but the state lost the case anyway, with the court finding that there was no "rational basis" for the statute (*Williams v. Pryor*, 41 F. Supp.2d 1257 (N.D. Ala. 1999)). The statute was finally upheld on appeal. (See page 112 below.) differed from most litigation over sexually oriented businesses, because this case included female users of vibrators as plaintiffs and included evidence that, in addition to the availability of such devices at some retail stores, they were also available at "Saucy Lady" parties, which had been attended by more than 7,000 Alabamans in the previous year, resulting in retail sales of $160,000 in one year (at 1263-64). The retail stores, which were owned by the lead-named plaintiff, focused on lingerie, oils, and sex toys, with only a limited supply of "R-rated" media.

The judge in the Alabama case wrote thoughtfully about the use of vibrators for sexual pleasure as an alternative to casual sex or unwanted or unavailable love affairs. The judge cited a number of magazines and books available at well-known booksellers that advocate or describe the use of the devices and, in a bow to technology, also cited web sites to the same effect. He cited offers of proof for two prospective expert witnesses, both involved in research and treatment of women with sexual problems.

In contrast, a retail establishment handling adult materials is a store, whether it has some adult materials or not—and the building can be easily adapted to a variety of retail uses. Furthermore, the custom of the theater business appears to be such that theatres that offer true sexually oriented material offer only that, although there are some that also provide video-viewing booths and sexually oriented books and videos.

Motion picture theaters have become a less important part of the sex business since the 1970s, when home ownership of VCRs became common and the video sex industry began to grow. For those that remain, it is important to remember an adult movie theater is a building, a land use, and a physical entity that, under applicable decisions of the U.S. Supreme Court, is entitled to certain First Amendment protections. In contrast, a store is the current use of a retail building, and it can easily provide a wide array of sexually oriented materials without being an "adult bookstore." Thus, a land-use regulation governing theatres directly confronts the First Amendment in a way that a land-use regulation affecting retail establishments does not—as to the theater, the First Amendment may well protect the building because the building is the medium, but as to a retail establishment handling adult media, we are convinced that the First Amendment protects the contents—not the establishment.

Webb Chappell

Video-viewing booths are descendants of the peep shows that intrigued GIs during World War II. We can find no public benefits that offset the health and safety issues that these booths raise.

Video-viewing Booths—The Anachronism of the Peep Show

A portion of the market for hard-core movies and videos is satisfied through showings in small booths. These video-viewing booths are substantive descendants of the peep shows that intrigued GIs during World War II. Like those early peep shows, which showed brief film loops for the deposit of a coin, the booths allow individual viewers to watch any number of videos after depositing the requisite $1 to $10 bill. Although we refer to them generically throughout this report as video-viewing booths or, in some cases, "peep shows," we have actually seen three different variations of them.

1. *Video-viewing booths***.** The standard video-viewing booth is a module about three feet by four feet, enclosed on three (or, where allowed, four) sides from the floor to a height of seven or eight feet. Where permitted by municipal code, booths can have doors that lock and a light outside the booth to indicate the booth is occupied. Inside the booth is a television screen (ranging in size from 13 inches to as much as 19 inches), slots for the deposit of coins, tokens, or, in many cases, bills, and controls to change "channels." Seating often consists of a folding or plastic chair in the middle of the booth. By inserting a token, coin, or bill, the customer can watch seconds or minutes of one or more of the video channels, which run continuously. Where we timed them, it appeared that $1 offered about two minutes of video.

2. *Preview booths.* As the name suggests, preview booths offer a customer the opportunity to preview one of the tapes offered for sale or rent in the store. For a fee of $5 to $10, management inserts the tape in a VCR and the customer then watches the movie in a private booth similar to a standard video-viewing booth but without the money slots and controls.

3. *Media rooms.* Large booths generally appear to be the industry's attempt to modify standard viewing booths to get around local bans against doors on any viewing booths that would accommodate 10 or fewer persons (anything above that number the industry calls "media rooms," which are usually not prohibited by local regulation from having a door). To create media rooms, local operators joined two or three former video viewing booths together to create a space about seven feet long and perhaps four feet wide; they installed a wooden bench about 12 inches deep along one end and one side and marked it off with painted stripes every 15 or so inches, a figure that was apparently taken from football stadium seats. Any sane fire marshall would have been horrified to find more than three persons in these media rooms. This is a prime example of what we have come to learn through our extensive research—the sex industry is very creative in the face of adversity!

Although presented to us by industry representatives as a desirable context in which to offer a variety of movies (several operators told us of their pride in the variety of non-adult titles available for selection in the viewing booths), the booths vary from prison-like to dismal. The best of them were clean rectangles occupied by a single folding chair or kitchen-type chair. Booths at other establishments offered only wooden benches for seating; in a few cases, these were supplemented with grungy-looking cot mattresses. The screens on which the videos are offered in the booths are generally the size of a computer screen, not the size on which people watch home videos in their family rooms.

One of the striking things we found in our field studies was that only in establishments with video-viewing booths did we encounter loitering and any sort of real discomfort in being there. The loitering near the video-viewing booths gave these businesses many of the characteristics

that most concern neighbors—characteristics having to do with use patterns and the behavior of customers rather than the inventory of the stores. Furthermore, in several cases, these booths, which essentially offer the same sort of on-premises entertainment as a movie theater, have been allowed to evolve as accessory uses to bookstores in locations that may be entirely appropriate for retail uses like bookstores but that are not appropriate for on-premises entertainment.

The setting of the booths is itself unattractive and, in some cases, intimidating. In several establishments that we visited, the booths lie along winding corridors that are not well lit. Although we gradually learned that the management at most adult establishments is alert enough to call the police or otherwise deal with serious problems, at first we were, frankly, somewhat frightened to enter these dark warrens, often staked-out by customers doing nothing but apparently sizing up other customers. As the establishments in Kansas City implemented the "doors-off" policy that became law during (but entirely independently) of our study, we noted that use of the booths seemed to taper off somewhat (a fact confirmed by at least one manager), and the booths most likely to be occupied after that time were the ones at the farthest ends of the corridors, with the least exposure to public view.

In short, we have been unable to determine any good reason why anyone would want to watch a video in such a booth unless what he/she wanted was the illusion of privacy in essentially a public place. Although some of the booths are called preview booths, we have frequently observed the opportunity for previewing materials in very public settings in mainstream video stores and again see no message-related reason why it is necessary to offer previews in a quasi-private setting.

When we asked industry representatives at a meeting what purpose the video-viewing booths serve, one articulate representative explained that, "Many of our customers are businessmen who cannot watch this material at the home or at the office." That may be true, but that is not a First Amendment issue. Nothing in the First Amendment requires that a local government use its regulatory scheme to create opportunities for people to do in public what they may be embarrassed to do at home or at work.

Further, the fact that the Tucson study (see Chapter 3) reported that the police found sperm in an overwhelming proportion of the fluid samples they collected from video-viewing booths confirms what we suspected from our own observations and what courts considering the issue have addressed. One chain that we visited included wall-mounted boxes of facial tissues and wastebaskets in each booth. We can think of no reason for those accessories other than management assuming that, during the brief time in which patrons use the booths, they will generate bodily fluids of which they wish to dispose.

In response to similar findings, a New Jersey court, in *Chez Sex VIII, Inc., v. Poritz*, 688 A.2d 119 (N.J. Super 1997), *cert. denied*, 694 A.2d 114 (N.J. 1997), *cert. denied,* 118 S.Ct. 337, upheld the constitutionality of a statute banning viewing booths, noting that the legislature had adequate evidence of the public health hazards of the sort of "anonymous sex" facilitated by such booths.

The incidence of indecent exposure arrests in and near such establishments reported in several of the studies further confirms these suspicions. We can conceive of no compelling reason why any city ought to facilitate that behavior in a small cell in a quasi-public location. We can find no public benefits that offset the significant public health and safety concerns that we have identified.

REVENUE FROM A SINGLE OPERATION

One operator provided us with figures from recent operations. All these figures were provided to the authors from the internal reports of a chain; we pledged confidentiality and believe that the figures are reliable. In round numbers, revenues from the video-viewing booths and preview booths ranged from $3,000 to $6,000 per location per week; retail sales in the stores that we visited (neither of which had an ideal location) ran from $6,000 to $9,000 per day per store, with video sales accounting for 20 to 30 percent of revenues, video rentals from 20 to 30 percent, magazines and books from 10 to 20 percent, and novelties from 20 to 25 percent, with negligible sales of lingerie and leather goods.

Corbis

Strip clubs have very limited Constitutional protection. But regardless of its legal status, nude or near-nude entertainment remains a popular form of entertainment.

Live Entertainment

Called Gentlemen's Clubs, Juice Bars (where alcohol is not allowed in the same establishment with nudity), Adult Cabarets, and, more classically, simply Strip Clubs, a variety of establishments provide nude or near-nude entertainment. The Supreme Court has struggled with the legal issues related to nude dancing and has concluded that it has very limited Constitutional protection (see the discussion in Chapter 5). Note, however, that several states, including New York, Oregon, and Washington, offer somewhat stronger state constitutional protection to expression and/or nudity than does the U.S. Constitution as presently interpreted—thus, this activity has protection in some states that it lacks in others.

Regardless of its legal status, nude or near-nude entertainment remains a popular form of entertainment, supporting some of the most prosperous establishments that we have seen. It is a business that seems to prosper in Sunbelt areas popular with retirees and in areas around convention hotels and outside military bases. Such establishments are also found along some major trucking routes, although those do not appear to offer the same ambience as those that cater to convention attendees.

Nudity is not uncommon today in movies and can even be found on network television. Major stage plays occasionally feature nude scenes. Society clearly accepts nudity under some circumstances—certainly more than it did half a century ago—and strip clubs clearly flourished, at least in major cities, even then.

In that context, there is probably a place for nude dancing in many communities today. It is a legitimate subject of public policy debate and one on which we have recommendations in Chapters 7 and 8. Like other discussions of sexually oriented businesses, it should be an informed debate. The following discussion describes the very different sorts of activities that occur in sexually oriented businesses under the guise of "dancing."

Dancing on stage. There is a range of nude, on-stage performances. The performances range from nude acrobatics—often around a pole—to something that more resembles dancing as the term is usually used. Many, but not all, involve some element of a striptease, with the dancer beginning the performance clothed and gradually revealing her (or, in some cases, his) body. Attempting to define which is art and which is not seems to us to be next to impossible. What distinguishes this subcategory of performances from the others that follow is that it takes place on a stage that features horizontal and/or physical barriers to prevent contact between the dancers and the audience.

Participatory dancing. Some nude-dancing establishments allow patrons to sit at the edge of the stage or along the runway. In some establishments, customers are allowed to touch the performers, particularly if they are providing tips; in other establishments, management enforces rules that allow the dancers to touch the customers but that allow the customers to touch only the dancers' hands—to put cash in them. This is the most limited form of participatory dancing.

Lap dancing. A fairly common form of entertainment in some communities is the "table dance" or "lap dance." One Florida establishment advertised "friction dancing," which we assume is similar. Although table dancing may have begun as dances on tables, those that we observed looked like lap dances to us. A dancer wearing a bikini bottom rubbed the front and back of her body against the front of the body of a male customer lounging across the chair but keeping his hands at his side. In other establishments the performer was totally nude while performing suggestive movements. A participant in a study of sex workers described it this way:

> All it was, really, was just riding on somebody's lap. . . . I tell them what they can do up front. "This is what you can touch; this is what you can't touch, this is how you can touch me, and this how you can't touch me, and if you go over that line the dance is over, I get up and leave." (Lewis 2000, 211)

Interviews with performers who provide such dances indicate that the male beneficiaries of it clearly reach climax, at least in some cases (Lewis 2000, 211).

It is our opinion that lap dances are not dancing. Whether they ought to be illegal is a matter for each community to determine. In our opinion, however, they are much closer to prostitution (sexual services for a price) than dancing, and they ought to be treated accordingly under local law and policy.

Stage dancing and participatory dancing are not as directly troublesome from a values perspective; touching is acceptable in our society if it is acceptable to both people involved. In most cases, it appears that the contact between the dancers and the customers consists of little more than a quick touch of a leg or a hand on a shoulder or some other body part, and the contact from the customers to the performers is usually in the form of tucking a bill in a g-string or top. The problem with lap dancing is that any limit a community would put on the amount of allowable contact would be impossible to monitor and enforce—it would essentially require one or more vice officers stationed in every such establishment. This is why we recommend the use of a raised stage and bars to keep the patrons (or the performers) back from the edge of it. This makes any physical contact difficult and makes the enforcement effort much easier—if the dancer is off the stage or the customer is on it, there is a violation.

Dancing in booths. Some establishments feature dancers in private booths. These performances typically place the dancer in one booth that is enclosed on three sides and that has a window on the fourth side; on the other side of the window is a second booth, which is where the customer sits or stands. We are aware of two different types of financial arrangements for these booths: 1) the customer pays a flat fee based on the type of performance he (or she) wishes to see (usually $10 for a strip, $20 for masturbation and so forth) for a five-minute performance; 2) there is an electrically operated shade or curtain that opens for a set period (a minute or two) based on the amount of money inserted. In some arrangements of both types, it is made clear to the customer that the performance will be relatively dull—and in at least a bikini—unless the customer also slips tips through a slot under the window.

We cannot say what occurs in all such booths, but Eric had the opportunity to view police videotapes from such booths in one community. In those tapes, the performers consistently stated their tip expectations up front. The "dance" consisted of the performer then taking a variety of poses to show various body parts to the customer—including wide-open labia—and then lying on the floor and demonstrating the use of a dildo. Like lap dancing, this display bore no resemblance to dancing and is not the type of performance that seems to be protected by the First Amendment. Like lap dancing, it is certainly something that a community can allow if it chooses to do so—but no community should do so under the delusion that it is dancing or with any thought that it has First Amendment protection.

Webb Chappell

There is probably a place for nude dancing in many communities today. It is a legitimate subject of public policy debate. Like other discussions of sexually oriented businesses, it should be an informed debate.

The Touching and Encounter Businesses

The sexually oriented businesses that seem to come the closest to legalized prostitution are what we call the touching and encounter businesses.

David Clark

As we found out in our research, sex business owners and operators can be very creative. The combination of a lingerie retail business with one-on-one modeling sessions in private rooms, for instance, creates a hybrid business that can promote difficulties for the zoning authorities.

Those include:

- lingerie modeling studios;
- nude encounter studios;
- nude photography studios;
- massage parlors not operated by medical professionals or certified massage therapists; and
- body-painting studios.

The first three types of businesses need not involve touching, but they typically take place with the customer and a nude or nearly nude entertainer in a closed booth or private room; although some have peepholes for management or other employees to check on the safety of employees, most of these appear to have enough privacy that no one other than the patrons and employees of the establishment will ever really know what happens there. We visited one lingerie-modeling studio with several long-term employees and came away convinced that it was, at least in general, not a touching business. This studio placed the model and the customer (apparently sometimes a couple) in a closed room, with the customer(s) presumably remaining seated and the model putting on a lingerie modeling performance.

We have read and heard about a different type of lingerie modeling that is essentially a participatory striptease. In this type of business, which usually involves an audience of several dozen people (we have heard of it occurring as a program for a men's luncheon club), a customer "buys" an item of lingerie that a model is wearing and she delivers it on the spot, thus reducing the amount of clothing that she is wearing. We have put the term "buy" in quotation marks because we are skeptical about whether anyone really takes the used items with them—at least for use as lingerie. Obviously a business of this type poses less risk of illegal sex acts taking place than the other type of lingerie modeling because it occurs in a somewhat public setting. On the other hand, like nude dancing that comes off the stage, it creates the opportunity for—and probably encourages—direct physical contact between an entertainer and a customer.

Our information about the sexually oriented massage business is all second-hand—we have made no effort to explore such establishments. To indicate the nature of the business, however, we quote from judicial findings in a case involving such an establishment:

> 7. Since its inception, the primary source of income of the business run by the Babins have been fees paid by male clients for massage services. Virtually all of these massages include the stimulation of the male genitals to produce ejaculation.
>
> 8. The massage referred to in the preceding paragraph is commonly known as the hand release and represents the very basic and cheapest massage. Patrons of the King of Clubs [the establishment operated by the Babins] who were willing to pay for it could massage the female attendant while he himself was being massaged.
>
> 9. The exercise equipment at the King of Clubs was essentially there to give an appearance of a club where one could exercise in various ways. It appeared from both the testimony and the pictures to be virtually untouched and unused.
>
> . . .

12. The Babins from the outset knowingly, willfully, and intionally [sic] violated the conditions of the special exception and continued to do so even after the notice of violation was sent to them on February 12, 1982.

13. While the Babins professed a lack of understanding as to the meaning of the term "massage parlor," the inference from the depositions and testimony at the hearing is that this alleged misunderstanding could only result from a naivete which the Babins certainly do not have.

14. The Babins knew at all times pertinent to this action that the conditions of the special exception did not permit the type of massages referred to in Findings of Fact 7 and 8. (*Babin v. City of Lancaster, Pa.* Commwlth. 527, 493 A.2d at 144, note 2)

Clearly, there are legitimate massage therapists who provide a very different service than that described above. So how can a community allow such massage therapists to operate while barring sexually oriented massage parlors? The simple answer is through licensing of massage therapists. We recommend that communities consider allowing massage studios only as accessory uses to medical or physical therapy facilities operated by licensed medical professionals or a stand-alone facility operated by a massage therapist licensed under a state or local licensing program.

Although our research did not include nude photography, nude encounter, and body-painting studios, many of the issues related to the sexually oriented activities discussed above are relevant to these establishments. Like the massage parlors and other businesses described here, there is no First Amendment or other special protection for body painting, "nude encounters," or even private booths for nude photography. A community should allow such businesses to operate only because it believes that to do so represents good public policy.

FOR MORE INFORMATION

. . . about certification programs from masseuses, you can contact one of the following organizations or consult your state Department of Health to see if your state has certification standards and an examination.

American Massage Therapy Association
820 Davis St.
Evanston, IL 60201
(847) 864-0123
FAX: (847) 864-1178
www.amtamassage.org

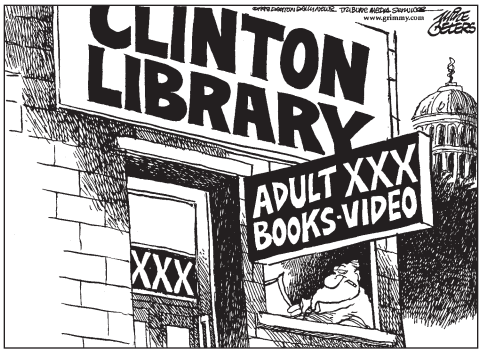
National Certification Board for Therapeutic Massage and Bodywork
8201 Greensboro Dr.
Suite 300
McLean, VA 22102
(703) 610-9015
FAX: (703) 610-9005
Automated Information Line:
(800) 296-0664
www.ncbtmb.com

OTHER BUSINESSES

There are a number of other businesses that fall in the general category of sex businesses. We treat none of them in depth, but we offer passing comments on several here.

Adult Motels

We have seen reference to adult motels in some local ordinances, and a licensing dispute over an adult motel was involved in one of the major Supreme Court decisions, *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), *modified*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). Once someone rents a hotel or motel room, we view that as private space, similar to a home, and we find it difficult to be very concerned about how they use the room, as long as it is within the law. To the extent that a particular motel may serve as a base of operation for prostitutes or drug dealers, we believe that the issue should be addressed as a criminal one, prosecuting and running off those who engage in illegal behavior. If such behavior is a chronic problem at a particular local establishment, most communities have existing ordinances that can be used to declare a particular place a public nuisance and close it down. Although some motels and hotels openly advertise "adult movies," most hotels today offer them, including most major chains. Marketing adult movies as an attraction certainly marks a different kind of hotel or motel, but most people who choose to lodge in such a place are not surprised by the broadcast content.



Kenneth Starr's investigation into Bill Clinton's affair with an intern led to a published report on the Internet (and elsewhere) that, in parts, was pornographic. The irony that a government concerned with access to pornography on the Internet would, in fact, do this was not lost on comedians and cartoonists.

INTERNET SEX BUSINESS PROFITS: BILLIONS AND BILLIONS

Figures in the billions are sometimes hard to comprehend, so it provides a useful illustration to consider the figures for some individual Internet entrepreneurs in the sex industry. Those include Beth Mansfield, a Tacoma, Washington, homemaker and mother of two whose "Persian Kitty" directory of adult Web sites was estimated to earn $1 million in 1997 (Lane 2000, 99). A stripper named Danni Ashe developed a Web business called Danni's Hard Drive and was grossing $4 million per year by 1999 (Lane 2000, 99). An amateur, home-based operator and Tulane graduate developed a home-based, Web-based, sex business that grossed $10,000 per month with expenses of about $3,500, allowing her to quit her other job (Lane 2000, 213).

Bathhouses

We lack first-hand experience with bathhouses, but, from what we have read and heard, we believe that bathhouses fall into two categories. In some, attendants provide bathing services, which would make them very much like massage studios. We would refer the reader to the discussion of touching and encounter businesses above to see our recommendations in how to deal with them. In others, individuals bathe themselves and, as we understand it, often make contacts for—or engage in—casual sex, which would place these in the same category as sex clubs, which are described below.

Sex Clubs

We have read and heard a little about sex clubs, where people go for apparently casual sexual encounters. Although freedom of association and privacy provisions in some state constitutions may provide some degree of protection for such establishments, they would not appear to have any First Amendment protection. Because they appear to encourage sex in public places and the public policy that underlies much of the regulation of sex businesses seems to be to discourage sex in public places, we would recommend banning them except where there is a good reason to allow them.

Escort Services

This report deals with land use issues and the operational impacts of businesses at particular physical locations. As a land-use, an escort service is usually just an answering service and is thus beyond the scope of this report. To the extent that an escort service may be a front for unlawful prostitution, that is a matter for the vice squad and beyond the scope of this report.

Phone Sex Businesses

Phone sex represented another blending of technology and sex. Today, the industry consists primarily of services that connect a calling customer with a performer who engages in a usually explicit conversation with the customer for a fixed period of time or for a per-minute fee. Charges can be made to major credit cards or to a telephone number, through the use of a 900-exchange.

The phone-sex industry can be lucrative for its performers but also for the phone companies. New York Telephone may have made as much as $25,000 per day in 1983 from a single phone-sex arrangement with *High Society* magazine (Lane 2000, 153). Many "900," pay-per-call services use out-of-country exchanges. One of those, the Guyana Telephone and Telegraph Company, earned $91 million from pay-per-call services—many of them sexually oriented—in 1995 (Lane 2000, 156).

Like Internet businesses, discussed below, phone sex businesses are largely beyond local regulation. As a land-use, the headquarters of such a business would have, at least as we understand the business, exactly the same characteristics as an answering service—it would be distinguishable from many other business offices only because it, like an answering service or security firm, would be staffed around the clock. Performers generally work from home and not from a business location, and that raises the issues of sex businesses as home occupations—discussed below in this chapter.

Internet Sex Businesses

The growth industry in the year 2000 is the Internet. *Penthouse* and *Playboy* have both added pay-sites to their product lines, but they compete with a large number of sex entrepreneurs—many of them literally cottage industries, or, in zoning terms, home occupations. In 1998, adult businesses on line generated an estimated $1 billion, or between 5 and 10 percent of all

revenues from the Internet (Lane 2000, 34), a figure that increased to roughly $2 billion in 1999 (Lane 2000, 115). Nearly one-third of Internet users visit adult-oriented sites (Miller and Schwartz 1999).

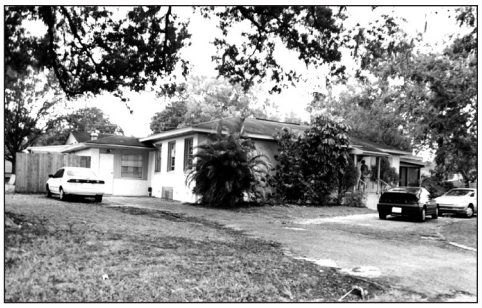
Some Internet sex businesses appear simply to represent a new medium for existing businesses. To the extent that an existing adult cabaret decides to tape and broadcast some of its performances over the Web, there is no difference in the land-use impact on the community—it is still a sexually oriented business with live entertainment. Much of the production of sexually oriented videotapes now takes place in Southern California's San Fernando Valley, in locales not very different from those in which traditional movies have been made (Gettelman 1999). As a land use, a movie studio is simply a movie studio—and that is not a land use that is an issue in many communities. The Internet, however, lends itself to cottage industries, and those industries can fall into the increasingly gray area of home-based Internet occupations, discussed in the next section.

A Sex Business as a Home Occupation

The earliest examples of lawful sex businesses as home occupations were undoubtedly those involving performers in the phone-sex industry, most of whom receive incoming calls through a switchboard to their homes. Today, Internet businesses raise many of the same issues regarding sex businesses as home occupations.

Danni's Hard Drive, and Persian Kitty's, described in the sidebar, at least began as home-based businesses. A more notorious example, at least with the general public, is Voyeur Dorm, a rather traditional house located in a neighborhood in Tampa. It differs from other houses in the neighborhood, however, because it has been fitted with 75 cameras that purportedly film all of the activities of the six, "college-age" young women who live in the house (Huettel 2000). As with other sexually oriented businesses, our question is What is the impact? According to the *St. Petersburg Times*, not much. The Tampa Zoning Administrator told a reporter that she had not received a single complaint about the house during the several months that she spent reviewing an application for a business license for it. Most neighbors apparently learned about it from the news media, which began to cover the story after the city denied the business license application; police were unaware of the existence of the "dorm" until the zoning administrator told them about it (Huettel 1999). As this report was in the final publication process, the Federal District Court for the Middle District of Florida ruled that Voyeur Dorm was an adult business that was not permitted in its residential location (*Voyeur Dorm L.C. v. City of Tampa,* Case No. 8:99-cv2180-T-24F (U.S. M. Dist. Fla. 2000)).

For a discussion of whether these operations should be banned as home occupations, see the "Zoning Talk" sidebar on the following pages.



Chris Waldman

This innocent-looking house was the home to Voyeur Dorm where 75 cameras provided visual daily coverage of the activities of six "college-age" women for a fee. The business ran into trouble when it applied for a license. A federal district court found it to be, by definition, a commercial sex business and ordered it shut down.

Mail-Order Sex Businesses

Mail-order sex businesses typically provide materials—whether visual, text, toys, or something else—for individuals to use in their own homes. This report focuses on land-use and licensing issues of business establishments. We value our own privacy and respect that of others in their own home. As a practical matter, there is no way for a particular local community to regulate the receipt of material by mail.

A mail-order sex business ought to be little different as a land-use than any other shipping and warehousing operation. Life is not always so simple, however. Adam & Eve, a major catalog and Internet supplier of sex toys, videos, and magazines, with a strong emphasis on women's interests, submitted a site-plan for a new warehousing operation and faced a large protest

[*Editor's Note: The Planning Advisory Service has received a number of phone calls in the past year or two about regulating sex businesses as a home occupation. The editor asked the authors to specifically address the question. They could not agree, and the result is this Point/Counterpoint dialog, which we print here for your consideration.*]

Dear Eric and Connie: Should commercial sex businesses be allowed as home occupations?

Eric: Voyeur Dorm probably most dramatically confronts social sensibilities because it represents what appears to be a sexually oriented group-living situation in a residential neighborhood. Or consider, Danni, a mother with children at home, who broadcast her limited sexual activity from her home onto the Internet (see page 35). Or the phone-sex performer. What if a married couple simply photographs its own sexual—and other—activities and makes that available on the Web?

On what grounds would a community ban such businesses? In some communities, Voyeur Dorm might violate occupancy limits designed to limit occupancy of single-family homes to families or only two or three unrelated people living together, but there is little else about the operation that would run afoul of most local zoning ordinance's home occupation standards such as:

- changes to the structure that are visible from the exterior;
- signs advertising the home occupation;
- employees who are not residents of the home working on the premises;
- customers coming to the premises; and
- inventory.

Connie: Eric, dear, be real! A *commercial* sex business operated in a residential neighborhood as a home occupation has all the *potential* for creating the negative secondary impacts that we have documented in this PAS Report. Is it not true that there is the potential for loss of real estate value due to the discovery your home is next door to one that is being used to operate a commercial sex business as a home occupation? Is there not a *potential* for minors to unwittingly be enticed to enter a home wherein sexually oriented activities are taking place for commercial purposes? What about a nice friendly sex orgy conducted by family members for "pay per view"?

Eric: Come on, Connie. There is an even greater possibility that a child will walk in on two consenting adults having non-broadcast sex because there are far more couples doing that. Most people simply will not let that happen. Furthermore, from what I read, much of the time watching Voyeur Dorm is dull, dull, dull. The genesis of the idea for Voyeur Dorm, as I recall, was "Jenny Cam," which was a single camera that a co-ed used to broadcast her life on line. Which part of this would you ban? Do the Jenny Cams have to be turned off at 8 p.m.?, or do we have an ordinance that they are not allowed in the bedroom?, or do we simply say that no one can originate Internet broadcasts from home? Will you apply that ordinance to someone who publishes an investing newsletter on-line?

Connie: Obviously, *operational* standards for commercial sex businesses as home occupations are not the solution. That would suggest their location is fine, as long as they follow certain operational guidelines. Not permitting them as a home occupation is the solution. As you recall, residential neighborhoods are at the top of the "protected" uses list. Your suggestion that we then would have to prohibit investment news publishing as a home occupation is far from the point. I can't recall where these activities have been proven to have negative secondary impacts to residential neighborhoods. On another point, many communities allow home-based businesses to employ a limited number of nonresident members. What if a sex business is operated from a home that is essentially broadcasting porn movies that are made in the home either by the residents or an employee? Remember, I am *not* suggesting we regulate *personal* sexual activities occurring in the home, but I am saying that a *commercial sex business* should be prohibited from becoming a legal home-based business because of its secondary impacts.

Eric: I am just suggesting even-handed treatment. If the average home occupation can have one outside employee, why not an Internet business? I certainly agree with you that a single-family residence should not become a movie studio—and that is true whether the subject matter of the movies is sex or salvation. I am simply saying that if people who otherwise lawfully live in a residence choose to take pictures of their activity to mail to friends—or customers—or choose to broadcast sound or video images of their activities, they ought to be able to do that—whether their activities involve reading tea leaves, predicting the stock market, analyzing crop circles, or demonstrating sex techniques.

Connie: I am not giving up on this. Another example might be the "escort" who comes by the office in the home-based escort business for payday. This increases the potential for a person who may, in fact, be a prostitute to be in a residential neighborhood.

Eric: At one point, I lived next door to a contractor who ran his business out of his residence, and payday was a pain in the neck. I think that is a good argument for not allowing a business with several employees to be based in a residence, regardless of what it does or whether the employees are there every day. The issue of escort services still puzzles me. I have *no* experience with them, but I assume that most involve some form of sex for pay, which means they violate laws against prostitution and ought to be handled by the Vice Squad. I am fine about banning escort services in general.

Connie: Let's talk about "phone sex" business as a home occupation. I think it could be successfully argued that those engaged in such business are running the risk of sexual predatory activity in a residential neighborhood. Yes, a bit far-fetched, but as you may recall, *most* zoning disputes tend to deal with the far-fetched . . . like the

lady that kept her horse in the garage!

Eric: I am assuming that the answering service for the phone sex business is lawfully established in a district that allows answering services and that the only activity that occurs at home is a worker handling the call. In that context, Connie, your scenario is *really* far-fetched. Remember that we recommend that licenses for nude entertainers be kept in a file and not posted because sex entertainers who perform in person value their privacy and security. These phone-sex calls come in through a switchboard and are traceable back to it—which, I have stipulated, ought to be an answering service in a business location that allows them. There is no reason to think that someone participating in such a call from home wants to or will attract sexual predators to the neighborhood—as a matter of fact, there is absolutely no evidence that sexual predators pay for phone sex as a way of identifying victims. There is a greater risk that someone who lost a bundle on a bad dot-com stock will find that securities advisor, operating out of her home, and come after her with a weapon.

Connie: Some zoning administrators would say, Well, we're not planning to expressly identify in our code sex businesses as permitted home occupations; we're just not going to regulate them. To that I say, if it *does* become a problem, you have no way of dealing with it from a land-use position; once it becomes a known home occupation within a residential neighborhood, it *is* a land-use issue and has the potential for secondary land-use impacts like those of other sexually oriented uses. Some would say, Well, just prosecute on the basis of criminal issues. But what if the business has not violated any criminal codes?

Eric: Okay, on this you *might* actually have a point. If people learned that a notorious sex business was operating in the neighborhood, maybe—and I do mean maybe—that would have an adverse effect on property values. But remember that my starting point was that there be no signs, no exterior changes to the home, probably no outside employees—so that limits the risk of impacts. But clearly a Voyeur Dorm that is location specific does create some risks of land-use impact that Sally Sophomore taking a few phone sex calls each night in her off-campus apartment does not create—no one will ever know who Sally Sophomore is or what city she is in unless she chooses to tell them. But I am still willing to go down this road a little. Maybe we need a local version of the military's "don't ask, don't tell" policy—only our policy is, if you let anybody find out this is here, it is illegal because then it starts to have land-use impacts.

There is another, very practical, aspect to the consideration of whether and how to regulate home-based sex businesses, and that is enforcement. Most family-occupancy limitations are enforced only on a complaints basis or enforced through an inspection-based rental housing code. Voyeur Dorm apparently triggered a zoning review by applying for a business license, but it might have avoided the problem by seeking the business license for an office address where it processes payments and handles other business matters. The fact that neighbors and police did not notice Voyeur Dorm until they read about it in the paper is an indication of the difficulty of identifying such businesses even to begin an enforcement process—and, once such a business is identified, any enforcement action would require search warrants and other complex, time-consuming measures that most zoning offices try to avoid.

Incidentally, on November 6, 2000, Voyeur Dorm was, infact, found by the court to be an adult use and will be forced to close.

Connie: So make it illegal and enforce it when someone finds out. Most home occupation ordinances are only enforced on a complaints basis anyway.

Eric: I have a problem with that philosophy—I regularly advise clients that they ought to adopt an ordinance only if they intend to enforce it actively. Any other approach raises issues of "selective enforcement," which raises the Constitutional issue of "equal protection."

One of the problems with occupancy restrictions that attempt to limit occupancy to family members or a limited number of unrelated individuals is that no enforcement officer I have ever met wants to enforce such limits because enforcement of occupancy limits requires going inside a house. I have read that domestic disturbances are among the most dangerous police calls because police are entering a private residence in a contentious situation—that is why they almost always call for backup. Having an enforcement officer enter a private residence to find out if anyone is having sex with a camera turned on is going to be at least that contentious. As a practical matter, it will require a search warrant, which ought to be handled by officers in blue who know how to do those things. That takes us back to the point that we ought to address these activities only if they are illegal—and then we ought to let the police handle it.

Connie: The real problem is that you would not be upset to find that Voyeur Dorm and its "six college-aged women" was in *your* neighborhood, but I don't want it in mine.

Eric: There may be a grain of truth in that—but what about Dude Dorm, which the same outfit is now operating somewhere in Texas? But the real problem, in my view, is twofold. First, we have based all of our other recommendations in this report on documented or at least highly probable impacts—here you are basing a recommendation on a bizarre supposition about something that might happen. Second, where there is no evidence of secondary impacts (and Voyeur Dorm, which ought to be one of the highest-impact types of home occupations, has clearly not had such impacts at this point), what you are trying to do is regulate speech—you will allow the securities analyst, the palm reader, or the massage therapist to work out of her home, but you want to censor the message of a phone-sex worker who is simply trying to pay her college tuition. That raises the very fundamental Constitutional issue that we discuss throughout Chapter 5.

Connie: Well, here we go with the First Amendment arguments . . . but you forget that residential neighborhoods have Constitutional protections also; it's not *all* "sex-sided"! Well, we're never going to resolve this one.

Eric: So let's do what Click and Clack do in the newspaper version of Car Talk—we've each expressed our opinions; now let the readers make up their own minds.

Connie: It's OK with me, as long as I get the last word.

Eric: That's fine. I'll be Clear and Clean, and you be Clunk, and you get the last word.

Connie: Last...if a city wants to allow these activities, allow them in a business district just like other sex businesses are permitted! There, I feel much better!

at the site-plan review stage. The local board of zoning adjustment denied site plan approval because of the protests; Adam & Eve sued. It is our understanding that the North Carolina city involved elected not to defend the action and simply let the court issue an order effectively granting the company its site-plan approval and building permit.

Industrial zones are the location of choice for sex businesses in many communities. Most of the objections to sex businesses relate to signs and other interactions with the community. A mail-order sex business, based in an appropriate industrial district that allows other warehousing uses, simply raises none of those issues.

LESSONS LEARNED

1. The sex business is big business, with video sales and rentals alone amounting to approximately $20 per U.S. adult per year. The sex business has, in its customer base, moved into the mainstream, serving men and women, couples and individuals, and people from all walks of life.
2. Sex toys and novelties have well-documented therapeutic uses.
3. There are stores and other outlets that primarily market sex toys and related items for women.
4. There is every reason to believe that some of the increase in the use of sex toys, and sexually oriented videos and other visual media has occurred as people have shied away from casual sex because of fear of AIDs and herpes and substituted self-satisfaction for that casual sex.
5. Most mainstream bookstores, video stores, and newsstands include at least some material that could be classified as soft-core pornography, and many include at least some material that would meet our definition of hard-core pornography.
6. Many mainstream video stores (although none of the national chains with which we are familiar) include back rooms with large stocks of hard-core videos.
7. Many large newsstands include separate racks or back rooms with large stocks of hard-core magazines and other publications.
8. Mixing lingerie, leather goods, and sexually oriented media or adding sex toys to the product mix of a retail outlet causes it to take on the image of selling sex, which makes it very different from a store that sells books or videos, some of which happen to be sexually oriented. We have applied the term "sex shop" to such an outlet.
9. Some motion picture theaters specialize in sexually oriented movies and enjoy considerable Constitutional protection.
10. Motion picture theaters represent a medium and a land use.
11. Video-viewing booths generate a lot of revenue. The also have the undesirable impact of serving as "masturbation booths" and otherwise serving as a place that encourages quasi-public sex acts.
12. Dancing is an art form that may sometimes allow and perhaps even require nudity.
13. Although "art" can be difficult to define, some of the forms of participatory dancing that are found in sexually oriented establishments seem much closer to prostitution than art and thus seem distinguishable from the kind of art that enjoys Constitutional protection.

14. Lap dancing verges on prostitution, in some cases taking a male customer to climax.
15. Although other forms of participatory dancing or dancing that allows customers to make brief contact with the dancers—or vice versa—may be more innocent, allowing any touching but then trying to limit it to "appropriate" touching creates major enforcement problems.
16. The simplest way to limit sexual contact between dancers and customers is to keep the dancers on stage and the customers in the audience.
17. If a dancer is performing a dance or other art form and not obscene acts, there is no reason for it to take place in a closed booth as a performance for a single, tipping customer.
18. Touching and encounter businesses in a sexual context create significant risks by placing a customer and an entertainer in a seemingly private but still quasi-public space with a sexually charged atmosphere. There is evidence that some of these provide male (and, undoubtedly in some cases, female) customers with sexual satisfaction; although others may not provide such a complete service, with two people in a closed space, it is very difficult to tell—and enforce—the difference. The simple solution is to avoid creating the situation.
19. There are massage therapists who are not medical practitioners but who provide nonsexual, therapeutic massage—they can best be identified by relying on the National Certification Board for Massage Therapy and Body Work or a similar licensing or certification board to certify them.
20. There is a philosophical inconsistency in local policies that prohibit prostitution but that allow lap dancing, sexually oriented massage establishments, and other sexually oriented touching and encounter businesses.

CHAPTER 3

Formal Studies of Sex Businesses:

What They Tell Us About Real and Perceived Impacts

Results of surveys in neighborhoods around sexually oriented businesses show clear concern with the land-use impacts of sex businesses.

THIS CHAPTER EXAMINES FIELD STUDIES ADDRESSING THE IMPACTS AND PERCEIVED IMPACTS OF SEXUALLY ORIENTED BUSINESSES. It first presents two original surveys in which we were directly involved: (1) a comprehensive door-to-door survey of residents and business owners/managers in neighborhoods around sexually oriented businesses and some other businesses with sexually oriented materials in Kansas City, Missouri; and (2) a survey mailed to property appraisers in Rochester, New York, seeking their opinions on the impacts of different types of businesses on commercial and residential property values. This chapter also includes our summaries and analyses of 10 other studies and reports on the regulation of sexually oriented business completed by Denver; Fort Worth; Indianapolis; New York City; Newport News, Virginia; Phoenix; St. Paul; Tucson; and Whittier, California. We found that some of the studies we reviewed have significant limitations on their usefulness. We have included them because they are often cited as supporting documentation of "studies from other cities" incorporated by cities that are adopting sexually oriented business regulations, a procedure that has been allowed by the courts as a substitute for a city conducting its own survey of secondary effects of sexually oriented businesses.

THE KANSAS CITY STUDY

As part of a larger study that we conducted of Kansas City's sexually oriented businesses, we contracted with Oedipus, Inc., a professional public opinion research firm from Boulder, Colorado, to conduct a series of interviews with residents and business managers of the neighborhoods surrounding the sexually oriented establishments included in the study. Oedipus has an extensive history of conducting surveys related to land-use issues and to issues surrounding the licensing and approval of particular businesses, typically establishments offering liquor or adult materials or entertainment.

Our study design for the survey was quite different from those used in other communities. . . . We wanted a more objective response and designed a survey method in which the survey teams never mentioned sexually oriented businesses or any others.

The Survey

The survey involved a total of 1,049 "door-knocks" that resulted in 360 successful interviews. At 577 locations, no one answered the door, the business was closed, or the business was open but the manager was not available; another 112 locations were not included because respondents were not residents of the neighborhood or preferred not to participate. We reached our target goal of at least 20 completed surveys from neighborhoods around each business involved in this study except for one business located in the heart of downtown, for which the survey team was able to obtain only 18 completed surveys.

Our study design for the survey was quite different from those used in other communities. Surveys in other communities that have focused on sexually oriented businesses asked direct questions like, Does the adult business in your neighborhood create any problems for you? We wanted a more objective response and designed a survey method in which the survey teams never mentioned sexually oriented businesses or any others. After the survey eligibility questions, the first eight questions in the survey were on general topics such as the upkeep of homes and businesses in the neighborhood, traffic congestion, and pedestrian safety. In other words, we buried the intent of the survey with questions about general neighborhood issues and took significant steps to avoid "leading" the responses in any way.

Beginning at question 9, the survey teams asked general questions that intended to elicit responses related to the substance of our study. Those questions were:

9. Is there a business in your neighborhood that is a problem or not good for your neighborhood?
10. Is there a business not located in your neighborhood that your neighborhood needs? [irrelevant to study and not discussed further]
11. Is there a business operating in your neighborhood that should not be in your neighborhood?
12. If you listed a business that should not be in your neighborhood in question #11, which, if any, of these businesses has adversely affected your ability to sell or rent your property?
13. If you operate a business, has any other business affected your ability to hire or retain employees?

We studied neighborhoods around what we later characterized as five main types of businesses dealing in sexually oriented materials.

- Video stores, which emphasized the sale of videos but which included some—or many—hard-core, sexually oriented videos
- Sex shops, which included a variety of sexually oriented goods, usually featuring sex toys, some media, and, in some cases, very racy lingerie, leather goods, and other accessories
- Retail outlets with a variety of consumer goods and a substantial stock of sexually oriented inventory
- Sexually oriented motion picture theaters
- Adult cabaret

There was one variation that affected our classifications—the inclusion of video-viewing booths as an accessory use. (See the list of our classifications in Table 3-1 where we also indicate whether video-viewing booths were included in the business.) There was also one business with live entertain-

TABLE 3-1. CLASSIFICATION OF ADULT BUSINESSES IN THE KANSAS CITY RESIDENT/BUSINESS SURVEY

Business Name	City Classification	Authors' Classification
1st Amendment	Less than substantial portion	Sex shop
Adrienne's Book Store & Arcade	Video-viewing booths	Sex shop with viewing booths
Bazooka's Showgirls	Adult entertainment; video-viewing booths	Adult cabaret; adult mini-motion picture theater; viewing booths; adult video rentals and sale; live encounter booth
Ellwest Stereo Theatre (After Dark)	Video-viewing booths	Sex shop with viewing booths
N.Y. Times Square Video	Video-viewing booths	Sex shop with viewing booths
Old Chelsea Theatre	Video-viewing booths	Adult motion picture theater; adult live theater with viewing booths; live encounter booth
Passion Pit	Video-viewing booths	Sex shop (more than 40% adult video sales and rentals)
Pleasure Chest Adult Bookstore	Video-viewing booths	Sex shop with viewing booths
Priscilla's	Less than substantial portion	Sex shop
Ray's Over 21	Video-viewing booths	Sex shop with viewing booths
Ray's Video (Main St)	Video-viewing booths; less than substantial portion	Sex shop with Beanie Babies, newspapers, and viewing booths
SRO Video	Less than substantial portion	Video store
Stadium News (After Dark)	Video-viewing booths	Sex shop with viewing booths
Strand Video	Video-viewing booths	Sex shop; adult mini-motion picture theater with viewing booths
Time for News	Video-viewing booths	Sex shop with viewing booths
Valentine Video	Less than substantial portion	Video store
Video Mania	Less than substantial portion	Video store

ment, as well as books, videos, two small motion picture theaters, and video-viewing booths. Note that our classification, which is discussed in more depth in Chapter 8, differed from the one Kansas City had used before our study. The city had distinguished between adult and non-adult retail outlets on the basis of the percentage of the store's stock-in-trade that involved sexually oriented media. Stores with "less than a substantial portion" of the stock in trade, which the city at that time interpreted to be 50 percent of the number of inventory items, were considered non-adult uses.

Responses

Oedipus, the public opinion research firm, reported the responses separately for the two categories of businesses included in this study: those with video-viewing booths (referred to in the Oedipus report as "adult businesses") and businesses with "less than a significant or substantial portion of their stock in trade" in adult materials, referred to in the Oedipus report as "other businesses with adult materials." The responses from different neighborhoods were very similar.

In response to questions 9 and 11, 57 and 63 percent, respectively, of the 360 respondents said there was no business in the neighborhood that was a problem or should not to be there. (See Table 3-2.) However, 102 respondents indicated that there was some business in the neighborhood that was a problem or should not to be there. Of these respondents, 97 named an adult business or another business with adult materials. (See Table 3-3.) Ninety percent

TABLE 3-2. RESPONSES TO KEY QUESTIONS IN KANSAS CITY SURVEY (percentage of respondents)

Question	No	Yes	No Opinion or Not Applicable	Don't Know
(Q9) Business in your neighborhood that is a problem?	56.94	36.39	.28	6.39
(Q11) Business in your neighborhood that should not be there?	63.06	28.33		8.61
(Q12) Business from previous question affected your ability to sell/rent property?	5.28	7.78	84.44	2.5

Source: Oedipus, Inc., *Survey Regarding Businesses with Video-viewing Booths or with Less than a Significant or Substantial Portion of Their Stock in Trade in Adult Materials, Kansas City, Missouri* (Boulder, Colo.: Oedipus, Inc., 1998); from responses to Questions 9, 11, and 12, pages 4, 5, 7.

TABLE 3-3. TYPES OF BUSINESS LISTED AS "SHOULD NOT BE IN NEIGHBORHOOD"

Business Type	Named by Respondents[1]
Adult business or business with adult materials	97
Liquor store	13
Bar	12
Hotel	9
Nonprofit rehab, halfway houses, blood bank, Planned Parenthood	
Check-cashing	6
Pawn shop	5
Convenience store/gas station	4
Temporary employment/day labor	3
Fast-food restaurant	3
Car salvage yard/car lot	3
Industrial [in residential area]	3
Auto body shop/motorcycle repair	2
Recycle center	2
"Hippie" shop	2
Business with overflow parking	2
Other	2

1. Sample size = 102 respondents who answered Yes to Question 11. (See Table 3-2.)

Source: Oedipus, Inc., *Survey Regarding Businesses with Video-viewing Booths or with Less than a Significant or Substantial Portion of Their Stock in Trade in Adult Materials, Kansas City, Missouri* (Boulder, Colo.: Oedipus, Inc., 1998); from responses to Question 11, pages 5-6.

of the respondents gave land-use impacts as to why they believed the sexually oriented businesses did not belong in the neighborhood. Reasons given included such things as "trashy," "trashy store front," "lowers property value," "draws bad crowd," draws unsavory people," or "bad influence on children." " A small number of respondents cited the content of the materials handled by the business.

The businesses named most frequently by respondents to Question 11 were: First Amendment (20 times), Priscilla's (13 times), Ray's Video (12 times), Ray's Over 21 (11 times), Pleasure Chest (11 times), Ellwest (9 times), Old Chelsea (8 times), Bazooka's (7 times), Strand (6 times), Passion Pit (3 times), After Dark Video (formerly Stadium News 3 times), New York Times (2 times), and First Amendment and Adrienne's (1 time each), and unnamed stores (4 times); note that First Amendment, the Passion Pit, and Priscilla's do not have video-viewing booths.

Businesses that were not listed, although the survey teams worked the neighborhoods around them, included: SRO Video; Time for News; Valentine Video; and Video Mania. SRO Video was essentially a control establishment—a mainline video store with a few hardcore videos on a high shelf. Valentine Video and Video Mania are mainstream video stores with large back rooms of hard-core material. Time for News is clearly a sexually oriented business, but it is located in an entirely commercial area.

In response to question 12, related to the impact of a particular business on one's ability to sell or rent a property, most did not identify a problem. Of those who did identify a problem, 26 of the 28 named an adult business or another business with adult materials. Only five respondents indicated that a particular business had impaired their ability to hire employees.

Connie Cooper

Bazooka's was one of the Kansas City businesses that was deemed by nearby residents as "a business operating in your neighborhood that should not be in your neighborhood." This, despite the fact that the business was one of the classiest the authors visited in their research.

Analysis

We were surprised at the survey results. We certainly anticipated that some adult businesses would be named in response to our relatively neutral questions regarding problem businesses, but we anticipated a fairly even mix of bars, used-car lots, junkyards, and marginal convenience stores, along with businesses included in this study. The fact that 96 percent of the persons identifying a business that "should not be in [their] neighborhood" specifically named adult businesses or businesses with adult materials is very significant. The fact that 90 percent of those responding to the question about why they objected to the businesses gave reasons related to land-use (i.e., they used descriptions of the property or actions around it) for opposing those businesses is also significant. In a public hearing, accompanied by counsel for neighborhood groups, those testifying might be expected to couch their testimony carefully to avoid tripping over First Amendment issues. In response to an unscheduled personal interview, however, one normally obtains direct, unrehearsed responses; in that context, we would have expected more responses that focused on the moral issues, responses like "we don't need porn in this neighborhood," or "that business is immoral." Because these responses are given in a nonpublic and direct sense, we give them great legitimacy. And this, in turn, affects how communities might best respond to the issues that arise from sexually oriented businesses. In other words, the respondents' complaints focused on business activities rather than on the message content of communications, and those factors can be addressed through zoning and licensing procedures without having to confront First Amendment issues. Our own observations of these businesses (see Chapter 2) confirmed many of the perceptions of the respondents to the survey.

There are two other aspects to the survey results that are particular significant. The responses from the neighborhoods surrounding what the industry calls "percentage stores" (stores carrying adult materials but falling below the percentage the city uses to classify the use as an "adult business") were essentially similar to responses from neighborhoods surrounding businesses that were clearly adult businesses. The similarity of these responses did not surprise us. We believe that Kansas City's former distinction between adult uses and "percentage stores" missed the real distinction between these businesses. We found several establishments that were objectionable to neighborhoods but that had "less than a substantial portion" of their inventory in sexually oriented merchandise. In each case, the establishment involved had a significant inventory of sex toys, racy lingerie, and novelties (none of which was then included by Kansas City in computing the adult-oriented inventory); we subsequently classified such businesses as "sex shops," a finding discussed in more depth below.

We believe that Kansas City's former distinction between adult uses and "percentage stores" missed the real distinction between these businesses.

The survey showed no respondents naming mainstream video stores with adult videos in a back room (viz., SRO Video, Valentine Video, and Video Mania) as the type of business that should not be in the neighborhood. (See Table 3-4.) SRO Video had a small number of adult titles, kept high on the wall and displayed with only the spines showing. We did not expect it to turn up in the survey responses, and it did not. Valentine Video and Video Mania, in contrast, had very large inventories of sexually oriented videotapes and, in contrast to some of the other businesses, many customers. It would be safe to say that we saw 15 or 20 times as many customers in the adult sections of Valentine Video and Video Mania as we saw in First Amendment, but First Amendment turned up 20 times on the survey

TABLE 3-4. ADULT BUSINESSES OR BUSINESSES WITH ADULT MATERIAL THAT "SHOULD NOT BE IN NEIGHBORHOOD" (Authors' Classification)

Type of Business[1]	Number in Studied Neighborhoods	Times Mentioned[2]	Percentage of Mentions[3]
Adult live theater	1	7	6.2
Adult movie theater	1	8	7.1
Sex shop with viewing booths	9	58	51.3
Sex shop without viewing booths	3	36	31.9
Unamed store with adult materials		4	3.8
Mainstream video store with adult videos in back room	2	0	0
Mainstream video store with few adult videos	1	0	0

Notes:

1. Where business included multiple businesses, it is identified here only in the first category in which it falls, because the categories are listed in order of their impact on neighborhoods.

2. Number of mentions was 113 from a total of 97 respondents who identified an adult business in response to Question 11.

3. Total varies from 100 percent because of rounding.

Source: Tabulated by authors from follow-up responses to Question 11, as reported separately for two different groups on pages 13 and 21 in the Oedipus study, eliminating double-counting. Total number of mentions exceed number of persons identifying an adult business, as show in Table 3-3, because some mentioned multiple businesses.

responses as regards types of businesses that should not be in the neighborhood, and Valentine Video and Video Mania were not mentioned once.

Consistent with the findings about First Amendment are the survey results involving Priscilla's. Priscilla's was mentioned by survey respondents 13 times. It was probably the nicest store that we visited in terms of quality of décor and fixtures, care in merchandising, lighting, cleanliness, and general management attention. Although we ultimately recommended that sex shops like Priscilla's be included under the new licensing ordinance in Kansas City, we did not anticipate that it would have any difficulty meeting the many standards regarding operations and maintenance of the premises.

Priscilla's featured lots of lingerie, lots of novelties, lots of sex toys, and a relatively small number of videos—roughly comparable to the number of sexually oriented videos at SRO. In short, the emphasis in Priscilla's was not on media but on accessories. Within a block of Priscilla's is Roscoe's, a large and comprehensive video store with a large backroom with adult videos—similar to those we found at Valentine Video and Video Mania. In contrast to Pricilla's, Roscoe's did not turn up once in the survey responses, although its neighborhood is the same as Priscilla's. If neighbors were concerned about the specific content of the materials (sexually oriented videos), they would have named Roscoe's. People that we spoke to characterized Priscilla's as a retail store selling "sex" with its mixture of lingerie, XXX videos, and sexual oriented paraphernalia—that view would completely explain the multiple survey responses naming the store. Roscoe's was a video store that just happened to carry XXX-rated videos as an ancillary to its main operation as a video store.

We believe there are two reasons why Priscilla's and First Amendment were such significant issues for neighbors, while three other stores that traded in much larger quantities of sexually oriented media did not:

1. First Amendment and Priscilla's were, according to our categories, sex shops. In addition to videos, they carried sex paraphernalia and magazines, along with extraneous merchandise, such as reading glasses, caps, and ceramic cups. Valentine and Video Mania are comprehensive video stores that choose to carry many adult-oriented videos (confined to a controlled back room), along with lots of family-oriented videos. This is a land-use distinction, based on the context in which the material is sold or rented and not on the content of the material.
2. First Amendment and Priscilla's were located on blocks that abutted residential properties, while Video Mania, Roscoe's, and Valentine Video were clearly located in major commercial areas.

The recommendations we make in the later chapters of this report are based on our recommendations to Kansas City to address these issues, although we have continued to refine our thinking and the resulting recommendations. Kansas City adopted those recommendations in the form of zoning ordinance amendments and a new licensing ordinance similar to those for which we provide drafting checklists in Chapters 7 and 8. For a detailed treatment of how we resolved these issues, see those chapters.

Connie Cooper

Kansas City's Ziegfield's promises that there's "nothing on but the jukebox" in this "gentlemen's club." Venues with live entertainment pose a whole different set of problems than retail uses that do not. The authors suggest that the distinctions are similar to those between a bar and a liquor store.

The recommendations we make in the later chapters of this report are based on our recommendations to Kansas City to address these issues, although we have continued to refine our thinking and the resulting recommendations.

A SURVEY OF APPRAISERS IN ROCHESTER, NEW YORK

The City of Rochester, with the assistance of Duncan Associates, conducted a survey of property appraisers in Rochester/Monroe County, New York, to determine their perceptions of impacts of specific businesses, including sexually oriented businesses, on residential and commercial property values.

The survey was conducted in the context of a larger study of sexually oriented businesses. Because any question focusing simply on the question of whether such businesses may have a negative impact on property values clearly biases the respondent to answer affirmatively, this survey placed such businesses in context, by including such businesses in a list of other businesses that are sometimes considered LULUs (Locally Unwanted Land Uses). Furthermore, rather than lumping all sexually oriented businesses together, the survey included several different types of such businesses, ranging from passive retail uses (sale or rental of sexually oriented books and videos) to higher impact uses, such as those with live entertainment. These businesses as a group (that is, all the LULUs) are generally called "the studied businesses" in the rest of this analysis. The categories of businesses sent to the appraisers are listed in Table 3-5.

Because any question focusing simply on the question of whether such businesses may have a negative impact on property values clearly biases the respondent to answer affirmatively, this survey placed such businesses in context, by including such businesses in a list of other businesses that are sometimes considered LULUs (Locally Unwanted Land Uses).

TABLE 3-5. TYPES OF BUSINESS NAMED ON ROCHESTER SURVEY OF APPRAISERS

Business Type
Bar
Bar with live entertainment
Bar or juice bar with nude dancers or servers
Bookstore
Bookstore that includes some sexually oriented materials
Bookstore that advertises itself as XXX or "Adult"
Bowling alley
Convenience store
Convenience store with gas
Convenience store with alchohol
Newsstand
Newsstand with back room of sexually oriented materials
Pawn shop
Salvage yard
"Sex shop" featuring leather goods, lingerie, sex toys
Video rental shop
Video rental shop with back room of sexually oriented materials
Video rental shop that advertises itself as XXX or "Adult"

Source: Survey of Appraisers by Department of Zoning, City of Rochester, New York; study design and data compilation by

Most local ordinances dealing with sexually oriented businesses address the apparent impacts of such businesses on property values by requiring sexually oriented businesses to be separated by some specified distance (typically between 500 and 1,500 feet) from certain categories of land uses. Thus, the survey attempted to find a relationship between distance or other locational factors and impacts on property values. Finally, recognizing that all of the possible LULUs included on the list are com-

mercial enterprises and that any commercial enterprise will have a different impact on residential property than on commercial property, the survey asked separately about the probable impacts on residential property values and on commercial property values.

The survey included questions designed to determine the distance from a given residential or commercial property at which appraisers would determine the impact of studied businesses. It also provided an opportunity for the appraisers to rank the potential negative impacts on a property's value caused by subcategories of the studied businesses. The survey allowed additional comments, but review of those comments is not included in this report. The survey was conducted in spring 2000.

Thirty-nine responses were received and analyzed. All returned surveys were included in the data analysis. Portions of some returned surveys were left blank, and those portions were not included in analysis.

Thirty of the 39 responding appraisers had some type of real estate appraisal certification in New York State. Their average number of years of experience in appraising was 20.2, and the average number of years of experience in Monroe County was 19.7.

Appraisers were given an opportunity to rank 18 different business types by the potential adverse impact they might have on the value of either residential or commercial property.

The survey provided an opportunity for the appraisers to rank the potential negative impacts on a property's value caused by subcategories of the studied businesses.

The Relationship between Proximity and Use

Tables 3-6 and 3-7 show the responses to questions about separation distances. The greatest factor affecting both residential and commercial uses was whether a potentially negative influence was located on the same block.

TABLE 3-6. DISTANCE/SEPARATION FACTORS IN IMPACTS OF BUSINESSES ON VALUES OF NEARBY RESIDENTIAL PROPERTY

Consideration Factor	Percent[1]	Total
Studied business located on same block	57	17
Distance affected by type of business impact generator	47	14
Distance related to impacting business fronting on same street	23	7
Studied business located within 500 feet	10	3
Studied business located within 1,000 feet	13	4
Studied business located within 1,500 feet	0	0

Note:
1. Percent indicates how many of the 30 useable responses indicated the given consideration factor. The percents total higher than 100 percent because the survey allowed respondents to make multiple selections

Source: Survey of Appraisers by Department of Zoning, City of Rochester, New York; study design and data compilation by Duncan Associates, Austin, Texas, Table 2. Note that, due to inconsistencies in the method of responding to the survey, the table represents a scoring of the responses by Duncan Associates and not a straight compilation of answers. Some responses ranked all of the studied businesses, from the most negative to least negative impacts on property value; some simply assigned point values to their perceptions of the impacts of some of the businesses. Because of this inconsistency in responses, all useable responses were re-coded, converting the wide range of respondents' ranking or rating systems into a quartile system (rating from 1 to 4, with 1 being the highest potential negative impact). There were 23 useable responses for residential property impacts and 14 useable responses for commercial property impacts that underwent this recoding. We believe that the intent of each respondent was clear and that the recoding accurately reflects the responses of participants.

The next highest consideration was the type of business generating the impact. The analysis did not correlate this result with the rankings of potentially negative impacts because the sample size was not large enough to allow a statistically significant analysis. It is possible, however, that a larger sample size would show a positive correlation among the character of a business, its distance from the protected land use, and the impacts on the land use; that is, higher-impact businesses (those with on-premises entertainment) may have an impact at a greater distance than lower-impact, retail uses.

Whether a studied business fronted on the same street as the other property was the next highest consideration among the appraisers.

TABLE 3-7. DISTANCE/SEPARATION FACTORS IN IMPACTS OF BUSINESSES ON VALUES OF NEARBY COMMERCIAL PROPERTY

Consideration Factor	Percent[1]	Total
Studied business located on same block	72	13
Distance affected by type of studied business	44	8
Distance related to studied business fronting on same street	17	3
Studied business located within 500 feet	11	2
Studied business located within 1,000 feet	11	2
Impacting business located within 1,500 feet	6	1

Note:
1. Percent indicates how many of the 18 useable responses indicated the given consideration factor. The percents total higher than 100 percent because the survey allowed respondents to make multiple selections.

Source: Survey of Appraisers by Department of Zoning, City of Rochester, New York; study design and data compilation by Duncan Associates, Austin, Texas, Table 3. Note that, due to inconsistencies in the method of responding to the survey, the table represents a scoring of the responses by Duncan Associates and not a straight compilation of answers. Some responses ranked all of the studied businesses, from the most negative to least negative impacts on property value; some simply assigned point values to their perceptions of the impacts of some of the businesses. Because of this inconsistency in responses, all useable responses were re-coded, converting the wide range of respondents' ranking or rating systems into a quartile system (rating from 1 to 4, with 1 being the highest potential negative impact). There were 23 useable responses for residential property impacts and 14 useable responses for commercial property impacts that underwent this recoding. We believe that the intent of each respondent was clear and that the recoding accurately reflects the responses of participants.

The Ranking of Business Types

Tables 3-8 and 3-9 show the studied business types separated into three categories based on their relative potential to have an adverse effect on either residential or commercial property values.

It is important to note that the results of this survey are descriptive only. They quantify only the opinions of real estate appraisers in Rochester/Monroe County, New York, about the potential impact of certain types of businesses on property values. This survey does not compare actual property values or appraisals to the responses collected, nor is there any reliable statistical method to infer the actual effect on property values from the information collected by this survey.

Analysis

The responses to the impacts by business type are, in part, counterintuitive. The investigators anticipated that salvage yards would have been a

TABLE 3-8. TYPES OF STUDIED BUSINESSES WITH ADVERSE EFFECTS ON RESIDENTIAL PROPERTY

Greatest Potential Impact	Moderate Potential Impact	Minimal Potential Impact
Bar or Juice Bar with nudity	Video rental with SOM*	Pawn shops
XXX or "Adult" video rental	Newstand with SOM*	Convenience store with alcohol
XXX or "Adult" bookstore	Bar	Convenience store with gas
"Sex shops"	Bookstore with SOM*	Bowling alley
Salvage yards		Convenience store
Bar with live entertainment		Video rental shop
		Newstand
		Bookstore

* "SOM" indicates sexually oriented materials.

Source: Survey of Appraisers by Department of Zoning, City of Rochester, New York; study design and data compilation by Duncan Associates, Austin, Texas, Table 4. Note that, due to inconsistencies in the method of responding to the survey, the table represents a scoring of the responses by Duncan Associates and not a straight compilation of answers. Some responses ranked all of the studied businesses, from the most negative to least negative impacts on property value; some simply assigned point values to their perceptions of the impacts of some of the businesses. Because of this inconsistency in responses, all useable responses were re-coded, converting the wide range of respondents' ranking or rating systems into a quartile system (rating from 1 to 4, with 1 being the highest potential negative impact). There were 23 useable responses for residential property impacts and 14 useable responses for commercial property impacts that underwent this recoding. We believe that the intent of each respondent was clear and that the recoding accurately reflects the responses of participants.

TABLE 3-9. TYPES OF STUDIED BUSINESSES WITH ADVERSE EFFECTS ON COMMERCIAL PROPERTY

Greatest Potential Impact	Moderate Potential Impact	Minimal Potential Impact
Bar or Juice Bar with nudity	Salvage yards	Bookstore with SOM*
XXX or "Adult" video rental	Video rental with SOM*	Pawn shops
"Sex shops"	Newsstand with SOM*	Bar
XXX or "Adult bookstore"	Bar with live entertainment	Convenience store with alcohol
		Video rental shop
		Bowling alley
		Bookstore
		Convenience store
		Convenience store with gas
		Newsstand

* "SOM" indicates sexually oriented materials.

Source: Survey of Appraisers by Department of Zoning, City of Rochester, New York; study design and data compilation by Duncan Associates, Austin, Texas, Table 5. Note that, due to inconsistencies in the method of responding to the survey, the table represents a scoring of the responses by Duncan Associates and not a straight compilation of answers. Some responses ranked all of the studied businesses, from the most negative to least negative impacts on property value; some simply assigned point values to their perceptions of the impacts of some of the businesses. Because of this inconsistency in responses, all useable responses were re-coded, converting the wide range of respondents' ranking or rating systems into a quartile system (rating from 1 to 4, with 1 being the highest potential negative impact). There were 23 useable responses for residential property impacts and 14 useable responses for commercial property impacts that underwent this recoding. We believe that the intent of each respondent was clear and that the recoding accurately reflects the responses of participants. Also note that the total number of responses to surveys regarding impacts on commercial properties was much smaller (18) than the total responses regarding residential properties.

use with significant impact on commercial properties (they were in the highest impact group for residential properties) and that convenience stores selling gas and/or alcohol would have been perceived as having moderate potential impacts on residential properties. But the appraisers did not see them that way. Rather, they responded that video stores and bookstores with back rooms of adult material would have greater potential impacts on property values than such convenience stores and ranked them with salvage yards and bars with live entertainment in their potential effect on the property values of commercial properties. These results seem inconsistent with the summary of the Kansas City survey results above; in that survey, no respondents identified video stores and bookstores with back rooms of sexually oriented materials as having any adverse impact on their neighborhood. There was a critical difference in methodologies, however. In the Kansas City study, neighbors were required to identify problem businesses by name. In this survey, the businesses were identified only as "types" that included sexually oriented materials.

The authors suspect that many of the respondents to the Kansas City survey were totally unaware of the back rooms and that others paid little attention to them. There are several such businesses in Rochester, and local planners and enforcement officers have reported no problems with them. The researchers suspect that the appraisers may not be any more aware of these types of businesses than the respondents in Kansas City and may have responded to the question based on their perceptions about true adult uses.

Based on the results of the survey of appraisers in Rochester, New York, bars with nude servers or live entertainers clearly have the greatest potential negative impact on surrounding property values.

Classification of the "adult bookstore" in the same high-impact category as "sex shops" and sexually oriented businesses with live entertainment is also somewhat suspect. One of the investigators visited all of the identifiable sexually oriented businesses in Rochester and found no true adult bookstores that sold only books; many businesses that called themselves adult bookstores also had video-viewing booths, which are a form of on-premises entertainment, and all included sex toys and other items that would bring them within the authors' classification of a sex shop. Thus, to the extent that the appraisers responded from their own experience in Rochester, the attempt by the investigators to distinguish an adult bookstore from a sex shop appears to have been unsuccessful.

Survey Findings

Based on the results of the survey, appraisers in the Rochester/Monroe County area have the following views on the impact of the studied businesses, which included sexually oriented businesses.

1. Bars with nude servers or live entertainers clearly have the greatest potential negative impact on surrounding property values.
2. Sexually oriented businesses have a potential negative impact on the value of some neighboring property. That impact is greater than the impacts of some other types of businesses considered as undesirable neighborhood land uses.
3. To the extent that studied businesses have a potential negative impact on property values, they have significantly more negative impact on the value of neighboring residential property than on the value of neighboring commercial property.
4. The greatest potential impact on property values of the studied businesses is on properties located on the same block.

5. For uses located on different blocks, the location of a studied business on the same street as a protected use is more significant in measuring impact than is any particular separation by distance.
6. Based on a combination of responses, if two properties are equidistant from the same studied business, with one located on the same street as the studied business and the other on another street, the property located on the same street as the studied business will suffer the greater impact.
7. The impact of studied businesses on neighboring properties decreases with distance; the potential negative impacts stop somewhere between 1,000 and 1,500 feet.

Please note that interpolation of the distance/separation data suggests that pedestrian or driving distance is a critical factor and is far more important than absolute distance, but that interpolation goes somewhat beyond what the data says directly.

Although staff from the City of Rochester participated in the survey and accepted the survey, the city has taken no action to accept the findings and conclusions based on the survey as of the date of the publication of this PAS Report. The analysis and summary we provide here are entirely the responsibility of the authors of this report.

FINDINGS FROM STUDIES IN OTHER COMMUNITIES

Denver

"A Report on the Secondary Impact of Adult Use Businesses in the City of Denver" was prepared by multiple city departments for the Denver City Council in January 1998. It is detailed and carefully done. According to the study, after applying the mandatory separation requirements (500 feet from designated uses, such as parks, schools, and religious facilities, and 1,000 feet from other adult uses), "at least 67 business-zoned sites are available in addition to the 20 existing adult use businesses" (p. 16). Thus, there are a substantial number of available sites for adult use businesses in Denver.

Most adult businesses in Denver are licensed; the only exceptions are bookstores without video-viewing booths or other on-premises entertainment. In a discussion of licensing, the Denver report notes:

> Most adult use businesses in Denver have had their licenses suspended on one or more occasions for criminal violations by patrons or employees (or, in some cases, for licensing violations short of criminal behavior). The overwhelming majority of such violations involved public indecency, including masturbation, fondling and deviate sexual intercourse.
>
> . . .
>
> Among the four groups of licensed adult use businesses, Amusement Class 15 licenses, which offer adult books and material and adult picture show devices, do not seem to generate the same amount of violations as those businesses with live entertainment or movies. (p. 20)

The Denver study also involved surveys of local residents and business owners. Questions on the survey were directed at uncovering people's perceptions of the impacts of adult uses. The analysis revealed the following.

> The study found that people who live or own businesses near adult businesses—particularly pop shops, [nude dancing establishments that serve soda "pop" rather than alcohol] adult cabarets, and theaters—feel their presence in the neighborhood lowers property values, generates crime, and contributes to an overall decrease in quality of life. (p. 25)

PAS HAS STUDIES AVAILABLE

The Planning Advisory Service (PAS) staff has copies of the studies of the impacts of sex businesses on communities listed in this report as well as studies from other cities, including the Kansas City study performed by the authors and summarized above. These studies are available on loan to PAS subscribers. If you are not a PAS subscriber, you will be charged a research fee. Of course, you can also contact the cities directly. A review of the cities' web sites did not turn up these studies (with the exception of New York City), although most ordinances governing sex businesses from the cities cited here are available on line. Purchase information for the New York City study is available below in the sidebar by that city's case study.

This perception was reinforced by the results of focus group meetings held to discuss this topic.

Field observations of the adult businesses found a variety of problems, although most of the problems were such that they may have been characteristic of the neighborhood rather than related to the adult businesses.

Regarding crime:

> The study showed that the percentage of calls for police service linked to disturbance, prowler and sex-related crimes was roughly the same in the areas surrounding adult businesses as for the city as a whole. However, the incidence of such calls at the individual adult businesses, exclusive of surrounding areas, was proportionately higher than citywide averages. (p. 33)

Regarding property values:

> The study found that the increase in values of commercial property in "adult business groups" were less than the increase in comparable properties in 9 out of 14 case studies. Similarly, the increases in values for residential properties "abutting the adult business blocks" were less than the neighborhood average values in 10 out of 13 cases. (p. 54)

The most dramatic evidence from the Denver study involves the license suspensions and revocations for adult businesses. Clearly a number of these businesses have not been operated fully within the licensing law, although others have had no violations. Because many of the license violations involve crimes, the incidents at the businesses with problems may account for the difference in crime reports between adult businesses and others. The impacts on property values, particularly on residential values on abutting blocks, appear to be significant. Although this report does not establish any significant new findings, it reinforces the findings from studies in other cities and makes some important distinctions among types of adult businesses.

The impacts on property values, particularly on residential values on abutting blocks, appear to be significant. Although [the Denver] report does not establish any significant new findings, it reinforces the findings from studies in other cities and makes some important distinctions among types of adult businesses.

Fort Worth

The 1986 Fort Worth, Texas, study, "Documentation of Secondary Effects of Sexually Oriented Businesses," includes large portions of other studies as appendices, including those of Los Angeles, Phoenix, St. Paul, Detroit, Amarillo (Texas), Beaumont (Texas), Houston, and Indianapolis. What we found of interest is a comment made by a police captain in Forth Worth.

> These [sexually oriented] businesses have an effect on both neighboring business and residential areas by the elements they attract. The levels of criminal activity in areas around and near these adult establishments are disproportionately high compared to areas without such businesses.
>
> These businesses contribute to neighborhood decline by increasing vice-related activities, such as prostitution, obscenity, violations, and public lewdness. Open manifestation of prostitution and increased traffic of those seeking their services is detrimental to neighboring residential areas.
>
> [Sexually oriented businesses in two specifically-cited neighborhoods] cause the concentration of these activities and aggravate the crime rate in the areas they are located. (p. 5)

Indianapolis

This often cited study, "Adult Entertainment Businesses in Indianapolis, An Analysis," was completed in 1984. It compared crime rates and "real

estate value appreciation" in six areas that included sexually oriented businesses ("study areas") with six similar areas that did not have such businesses ("control areas") and with the city as a whole.

A summary of the study's findings indicates that:

- the major crime rate in the study areas was 23 percent higher than in the control areas and 46 percent higher than in the police jurisdiction at large;
- the "sex-related crime rate" in the study areas was 46.4, or some 80 percent higher than the rate for the same crimes in the control areas over the same period;
- although the property values within the study areas were distinctly higher than those in the control areas, those values appreciated at only one-half the rate of the control areas' and one-third the rate of Center Township [central Indianapolis] as a whole during the period 1979-1982; and
- twice as many houses were placed on the market at substantially lower prices than would be expected had the study area's market performance been typical for the period of time in question.

This study also included responses from a national survey of appraisers wherein some 75 percent responding "felt that an adult bookstore located within one block would have a negative effect on the value of both residential and commercial properties," but that "at a distance of three blocks" the impact of an adult bookstore fell of sharply so that the impact was negligible on both residential and commercial" (p. 34).

The report included four major recommendations.

1. Adult entertainment businesses should be allowed to locate in areas that are predominantly zoned for district-oriented commercial enterprises.
2. No adult entertainment businesses should be allowed to locate in areas that are predominantly zoned for neighborhood-oriented commercial enterprises.
3. Each location eligible to house an adult business should require a special exception that, among other things, would ensure that development standards to buffer and protect adjacent property values were employed.
4. Adult uses should not be allowed to locate within 500 feet of a residential, school, church, or park property line, nor within 500 feet of an established historic area (p. iv).

The survey of appraisers in this study is broad and important. The fact that the appraisers concluded that the impacts diminished substantially over a reasonable distance (three blocks, or about 1,000 feet in most cities) enhances the credibility of the findings. Because the Indianapolis study is more sophisticated than several others, particularly in examining trends in property values and listings for sale, the evidence is certainly compelling as to the impacts of these businesses

In considering the Indianapolis study, it is important to recognize that Indianapolis has continued to allow these businesses to exist as uses by right in some major commercial zones (consistent with the findings of the city's study and the recommendations of the study).

For More Information

The "Adult Entertainment Study" of the City of New York (November 1994) is available for $5 at www.ci.nyc.ny.us/html/dcp/

New York City

New York City's Department of City Planning 1994 Adult Entertainment Study made some interesting specific findings.

As regards signage on sexually oriented businesses, staff concluded the following.

> [T]he signage for the adult entertainment establishments is characteristically at odds with that of other establishments. In half of the study areas, signage for the adult uses occupies a greater percentage of storefront surface area than any other commercial uses located within the same blockfronts….
>
> On blockfronts in four of the sex study areas, adult use signage tends to be illuminated when that of non-adult commercial uses is not….
>
> In half of the study areas, graphic material for adult use signage was noted. For example, in [study area], the outline of the female figure was a component of the adult use business sign. (p. 51)

Their findings about police responses to criminal complaints in areas with sexually oriented businesses indicate that police officers, at least, do not necessarily correlate an increase in only adult uses with increases in crime.

> When the survey and control blockfronts were compared for criminal complaints and allegations, the officers generally did not link higher incidents with adult uses.…
>
> One officer stated that if more adult entertainment establishments were to locate in the study area, crime probably would increase. However, that officer and another responded that more bars, movies or theaters or video/bookstores of any kind would effectively increase crime in the study area. (p. 53)

Responses from real estate brokers emphasized the importance of separation distances and commented further on the notion of concentration.

> It is significant that more than 80 percent of the brokers responding (11 of 13) reported that an adult entertainment establishment tends to decrease the market value of property that lies within 500 feet of it. When the distance is increased from between 500 to 1,000 feet of an adult use, a majority of brokers (7 of 13) indicated that the same phenomenon would occur. At 1,000 or more feet, less than 25 percent of the brokers (3 of 13) responded in this manner. The pattern of response was basically unchanged when the question referred to two adult uses (a concentration) instead of one. (p. 53)

It must be noted that the study's analysis of trends in assessed property values relative to the location of adult entertainment uses was inconclusive.

In sum, the New York City study is one of the most complete and detailed studies available. Most of the data appears transferable to other communities facing similar issues. The responses of real estate brokers are consistent with findings from the Indianapolis survey of appraisers and the Rochester survey of appraisers reported in this chapter. The crime findings are generally consistent with those from other communities, although it would have been helpful to have the study address the issue of crime in areas with high concentrations of adult uses. Some communities regulate the signage on adult businesses directly; this study shows the results where a community has inadequate sign regulations in general or does not address the specific issues involved with signs on sexually oriented businesses. We make some recommendations concerning possible controls on signage (and the legal limits of such controls) in Chapter 5.

THE NEW YORK CITY ADULT ENTERTAINMENT STUDY

We found New York City's "Adult Entertainment Study" of great interest and value because of the high visibility of the city's efforts to successfully address adult uses in the nationally recognized area of Times Square as well as other areas of the city. The overall findings and conclusions of the city's report, extracted from the executive summary, follow.

> Numerous studies in other localities found that adult entertainment uses have negative secondary impacts, such as increased crime rates, depreciation of property values, deterioration of community character, and the quality of urban life.
>
> There has been a rapid growth in the number of adult entertainment uses in New York City. Between 1984 and 1993, the number of such uses increased from 131 to 177. The number of video/book stores/peep shows almost tripled and there was a 26 percent increase in topless/nude bars. Adult theaters declined by 52 percent.
>
> Adult entertainment is more readily accessible in NYC than it was ten years ago. There are more such establishments in a greater number of communities. Adult videos are produced in greater numbers and at lower costs. Cable television has significantly increased the availability of adult viewing material. Adult material is also available at newsstands and book stores.
>
> Adult entertainment uses tend to concentrate. The number of community districts with seven or more adult uses increased from three to eight over the last ten years. Seventy-five percent of the adult uses are located in ten of the city's 59 Community Districts. In Manhattan, adult uses cluster in central locations, such as the Times Square area. In the other boroughs, adult uses appear to cluster along major vehicular routes, such as Queens Boulevard and Third Avenue in Brooklyn, that connect outer reaches of the city and suburbs to the central business district.
>
> Studies of adult entertainment uses in areas where they are highly concentrated, such as Times Square and Chelsea, identified a number of significant negative secondary impacts. In the Times Square area, property owners, theater operators, and other business people overwhelmingly believe that their businesses are adversely affected. An analysis of criminal complaints indicated a substantially higher incidence of criminal activity in the Times Square area where adult uses are most concentrated. In addition, the study found that the rate of increase in assessed property values for study blocks with adult uses grew at a slower rate than control blocks without adult uses.
>
> DCP's [The Department of City Planning's] survey of areas with less dense concentrations of adult uses found fewer impacts than the study of the Times Square area. However, community leaders expressed concerns that adult uses impact negatively on the community and they strongly fear the potential results of proliferation.
>
> The strongest negative reactions to adult entertainment uses come from residents living near them.
>
> - Where respondents indicated that their businesses or neighborhoods had not yet been adversely affected by adult uses, this typically occurred in study areas with isolated adult uses. Moreover, these same respondents typically stated that an increase in such uses would negatively impact them. Community residents fear the consequences of potential proliferation and concentration of adult uses in traditionally neighborhood-oriented shopping areas and view the appearance of one or more of these uses as a deterioration in the quality of urban life.
> - Most real estate brokers report that adult entertainment establishments are perceived to negatively affect nearby property values and decrease market values. Eighty percent of the brokers responding to the DCP survey indicated that an adult use would have a negative impact on nearby property values. This is consistent with the responses from a similar national survey of real estate appraisers.
> - Adult use accessory business signs are generally larger, more often illuminated, and graphic (sexually-oriented) compared with the signs of other nearby commercial uses. Community residents view this signage as out of keeping with neighborhood character and are concerned about the exposure of minors to sexual images.

Newport News

The Newport News, Virginia, study, conducted by the city's Department of Planning and Development, published in March 1996, consists of citations of other adult use studies as well as some local findings.

One part of the analysis examined police calls to specific establishments. Over a 20-month period, it found an average of 23 calls per adult entertainment establishment, 14 calls per nightclubs that did not feature adult entertainment, and two calls per adult book, merchandise, or video store. It then made a paired comparison between two adult entertainment establishments and two restaurants that served liquor, finding a greater number of police calls per occupancy for the adult entertainment establishments than for the restaurants. The study also paired two nightclubs with two other restaurants and found a higher rate of police calls per occupancy for the nightclubs than for the restaurants (pp. 8-10).

The second part of the study compared police calls and crime rates in paired study areas with and without adult businesses and found an increased crime rate in the areas with adult businesses (pp. 10-11).

The findings regarding police calls are hardly surprising. The nature of the nightclub and live entertainment business is likely to attract more police-related problems than a typical restaurant.

The findings regarding police calls are hardly surprising. The nature of the nightclub and live entertainment business is likely to attract more police-related problems than a typical restaurant. That is a reason for caution in siting such establishments and for careful patrolling. Those findings, however, provide little that is useful to other communities in dealing with retail establishments and other businesses that do not involve on-premises entertainment.

In the neighborhood comparisons of crime statistics, the city made a reasonable effort to control for population variables, but it is not at all clear that the study controlled for other relevant variables (e.g., it is not clear that the control areas had any entertainment businesses likely to be open during the evening hours). Furthermore, for some other communities, it will be difficult to use this data because it includes 14 adult entertainment establishments (all involving live entertainment), nine nightclubs, and eight book and video stores. Without separating the uses with alcohol and live entertainment from the more passive uses, it is very difficult to draw conclusions from this study that are useful to communities dealing primarily with establishments where the only on-premises entertainment consists of video-viewing booths or in addressing those establishments "with less than a significant or substantial portion of their stock in trade" in adult materials.

Phoenix

The Phoenix study, conducted by the city planning department and published in May 1979, compares crime rates in "control areas" to rates of similar crime in two paired areas, one with a single adult business and the other with several adult businesses. The study found "about 40 percent more property crimes and about the same rate of violent crimes per 1,000 persons in the Study Areas [with sexually oriented businesses] as compared to the Control Areas" (p. 8).

Phoenix relied on this study in adopting its adult use ordinance, but the city no longer cites the study, and it is difficult to attach a great deal of significance to it. Although the study found a higher rate of sex crimes in the areas around the sexually oriented businesses than in the paired "control areas," it actually found a lower rate of violent crime in the areas with sex businesses than in the paired areas. In fact, the difference in sex-related crimes was almost entirely explained by the incidence of "indecent exposure." That is certainly a logical finding in an area with adult businesses, consistent with the expressed concerns of some neighbors.

St. Paul

The St. Paul, Minnesota, study, "Effects on Surrounding Area of Adult Entertainment Businesses in Saint Paul," was conducted in 1978 by the City of Saint Paul Division of Planning, Department of Planning and Management, and the Community Crime Prevention Project of the Minnesota Crime Control Planning Board. It found that:

> Given the measures of neighborhood condition chosen (crime rate and value of housing), the presence of adult entertainment establishments correlates statistically with poor neighborhood condition….
>
> These businesses tend both to locate in areas of poorer residential condition and to be followed by a relative worsening of the residential condition. (p. 2)

The study also found, however, that a proliferation of adult entertainment businesses in an area was associated with increased effects on property values and crime rates.

> One or even two adult entertainment businesses in an area might not be associated with noticeable change, but … two or more adult entertainment businesses in an area is associated with a statistically significant decrease in property value.
>
> Likewise, more than one adult entertainment business in an area is associated with a statistically significant increase in crime rate. (p. 2)

There are some serious limitations to the St. Paul study. First, it is always important in a study that finds correlation to recognize that correlation does not demonstrate causation. There may be some third factor, not studied or not properly controlled, that both attracts adult businesses and leads to deterioration.

More important, however, is the definition of "adult entertainment business" used in the study.

> Any alcohol-serving establishment, as well as adult bookstores, adult movie theatres, and saunas/massage parlors. (p. 2)

Table 1, at page 10 of the report, actually found no statistical correlation between sexually oriented businesses and "neighborhood quality/deterioration."

There is one important lesson to be learned from the St. Paul study—concentration of adult businesses of any type significantly increased the impacts. Because the study included bars and cabarets as "adult businesses," this finding also applies to such businesses, but its broader application does not affect its relevance to the sexually oriented businesses that are the subject of this report.

Tucson

The Tucson, Arizona, study consists of two separate parts, a memo from the Citizens Advisory Planning Committee addressed to the Mayor and City Council, dated May 14, 1990, and a memo from an Assistant Chief of Police to the City Prosecutor, dated May 1, 1990. The citizens committee memo largely contains recommendations for ordinance amendments, without factual information to substantiate the reasons for those amendments. Because of that lack of factual content, we have chosen not to discuss that portion of the study here. On page 2 of the police memo, on the other hand, we found two important findings worth mentioning here.

1. The police found repeated violations of a variety of laws at some establishments.
2. Inspecting the video-viewing booths produced two sets of liquid samples from the floors of the booths, with 81 percent of one set of samples and 96 percent of the other set of samples testing positive for semen.

The finding that the video-viewing booths are used for masturbation or other sex acts that leave semen residue on the floors of the booths could prove a useful one for cities attempting to draft purpose statements for any regulations governing those particular activities at sexually oriented businesses.

The finding that the video-viewing booths are used for masturbation or other sex acts that leave semen residue on the floors of the booths could prove a useful one for cities attempting to draft purpose statements for any regulations governing those particular activities at sexually oriented businesses.

Whittier

The 1994 Whittier, California, report on adult business regulations included a pair of recommended ordinances, a copy of an ordinance that had been struck down by the federal courts in *Walnut Properties, Inc. v. City*

of Whittier, 808 F.2d 1331 (9th Cir. 1986), *cert. denied*, 490 U.S. 1006 (1989), and the 1978 staff report that had supported the adoption of that earlier ordinance.

The 1978 study involved a staff comparison of the area with the largest concentration of adult businesses to an area similar in land-use patterns but without adult businesses. Here are some facts about and findings from the 1978 study.

- There were 13 separately identified adult businesses in the city at that time.
- Of those, six were "model studios," four were massage parlors, one was a theater, and there were two book stores.
- All but the theater and one massage parlor were located between 10529 Whittier Blvd. and 11531 Whittier Blvd. (pp. 1-2)

The findings were mixed, showing, for example:

- an increase in owner-occupancy of dwelling units in the area with the adult businesses;
- a decrease in business vacancies in the area with the adult businesses;
- a higher rate of turnover of residential units in the area with the adult businesses than in the control area; and
- a significantly higher rate of increase of crime in the area with the adult businesses than in the city as a whole (pp. 4-5).

One very important finding was that the area with six sexually oriented businesses had a significantly higher rate of turnover of residents in the neighborhood than any other areas, including those with fewer sexually oriented businesses.

One very important finding was that the area with six sexually oriented businesses had a significantly higher rate of turnover of residents in the neighborhood than any other areas, including those with fewer sexually oriented businesses (p. 8).

Whittier also responded in its 1994 ordinance to a special problem that affects the implementation of separation requirements. The vast majority of the commercial properties in the City of Whittier are relatively narrow or shallow, and most abut residential properties or are separated from residential or public uses, such as parks and schools, by on the width of the street or alley. Thus, a separation requirement measured in a straight line might eliminate most commercial sites from consideration, raising site availability issues (discussed in Chapter 5). As a result, the 1994 ordinance based measurements on distances along street right-of-way lines as an approximation of pedestrian routes, meaning that an adult use facing on one street might be several hundred feet from a residence directly behind it; in 1999, however, the city amended the ordinance and went back to using straight-line measurements from property line to property line.

In considering the findings from this study, it is important to note that most (11 of 13) of the businesses in the study had on-premises entertainment or other activities, and that nine of those involved live interaction with patrons; the entertainment activity without live interaction was a movie theater, and the other two establishments were bookstores. Although this data would be useful to another community with a heavy clustering of uses with on-premises entertainment, it is hard to apply to communities with more dispersed uses or with a different mix of uses. Compounding the problem are the subsequent findings that many of the establishments in the study involved prostitution and were successfully closed under a "red-light abatement" ordinance even after the federal court (in *Walnut Properties*) struck down the city's ordinance regulating adult businesses. It is possible that most or all of the negative impacts found in the Whittier Study could be

attributed to the businesses with illegal activity, in which case it would show nothing about lawful adult businesses, which are the focus of this report; at best, it is impossible to separate the apparent impacts of the unlawful businesses from that related to the lawful ones, which makes it difficult to use the data in other communities.

FINDINGS

There is direct evidence from the collective studies to support the following findings.

1. Real estate professionals believe that there is a significant negative impact of sexually oriented businesses and other adult-related entertainment businesses (such as bars with live entertainment) on both residential and business properties within 500 feet of those types of businesses. The impacts are less significant if the separation between the studied use and the other use is 500 to 1,000 feet. Beyond 1,000 feet, there may be some impact, but beyond 1,500 feet there is no basis for believing that there will be any impact on property values. (See the studies from Rochester, Indianapolis, and New York City; there is also some supporting data from Denver.)
2. The greatest impacts on property values are on other properties on the same block. (See the Denver and Rochester studies.)
3. The impacts on property values are greater on residential properties than nonresidential properties. (See the Rochester and Indianapolis studies.)
4. The studies showing the most significant impacts of sexually oriented businesses on neighborhoods involved significant numbers of businesses with live entertainment and/or direct interaction between patrons and entertainers or other employees. (See the Newport News, St. Paul, and Whittier studies.)
5. There is a lower correlation of crime incidents with retail sexually oriented businesses than with those that involve on-premises entertainment of any kind. (See the Denver study.)
6. The Tucson study found sperm samples on the floors and walls of almost all video-viewing booths that police inspected.
7. Although there is some evidence of an increase in crime, particularly around concentrations of sexually oriented businesses (see the Phoenix, Denver, Indianapolis, Whittier, and St. Paul studies), the increase is not necessarily in violent crimes (see the Phoenix and Denver studies).
8. The patterns of increased criminal activities related to sexually oriented businesses appear similar to, or in some studies are indistinguishable from, patterns of increased criminal activities related to bars, nightclubs, and other adult-oriented entertainment enterprises, including those who do not have sexually oriented entertainment. (See the St. Paul and Newport News studies.)
9. At least one very thorough study reached no clear conclusion regarding a relationship between sexually oriented businesses and criminal activity. (See the New York City study.)
10. At least two cities that studied the issue clearly had prostitution flourishing in some adult businesses (see the Denver and Whittier studies), but also see "Lessons Learned" below.

The studies showing the most significant impacts of sexually oriented businesses on neighborhoods involved significant numbers of businesses with live entertainment and/or direct interaction between patrons and entertainers or other employees.

Concentrations of sexually oriented businesses significantly increase the negative impacts; in some studies, it is difficult to identify significant impacts of a single retail outlet.

LESSONS LEARNED

We believe that the following lessons can be drawn from the synthesis and analysis of evidence from the studies.

1. Some sexually oriented businesses and other high-impact commercial uses are incompatible with nearby residential and institutional uses.
   a. There is clear evidence of the adverse effect of some businesses on property values of residential properties.
   b. There is cumulative evidence of a variety of land-use compatibility problems between some businesses and residential properties.
   c. Religious, educational, and other institutional uses commonly found in residential neighborhoods are generally afforded—and typically need—the same protection from incompatible land uses that is offered to residential uses.
2. Sexually oriented businesses with on-premises entertainment have more significant neighborhood impact than other sexually oriented businesses. We believe that the comparison is somewhat analogous to a liquor store and a bar—both sell alcohol, but the one that encourages people to stay and enjoy the alcohol there has a greater effect on the community than the one that simply provides retail, take-out goods.
3. Concentrations of sexually oriented businesses significantly increase the negative impacts; in some studies, it is difficult to identify significant impacts of a single retail outlet.
4. Video-viewing booths provide on-premises entertainment and serve as masturbation booths.
5. Stores with a variety of sexually oriented goods—including sex toys and, in many cases, leather goods and lingerie—seem to be selling sex and thus have much greater impacts on neighborhoods than retail outlets that simply deal in media. We have called such stores "sex shops," a classification that we explain more fully in Chapter 7.
6. A mainstream video store with sexually oriented videos in a back room or otherwise separated from the general stock does not create neighborhood problems, even if the stock of sexually oriented videos is large and includes hard-core videos.
7. We believe that it is a reasonable extrapolation of the same conclusion to say that a sexually oriented bookstore or video store will have fewer negative neighborhood impacts than a sex shop.
8. Zoning and other standards requiring separation between high-impact commercial enterprises (including but not limited to sexually oriented businesses) and residential uses and certain institutional uses are clearly justifiable based on secondary impacts, including negative impacts on property values and problems with land-use compatibility.
9. Evidence regarding the correlation of criminal activity and high-impact commercial enterprises, including both sexually oriented businesses and businesses that combine live entertainment and the service of alcohol, is mixed; it can be read to support the need to separate the high-impact uses from residential and institutional uses or it can be read as neutral, but it in no case suggests that these uses are compatible.

10. Communities using such distance separation requirements between high-impact commercial enterprises and other uses should generally bar the high-impact uses from the same block as the protected use.
11. Communities using such distance separation requirements should consider using pedestrian or driving distances in measuring the separation.
12. Using pedestrian or driving distances between the high-impact uses and protected uses, a minimum separation of 500 feet is easily justified and a separation of 1,000 feet may be justified, based on local circumstances. A separation requirement of up to 1,500 feet may be justifiable where the distance is measured along the same street. Separation requirements beyond 1,500 feet cannot be justified from the available data.
13. There is a clear basis for imposing a greater separation requirement between sexually oriented businesses with on-premises entertainment and sex shops, on the one hand, and protected uses on the other, than for separation between other sexually oriented businesses and protected uses. Although the responses indicated strongly that the necessity for a separation requirement depended on the type of studied business involved, the data, considered in context, do not justify other specific distinctions.
14. Bars with live entertainment should be subject to the same separation requirement from protected uses as sexually oriented businesses with live entertainment.

There is a clear basis for imposing a greater separation requirement between sexually oriented businesses with on-premises entertainment and sex shops, on the one hand, and protected uses on the other, than for separation between other sexually oriented businesses and protected uses.

CHAPTER 4

How Local Governments Regulate Sex Businesses

Our research included a look at what 21 local governments are doing regarding licensing and zoning of sexually oriented businesses.

THERE HAS BEEN A PROLIFERATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN RECENT DECADES. Concern about their secondary impacts has prompted jurisdictions across the United States to pass zoning and licensing ordinances to address these concerns. In response to a challenge to amendments to its Zoning Resolution regulating sex businesses, New York City presented evidence that showed the number of sex businesses in the city had increased from nine in 1965 to 177 by 1993.

In this chapter, we share with you our knowledge of what 21 local governments are doing regarding licensing and zoning of sexually oriented businesses. It was interesting but perhaps not surprising that eight of these jurisdictions have adopted new ordinances or significant amendments in the last five years; 14 have done so in the last 10 years.

In some cases, the impetus for adoption of the new ordinances clearly relates to litigation experienced locally, while in other cases it is due to litigation occurring elsewhere but having ramifications for their regulatory approach. Many of the recent amendments, however, seem to have resulted from political initiatives, apparently arising from constituent pressures. Denver, in response to findings from an adult use study (1998), revised its regulations, eliminating adult uses from neighborhood-oriented commercial districts; Charlotte also adopted a new adult licensing ordinance (1999) in response to constituent concerns and actual experiences. In one case, a store hung a number of its adult titles from the ceiling of the business in an effort to expand their inventory while attempting to conform to the percentage of floor area limitation for adult media under Charlotte's old ordinance.

Portland is examining its options in light of the extremely broad protection given adult uses by its state constitution. The city continues to have concerns about adult uses near residential neighborhoods. Public officials are frustrated by the fact that they have a permit process for businesses such as dealers of second-hand merchandise but cannot similarly regulate adult businesses. The city does have a "chronic nuisance" ordinance that it can use against particularly troublesome businesses of any sort, and it does use that provision occasionally.

TABLE 4-1. REGULATORY METHODS USED BY SURVEYED JURISDICTIONS

Jurisdiction	Licensing Ordinance	Zoning Ordinance
Atlanta, Georgia	X	X
Austin, Texas[1]		X
Charlotte, North Carolina	X	X
Cincinnati, Ohio	X	X
Cleveland, Ohio		X
Denver, Colorado[2]	X	X
Fort Worth, Texas[3]	X	X
Indianapolis/Marion County, Indiana		X
Louisville, Kentucky[4]	X	X
Manatee County, Florida	X	X
Minneapolis, Minnesota		X
Newport News, Virginia[5]		X
New York City, New York		X
Oklahoma City, Oklahoma[5]		X
Phoenix, Arizona	X	X
Portland, Oregon		
Saint Paul, Minnesota[6]		X
San Diego, California[7]	X	X
Seattle, Washington	X	X
Tucson, Arizona	X	X
Whittier, California		X[8]

Notes

1. Austin requires a certificate of occupancy for sexually oriented uses.

2. Denver licenses adult theaters and businesses having live entertainment or selling alcohol.

3. Fort Worth requires a special certificate of occupancy for sexually oriented businesses.

4. Louisville relies more on licensing to regulate sexually oriented uses.

5. Newport News and Oklahoma City regulate sexually oriented uses as conditional uses.

6. Saint Paul requires sexually oriented uses to apply for a special conditions use permit.

7. San Diego, through its Business Permits and Licenses' "Police Regulated Business Regulations," regulates peep show establishments, massage businesses, massage technicians, nude entertainment businesses, and nude entertainers.

8. Whittier requires sexually oriented uses to apply for a "conditional adult use permit."

These amendments and revisions reveal a remarkable level of legislative activity on a relatively narrow topic. Most of these local governments have had zoning in place for 60 years, and several of the programs for regulation of adult business in these communities date to the 1950s or 1960s. Nevertheless, many of these communities are actively seeking better ways to address the complex balancing of interests involved in regulating sexually oriented businesses.

Table 4-1 provides an overview of the regulatory techniques employed by each surveyed jurisdiction.

ZONING TECHNIQUES FOR REGULATING SEXUALLY ORIENTED USES

In all jurisdictions surveyed, we find that zoning is the first line of defense in regulating sexually oriented uses. Zoning ordinances typically specify which zoning districts allow sexually oriented uses and set standards for the separation of the use from places frequented by families and children, as well as separation from other uses classified as sexually oriented. Some ordinances specify special signage and exterior design standards. New York City goes a step further and stipulates that no adult establishment is permitted to exceed 10,000 square feet in floor area and cellar space.

Basic Zoning Definitions

A community's basic definition of a "sexually oriented use" clearly delineates the scope of businesses activities covered by that term. Most local ordinances base the definitions of sexually oriented uses on definitions of "specified anatomical areas" and "specified sexual activities." Those definitions are consistent throughout the ordinances we examined and are consistent with those tested before the Supreme Court in *City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986) and *Young v. American Mini-Theater,* 427 U.S. 50 (1976). (See Chapter 5 for a discussion of these and other important cases in this field.)

New York City adds to its definitions of adult businesses the terms "characterized by an emphasis on" and "regularly features" to the phrase "specified anatomical areas or specified sexual activities"; however, the city does not further define the phrases "regularly features" or "characterized by an emphasis."

We find an interesting pattern of definitions in many zoning ordinances. Quite often the ordinances have a lengthy list of definitions for different types of sex businesses, stretching over four or five pages. In spite of this effort to define almost every sexually oriented activity, the ordinances typically regulate the businesses in the same manner, regardless of their difference in operational characteristics and impacts. With the increased use of licensing ordinances to regulate sexually oriented uses, however, we are beginning to see a better differentiation in regulatory approaches among types of uses.

A case in Cleveland illustrates how important definitions are, particularly defining a use as "adult" by percentage of stock-in-trade (discussed below). The city closed down a video store that was found to be an adult use operating in violation of the adult entertainment regulations. The business's inventory consisted of about 40 percent adult videos, thus making it an "adult" video store; the operators then gave up the adult titles rather than close the store. Moral to the story: definitions matter.

Zoning Districts Permitting Sexually Oriented Businesses

All of the zoning ordinances we reviewed appear to allow sexually oriented uses as uses by right in at least some general commercial and/or industrial zones, subject to separation requirements.

Atlanta, Austin, Cleveland, San Diego, and Manatee County, Florida, allow adult uses in the same districts as similar nonadult uses, subject to the separation requirements. Oklahoma City has a similar approach but overlays operating standards for adult uses through the zoning ordinance and allows them only in commercial districts. Seattle expressly prohibits adult panorams (an alternate name for peep shows) and adult movie theatres in all residential and most commercial and industrial zones; however, the city does permit these and other adult-oriented uses in certain downtown zones that have a commercial emphasis. Charlotte, Fort Worth, Newport News,

In spite of this effort to define almost every sexually oriented activity, the ordinances typically regulate the businesses in the same manner, regardless of their difference in operational characteristics and impacts.

New York City, Phoenix, Saint Paul, San Diego, Tucson, and Whittier allow adult uses in a variety of commercial and industrial zones. Denver and Indianapolis permit adult uses only in their general commercial zones, while Cincinnati allows them in only two manufacturing zones, although adult outcall services are allowed anywhere within the city. The liberal treatment of escort services was apparently adopted in response to threatened litigation by a "nude outcall service"; the proprietors argued, and apparently the city agreed, that it did not need to meet the location requirements for an adult business because there was no adult business conducted at the "out call" location and thus the regulations did not apply. In Minneapolis, adult uses are permitted in only one district, its central business district. This provision has brought with it some unintended consequences. The Central Business District, B-4, includes much of the developed area of downtown and a number of available sites on the fringe of downtown. Adult uses have located on the fringe of downtown, as the city hoped. There is now mixed-use gentrification occurring in some of that fringe area, leading to complaints from residents who have moved into the area even though the adult uses already existed. Table 4-2 reviews the zoning districts where adult uses are permitted in the surveyed jurisdictions.

Many of the issues related to sexually oriented businesses are operational issues—issues that are very difficult to control through zoning. Thus, many jurisdictions turn to licensing for additional controls on sexually oriented businesses.

Special Zoning Conditions

Although ordinances often allow adult uses by right, these uses are sometimes subject to conditions. In other words, the zoning for adult uses is expressly conditioned on the existence of appropriate licenses and compliance with certain locational standards; these are objective, determinable conditions and not ones that require additional, discretionary procedures. (Note: If your ordinance does not have objective conditions, it should; see Chapter 5.)

For instance, the cities of Newport News and Oklahoma City regulate sexually oriented businesses as "conditional uses"; in Saint Paul, adult uses must obtain a "special conditions use permit." Saint Paul requires an annual review of the special conditions use permit; all of the conditions are subject to review by the planning commission. Whittier, California, requires adult entertainment establishments to apply for an "adult conditional use permit" under its zoning code. This permit is very similar to many jurisdictions' licensing ordinances (discussed below) in the way that it addresses operational issues. For example, conditions of the permit require that graffiti be removed within 48 hours; bathrooms be free of sexually oriented materials; video-viewing areas be viewable from the manager's stations; and a video surveillance system be installed in the parking areas, entrances, and manager's stations.

LICENSING TECHNIQUES FOR REGULATING SEXUALLY ORIENTED USES

Many of the issues related to sexually oriented businesses are operational issues—issues that are very difficult to control through zoning. Thus, many jurisdictions turn to licensing for additional controls on sexually oriented businesses. Louisville, and Seattle strongly rely on licensing to control adult uses; Atlanta, Charlotte, Cincinnati, Denver, Manatee County, Phoenix, San Diego, and Tucson rely equally on licensing and zoning. Fort Worth has created a licensing program based on a certificate of occupancy that requires annual renewals.

Licensing standards often stipulate the following:

- manner in which the business must control access to the premises or sections of the store containing adult materials;
- age threshold (e.g., 18 years or older or 21 years or older);

TABLE 4-2. ZONING DISTRICTS PERMITTING SEXUALLY ORIENTED USES: SURVEYED JURISDICTIONS

Jurisdiction	Permitted Districts
Atlanta, Georgia	Same districts as non-adult versions of same use
Austin, Texas	Central Business District (CBD); Downtown Mixed-Used (DMU) District; Commercial Liquor (CS-1) District; Commercial Highway (CH) District
Charlotte, North Carolina	Some business and industrial districts
Cincinnati, Ohio	Temporary overlay district; Intermediate Manufacturing and Heavy Manufacturing Districts
Cleveland, Ohio	General Retail Business Districts; Industrial Districts
Denver, Colorado	B-4, B-5, B-7 and B-8 Business Districts
Fort Worth, Texas	F General Commercial; G Intensive Commercial; H Heavy Commercial; I Light Industrial; J Medium Industrial; K Heavy Industrial
Indianapolis/Marion County, Indiana	Community-Regional Commercial (C-4) District (but only in "an integrated center"); General Commercial (C-5) District; Thoroughfare Service (C-6) District; High-Intensity Commercial (C-7) District; Commercial-Industrial (C-8) District
Louisville, Kentucky	C-2 Commercial; C-3 Commercial; CM Commercial Manufacturing Districts
Manatee County, Florida	GC Commercial District
Minneapolis, Minnesota	Central Business (B-4) District
Newport News, Virginia	Conditional uses in the following districts: C-1 Retail Commercial; C-2 General Commercial; C-3 Regional Business
New York City, New York	Certain commercial and manufacturing districts that do not permit residential uses
Oklahoma City, Oklahoma	C-3, C-4 General Commercial Districts; Central Business District (CBD)
Phoenix, Arizona	C-2 District (Intermediate Commercial); C-3 District (General Commercial); two Industrial Districts; A-1 and A-2 (under cumulative provisions, from the respective commercial zones); and in the Downtown Core District, but only on land previously zoned C-2, C-3, A-1 or A-2
Portland, Oregon	N/A
Saint Paul, Minnesota	B-3, B-4, and B-5 General Business Districts; I-1and I-2 Industrial Districts
San Diego, California	CN Commercial Neighborhood (with limited hours); CR Commercial Regional; CV Commercial Visitor; CC Commercial Community; IL Industrial Light; IH Industrial Heavy; IS Industrial Small Lot
Seattle, Washington	Commercial downtown zones emphasizing commercial uses
Tucson, Arizona	Permits all adult activities in the Commercial-1, Commercial-3, Office Commercial Retail-1 and 2; permits all adult activties in the I-1 Industrial zone
Whittier, California	C-2 and C-3 Commercial; M Industrial zones

- facility cleanliness;
- conduct of customers (no loitering or illegal activities);
- manner in which the business is operated (e.g. requirement that a licensed manager is on duty to enforce operational standards); and
- hours of operation.

Phoenix enforces a no loitering policy in the viewing rooms and outside the premises. The city's license ordinance also requires nonporous coverings on walls, floors, and seating, and establishes a daily cleaning requirement for the premises. Louisville prohibits sexually oriented live, film, or videotape entertainment, or massage between midnight and 6 a.m.

Many licensing ordinances we reviewed stipulate that owners and managers have no felony convictions or operational violations and require a background check of them. In addition to "character checks," jurisdictions often require that the owner be current on all local taxes. (See Chapter 8 on licensing.)

An important aspect of licensing is that it enables a jurisdiction to set standards for suspension or revocation of the adult establishment's business license, something that is not possible with zoning.

An important aspect of licensing is that it enables a jurisdiction to set standards for suspension or revocation of the adult establishment's business license, something that is not possible with zoning.

Typical reasons for revocation are the sale of a controlled substance, sex acts, solicitation for prostitution, intoxication of the manager on premises, or falsifying information on the license application. In Fort Worth, in order to establish reasons for suspension, the city enumerates a variety of "sexually oriented business offenses" that may lead to license suspension, including:

- interfering with inspections or enforcement;
- failing to have a manager on duty;
- employing anyone under 18 years of age;
- allowing nudity where it can be observed by the general public;
- operating an "internal video surveillance system" without prior permission from the Police Department; and
- failing to maintain a current registration card, with detailed description and drivers' license information, on each employee.

Many of the above operational issues are of major concern to neighboring properties and are ones that zoning is often powerless to control; thus, licensing greatly enhances a jurisdiction's regulatory reach. Table 4-3 summarizes some of the licensing requirements and standards for sexually oriented businesses that are typically required by jurisdictions. These are discussed in detail in Chapter 8.

License Fees and Reviews

Licensing fees can be substantial for sexually oriented uses. Louisville sets an annual license fee of $5,000 for the business license and requires separate licenses for performers ($100). Manatee County establishes license fees, ranging from $2,000 for an adult bookstore and $2,000 for an adult massage establishment to $100 per video-viewing booth. As the discussion in Chapter 8 illustrates, it is important that these fees bear a relationship to the amount of work involved in reviewing the license application and are not so high that they appear to be punitive or look more like a tax than a fee.

In addition to fees, a number of jurisdictions require sexually oriented uses to be subject to periodic review. Fort Worth's certificate of occupancy

TABLE 4-3. SUMMARY OF LICENSING REQUIREMENTS AND STANDARDS USED

License Required of:
Business license required for business
Permit required for managers, employees, and dancers
Licensing Standards—Consideration of:
Control of access to adult materials
Design and lighting of premises
Minimum age restriction for employees and customers
Previous convictions of sex-related offenses
Other convictions
Tax delinquencies and nonpayment of fees
Building code compliance
Responsibilities and conduct of employees and customers
Revocation, Suspension—Consideration of:
Sex acts on premises
Prostitution on premises
Sale of controlled substance on premises
Access of restricted areas to minors
Licensee or manager intoxicated on premises
Violation of other operational requirements

stipulates that uses are personal and nontransferable, and that the certificate automatically expires in two years, unless renewed. In addition, the city council "may" hold a public hearing on the renewal application in response to a petition containing signatures of 25 percent or more of the "residents or property owners" located within 1,000 feet of the property line. The city also allows the council to deny renewal if the business "has, or will likely, cause undesirable and material secondary impacts on the immediate neighborhood within said 1,000-foot radius." Although we have not found any cases directly testing such a criterion, the standard is vague enough that it seems likely to face a difficult time in the courts. (See the discussion in Chapter 5 about the need for standards in licensing ordinances.)

SEPARATION REQUIREMENTS

Both zoning and licensing ordinances typically set standards for separation distances between sexually oriented uses and land uses that may be affected negatively by the sexually oriented use. Based on extensive studies, as discussed in Chapter 3 of this report, jurisdictions have found that sexually oriented uses do have secondary impacts, and thus the likelihood of these negative impacts is reduced by imposing distance requirements between the sexually oriented uses and what are considered "protected" land uses. Our survey revealed that most jurisdictions had separation standards from public gathering places, family-oriented uses (e.g., places of worship, schools, parks, and playgrounds, day care centers, and museums), and residential neighborhoods. Cleveland requires the separation of adult uses from pool and billiard halls, video arcades, and pinball arcades. Atlanta imposes a greater separation from protected uses if a sexually oriented use serves alcohol. Manatee County's 2,500-foot separation requirement from schools and churches is the largest we identified in

Those ordinances that specify how they measure separation distances often measure the distance as a straight line (radial). Although that seems like a simple measuring technique, it is not the most accurate measure of impacts—clearly pedestrian or travel routes are a much better measure of impact.

TABLE 4-4. SEPARATION REQUIREMENTS FOR ADULT USES AND PROTECTED USES

Jurisdiction	From Other Adult Uses (in feet)*	From Residential Uses (in feet)*	From a Park, School, or Day Care Facility (in feet)*	From a House of Worship (in feet)*
Atlanta, Georgia[1]	1,000 from 2**	500	1,000	1,000
Austin, Texas[2]	1,000	1,000	1,000	1,000
Charlotte, North Carolina[3]	500 and 1,000	1,000 and 1,500	1,000 and1,500	1,000 and1,500
Cincinnati, Ohio	1,000	1,000	1,000	1,000
Cleveland, Ohio[4]	1,000	1,000	1,000	1,000
Denver, Colorado[5]	1,000 from 2**	500	500	500
Fort Worth, Texas	1,000	1,000	1,000	1,000
Indianapolis, Indiana	500 from 2**	500	500	500
Louisville, Kentucky	500	1,000	400	400
Manatee County, Florida[6]	1,000	500	2,000	2,500
Minneapolis, Minnesota[7]	N/A	1,000	500	500
Newport News, Virginia[8]	500	500	500	500
New York, New York[9]	500	500	500	500
Oklahoma City, Oklahoma[10]	1,000	500	500	500
Phoenix, Arizona	1,000	500	500	N/A
Portland, Oregon	N/A	N/A	N/A	N/A
Saint Paul, Minnesota[11]	2,640 and1,320	800 and 400	400 and 200	400 and 200
San Diego, California[12]	1,000	1,000	1,000	1,000
Seattle, Washington[13]	N/A	N/A	300	N/A
Tucson, Arizona	1,000	1,000	1,000	1,000
Whittier, California	250	250	500	N/A

Notes:

* Where two numbers are provided, the separation requirement varies by zone.

** "x,000 from 2" means "x,000 feet from any two other such businesses."

1. Atlanta requires a separation distance of 2,000 feet from parks, schools, day care centers, and churches if the establishment serves alcohol.

2. In Austin, a 1,000-foot separation is required if 50 percent or more of lots within 1,000 feet are "zoned or used for residential purposes."

3. In Charlotte, an adult bookstore or adult mini motion picture theatre must be separated by at least 1,500 feet from any protected use and 1,000 feet from other adult establishments. Other adult establishments (live entertainment and adult movie theaters) must be separated by at least 1,000 feet from protected uses and 500 feet from similar adult uses.

4. Cleveland also requires a 1,000-foot separation from billiard halls, pinball/video arcades, and training facilities for persons with mental or physical disabilities.

5. In Denver, a 125-foot separation distance is required from a pedestrian or transit mall.

6. Manatee County requires a 2,500-foot separation for schools.

7. Minneapolis prohibits adult use on any property with its main public entrance on Nicollet (the transit mall through downtown Minneapolis).

8. Newport News establishes standards for "adult novelty shops" that require at least a 1,000-foot separation (measured from wall of building to property line of other use) from a house of worship, public or private school, public or private park or playground, public library or land zoned or used for residential purposes.

9. New York City does not permit an adult use in zoning districts that permit residential dwellings either by right or special permit. Parks are not a protected use.

10. Oklahoma City requires novelty stores to have a 1,000-foot separation from protected uses.

11. Saint Paul has different separation requirements based on the zoning district where the use is located (Central Business District requires less separation).

12. San Diego also requires separation from social service institutions.

13. Seattle requires "peepshows" to be separated 300 feet from a public school.

the jurisdictions surveyed. New York City was the only jurisdiction that did not include parks in its list of "protected" uses. Table 4-4 illustrates the separation requirements of the jurisdictions included in our survey.

How Separation Distance Is Measured

Cities measure separation distances in a variety of ways. Those ordinances that specify how they measure separation distances often measure the distance as a straight line (radial). Although that seems like a simple measuring technique, it is not the most accurate measure of impacts—clearly pedestrian or travel routes are a much better measure of impact. Adult businesses have the potential for impact when persons walk or drive by, not "as the crow flies," which is the implication using straightline measurements.

We also find significant variations in the determination of the starting and ending points of the separation distance. Some jurisdictions measure from the lot line of the adult use to the zoning district boundary line of the "protected" district (residential district). In cases where a protected use is within the same zoning district as the adult use, the measurement is often from property line to property line. Minneapolis requires that measurements be made in a straight line "from the main public entrances of the adult use to the lot lines of properties in residentially zoned districts."

Unfortunately, many ordinances do not specify how they measure the separation distance, which can create significant problems with measurement interpretations by enforcement personnel. Table 4-5 illustrates how different jurisdictions calculate separation distances.

Unfortunately, many ordinances do not specify how they measure the separation distance, which can create significant problems with measurement interpretations by enforcement personnel.

Concentration or Separation of Adult Uses

In contrast to Boston's once infamous "combat zone"—a specified area of the city designated for location of sexually oriented uses—most jurisdictions have implemented separation requirements that also prohibit "undue concentrations" of sexually oriented uses. These standards require sexually oriented uses to meet certain separation requirements from each other.

Atlanta, Denver, and Indianapolis allow two sexually oriented uses to be located adjacent to one another or within the same building (co-location). In contrast, Charlotte, Cleveland, and Saint Paul specifically prohibit the co-location of sexually oriented uses. Charlotte and Cleveland have particularly strong and clear language regarding co-location. Charlotte provides that no more than one adult use may be allowed in the same structure. Cleveland's ordinance has two relevant provisions, one requiring that "no two adult uses may be located in the same premises or on the same lot," and another providing that an adult use may not be an accessory use. Most of the other surveyed jurisdictions also had specific separation distances between adult uses. (See Table 4-4.)

Several ordinances expressly define each adult use as a separate use and apply separation requirements between adult uses. Interestingly, Austin's ordinance requires a 1,000-foot separation between adult uses but allows some on-premises viewing of videos and films in adult bookstores.

Variances to Separation Requirements

Some jurisdictions give the planning commission latitude to allow flexibility with specific separation standards. Saint Paul has an interesting provision. The city allows the planning commission to waive separation requirements (except between adult uses) with a consent petition indicating approval by 90 percent of the property owners within 800 radial feet of the proposed use; while this provision has been in effect for more than a decade, it has never been used. Manatee County uses very general cri-

TABLE 4-5. CALCULATING SEPARATION MEASUREMENTS

	Point of Measurement (Separation)		
Jurisdiction	**From Protected Use**	**From Adult Use to Adult Uses**	**Basis of Measurement**
Atlanta, Georgia	Property line to property line	Property line to property line	Straight line
Austin, Texas[1]	Property line to property line	Property line to property line	Straight line
Charlotte, North Carolina	Boundary of residential district, property line of other protected uses to edge of adult building	From each use	Straight line
Cincinnati, Ohio	Boundary of residential district or protected use	From each use	Not specified
Cleveland, Ohio	Boundary of residential district or lot line of protected use	From each use	Straight line
Denver, Colorado	Boundary of residential district or lot line of protected use or wall of use in commercial center	Structure to structure	Straight line
Fort Worth, Texas	Property line to property line	Property line to property line	Straight line
Indianapolis, Indiana[2]	Boundary of residential district to nearest district boundary	From structure to structure	Straight line
Louisville, Kentucky	From public entrance to adult use to residential district	From each use From entrance to entrance	Straight line
Manatee County, Florida[3]	Property line to property line	Property line to property line	Straight line
Minneapolis, Minnesota	Main entrances of adult use to lot lines of residentially zoned property	Only one adult use per block face	Straight line
Newport News, Virginia	Structure of adult use to property line of protected use	From structure to structure	Straight line
New York, New York	Entrance to entrance	Entrance to entrance	Straight line
Oklahoma City, Oklahoma	Property line to property line	Property line to property line	Straight line
Phoenix, Arizona	Exterior wall of adult use to district boundary	Exterior wall to exterior wall	Straight line
Portland, Oregon	Not applicable	Not applicable	Not applicable
Saint Paul, Minnesota	Property lot line to property line	Property lot line to property line	Straight line
San Diego, California	Exterior wall of adult use to property line of protected use	From structure to structure	Straight line
Seattle, Washington	Not applicable	Not applicable	Not applicable
Tucson, Arizona	Property lot line to lot line	From each use	Straight line
Whittier, California	Property lot line to lot line	From each use	Straight line

Notes:

1. Austin uses a weighted calculation of actual residential use within 1,000 feet.

2. Indianapolis measures the separation distance for an adult business located in an "integrated center" only from the exterior wall nearest the space actually leased by the adult business.

3. Manatee County prohibits adult entertainment establishments "within or adjacent to property designated as entranceways."

teria that allow "waivers" of locational provisions by the zoning board, related to "public interest," "injur[y] to nearby property," or "development of a 'skid row' or blighted area." (For a discussion of the need for standards in making decisions about uses protected by the First Amendment, see Chapter 5.) Fort Worth's zoning ordinance permits the granting of variances, like all zoning ordinances, based on demonstrated hardship, such as extraordinary conditions that are peculiar to a piece of property because of its size, shape, or topography. Based on conversation with Fort Worth staff, there continues to be concern about the granting of variances from the distance separation requirements for sexually oriented businesses. According to Texas statutes, however, the ordinance cannot preclude the granting of such variances if the request meets the standards for relief of a hardship imposed by the strict application of the zoning ordinance standards.

Sexually oriented businesses, however, have found ways to comply with separation requirements. For instance, in one of the cities surveyed, as a solution to complying with the city's separation requirement, an operator tore one corner off a building to create an adequate separation from another adult use. In another city, an operator constructed an interior "corner wall" from which the city agreed the separation distance could be measured. These are perfect examples of what we have come to learn about people in the sex entertainment business—they are very creative!

Of the 21 local governments included in this study, only a few make significant distinctions among adult uses in regulating where they are permitted to locate.

TREATING SPECIFIC ADULT USES DIFFERENTLY

Of the 21 local governments included in this study, only a few make significant distinctions among adult uses in regulating where they are permitted to locate. Denver permits adult media to be carried in mainstream bookstores if the gross floor area or shelf space does not exceed 10 percent and access to the materials is limited to those 18 years or older. Austin separates "adult lounges" from other adult uses, and there is a separate ordinance with design and operating requirements applicable only to adult arcades. It treats all adult uses other than arcades the same. Neither Seattle nor Phoenix applies its licensing regime to adult bookstores that do not have video-viewing booths, and Seattle does not distinguish adult bookstores from other bookstores in its zoning.

All of the other local ordinances we reviewed permitted all types of adult uses within the same zoning district and generally made them subject to the same separation requirements. Most of these ordinances define a variety of adult uses separately but then lump them into a single category (such as "adult entertainment" or "adult use") for purposes of regulation. Saint Paul lists each of the adult uses separately in the applicable zoning districts, as though it considered varying the list by district, but the same list of adult uses appears within each district. Charlotte, Newport News, Oklahoma City, Seattle, and Whittier, however, did require larger separation requirements for certain sexually oriented uses, such as adult book and novelty stores and peep shows.

Treating different sex businesses differently for separation purposes is a good start. Cities, however, also need to consider placing different sex businesses in different districts. The following material discusses some regulatory issues related directly to specific adult uses: adult bookstores, video-viewing booths (peep shows), exotic dancing, and clothing modeling.

Adult Bookstores

We have found a wide variation in the manner in which surveyed jurisdictions choose to define and regulate adult bookstores or bookstores that carried adult media. Despite these variations, almost all surveyed jurisdictions

include videos and adult novelties in their computation of "adult" stock-in-trade for defining businesses adult bookstores. (See Table 4-6.) Although adult novelties are included, a number of jurisdictions provide for more stringent standards for businesses that are defined as "adult novelty stores." Most ordinances, however, were never quite clear as to when an adult bookstore crosses over from being an adult bookstore to an adult novelty store.

Portland and Seattle do not regulate adult bookstores as adult businesses. In contrast, Charlotte uses higher separation requirements for adult bookstores and video-viewing booths than for adult live entertainment and motion picture theaters.

The most problematic question is, when does a bookstore cross the line from a traditional bookstore to an adult bookstore? Many jurisdictions use the terms "substantial," "significant," "preponderance," or "percentage stores" to differentiate adult bookstores from mainstream bookstores.

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New York City defines adult bookstores as bookstores that have a "substantial portion" of their stock-in-trade in books, magazines, photographs, films, video cassettes, or other printed matter or visual representations that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas'." The city has an administrative operations policy that specifies that "40 percent or greater" will be used to define "substantial portion" and includes the following factors.

- The amount of such stock accessible to customers as compared to the total stock accessible to customers in the establishment
- The amount of floor area and cellar space accessible to customers containing such stock
- The amount of floor area and cellar space accessible to customers containing such stock as compared to the total floor area and cellar space accessible to customers in the establishment

Like New York, Charlotte, Indianapolis, and Minneapolis make the determination based on a "preponderance of stock-in-trade" or "significant or substantial portion of the stock-in-trade" tests. Added to this, Atlanta and Indianapolis include a test based on dollar volume as a determinant.

The percent of adult media is often used to define the terms "substantial," "significant," or "preponderance." Atlanta defines "significant stock and trade" as 25 percent of the floor area, gross sales, or the dollar value of inventory as the threshold for determination. Newport News defines adult bookstores as those containing "magazines and other periodicals, or sex aids or paraphernalia of which more than 25 percent are distinguished or characterized by their emphasis on or having as its dominant theme or purpose, matters depicting, describing or related to sexual activities." Saint Paul and the two California cities, Whittier and San Diego, use a threshold of 15 percent of floor display area. Manatee County and Denver are the most restrictive in their definition of an adult bookstore. They use a threshold of greater than 10 percent of the "business stock" and measure it by gross floor area (Denver also includes shelf space area and monthly sales). Some cities, such as Louisville, mix the measurement standards, using 10 percent of the stock-in-trade and 15 percent of the floor space that is open either to the public generally or to members of the public other than minors or more than a total of 160 square feet. Table 4-6 illustrates the criteria used by jurisdictions in distinguishing adult bookstores from general bookstores.

Connie Cooper

Cities employ the term "substantial portion" or something similar to help them define sex businesses. New York City, for example, uses 40 percent of stock or floor area devoted to sexually oriented materials to define a sex business. This store had its substantial portion of stock in t-shirts, sunglasses, baseball caps, and toys to avoid being classified a sex business.

TABLE 4-6. CRITERIA FOR DEFINING ADULT BOOKSTORES

			Included in Computation		
Jurisdiction	**Based on**	**Proportion**	**Books and Magazines**	**Videos**	**Devices**
Atlanta, Georgia	stock/floor area/value/sales	"significant portion" defined as 25%	X	X	X
Austin, Texas	floor area	"holds itself out" and 35%	X	X	
Charlotte, North Carolina[1]	stock	"principal business purpose" "substantial or significant"	X	X	X
Cincinnati, Ohio	stock/excludes minors/ revenues/interior floor area	"substantial or significant"	X		X
Cleveland, Ohio[2]	floor or shelf area	"principal purpose"	X	X	X
Denver, Colorado	shelf space/monhtly sales receipts/floor area	>10% floor area or sales "substantial or significant"	X	X	
Fort Worth, Texas	inventory or receipts	35% of principal operation	X	X	X
Indianapolis, Indiana	stock/"dollar volume"	"preponderance"	X	X	
Louisville, Kentucky	stock, measured by floor area	10% stock/15% floor area "substantial or significant" or 160 square feet of store	X	X	X
Manatee County, Florida	stock, measured by floor area	10% of total gross floor area			
Minneapolis, Minnesota	stock	"substantial or significant" "segment or section devoted" as 10%	X	X (viewing booths)	X
Newport News, Virginia	stock	25% "stock in trade"	X	X (viewing booths)	X
New York, New York	stock and floor area	"sustainable portion" (defined as 40% or more)	X	X	X
Oklahoma City, Oklahoma[3]	stock	significant portion	X	X	X
Phoenix, Arizona		"substantial portion" or "principal purpose"	X	X	X
Portland, Oregon	not applicable	Not applicable			
Saint Paul, Minnesota	floor area	15% "significant portion" or greater than 150 square feet	X	X	X
San Diego, California	display or floor area	15%	X	X	X
Seattle, Washington	not applicable	Not applicable			
Tucson, Arizona	stock	"principal business purpose"	X	X	X
Whittier, California	floor area	>15%	X	X	

Notes:

1. In Charlotte, video stores are not deemed "adult" video stores if they have no more than 10 percent of their square footage devoted to sexually oriented videos, the videos are in a separate room with access limited to persons 18 years or older, and the number of videos offered in the general circulation portion of the business reflect a typical quantity of new release videos.

2. Cleveland's standard of floor or shelf area and >20 percent are not part of ordinance; that is an administrative decision.

3. Oklahoma City regulates adult novelties in a separate part of their code so that police can enforce compliance.

The purpose or business activity of the bookstore is often used as a measure in determining whether a bookstore is an adult bookstore. Zoning and/or licensing officials in Charlotte, Phoenix, and Tucson use a test based on the "principal business purpose" or "principal business activity." (See discussion in Chapter 5 of the need for objective standards.) As a practical matter, our interviews with local officials have found no examples in which a local government took a business to court in a dispute over the interpretation of such a subjective standard. Some cities, such as Austin, use a combination of business purpose ("holds itself out as") and floor-area (35 percent threshold). The city finds the use of floor area as a method of distinguishing adult bookstores works well for its small inspections staff. In part, Cincinnati relies on whether the business "regularly excludes minors" from the business or a portion of it "because of the sexually explicit nature of the items sold, rented or displayed therein." The rest of the Cincinnati criterion uses the "substantial or significant portion of the business" test.

There is a certain appeal to basing the distinction between x-rated bookstores and mainstream bookstores on the respective percentage of sales. In our interviews of attorneys and enforcement officers in these jurisdictions, however, we found absolutely no one who had any success in implementing such a measure. As with any enforcement issue, simpler is better—and simpler measures like percentage of stock or percentage of floor area are clearly more enforceable.

There is a certain appeal to basing the distinction between x-rated bookstores and mainstream bookstores on the respective percentage of sales. In our interviews of attorneys and enforcement officers in these jurisdictions, however, we found absolutely no one who had any success in implementing such a measure.

In our survey, we found that jurisdictions often include sex novelties or "marital aides" in determining whether a bookstore meets the "adult" classification threshold. Nine of the local governments we surveyed (half of those specifically regulating adult bookstores) include sex novelties in measuring the proportion of floor area or stock-in-trade devoted to the adult use; those local governments are Atlanta, Charlotte, Cincinnati, Cleveland, Louisville, Newport News, Saint Paul, San Diego, and Whittier. The definition of "adult novelty shop" in Phoenix includes stores that include both novelties and printed material; an adult "bookstore" includes only printed material. Austin and Oklahoma City define adult novelty stores separately, although Austin treats them no differently from adult bookstores.

The City of Portland, Oregon, has a particularly difficult time in regulating adult bookstores due to provisions in the state constitution. In the *City of Portland v. Tidyman,* 759 P.2d 242 (Or 1988), the city declared an adult bookstore as a public nuisance due to its location in an area prohibited by city ordinance. When the bookstore owners successfully defended their operation at the circuit court and appeals court levels, the city petitioned for review by the Oregon Supreme Court. The lower courts' judgments were upheld with the supreme court affirming that the city's ordinance imposing location and spacing restrictions on "adult businesses" was an invalid restraint on free expression under the state constitution. At this point, Portland's regulatory scheme in the field is limited to the regulation of nude, live entertainment activities, which are defined as "adult businesses" and which are required to obtain "adult business permits," a form of local licensing.

Video-Viewing Booths

We have found that the treatment of video-viewing booths or "peep shows" varies considerably from jurisdiction to jurisdiction. This is most likely due to the local perspective that video-viewing booths encourage, or at least allow, pernicious behavior. (See discussion in Chapters 2 and 3.) In examining local ordinances, it appears that jurisdictions are spending

an inordinate amount of regulatory time on this form of sexually oriented land use, with the exception of Portland, where the state constitution does not allow for local ordinance regulating sexually oriented uses.

Cincinnati, Cleveland, Fort Worth, Indianapolis, San Diego, and Whittier address this use separately; most of them refer to a collection of the booths as an "arcade," but San Diego uses the term "peep show establishments." Three cities (Atlanta, Charlotte, and Saint Paul) have a definition of "adult mini-motion-picture theater" that clearly includes video-viewing booths. In three others (Denver, Newport News, and Tucson), this activity appears to fall under the definition of "adult motion picture theater." Those cities make no distinctions in size of theater. Austin has a separate ordinance that regulates "adult arcades" and establishes interior design standards as well as operational requirements. Although Whittier addresses arcades in its ordinance as though they may be permitted, the ordinance expressly prohibits the showing of films in closed private viewing rooms.

Fort Worth, Indianapolis, and Whittier define an "adult arcade" as one in which images are shown to "five or fewer persons per machine at any one time." In contrast, Phoenix limits the number of persons in viewing booths to one person at a time. As we have indicated in Chapters 2 and 3, the booths encourage sexual activity in a quasi-public place; allowing multiple persons in the booths simply increases the likelihood and/or the variety of sexual activity occurring in the booths.

In addition to regulating the seating capacity of video-viewing booths, many jurisdictions have very specific standards for the design of the video-viewing space. Seattle and San Diego set minimum aisle widths. Seattle allows doors but specifies minimum lines of sight and requires the bottom of the door to be 24 inches off the floor; allows a chair in the booth only if there is also a window through the door; prohibits door locks and steps and risers into booth; and prohibits holes between booths unless covered with a ventilation device.

Cincinnati's licensing ordinance includes provisions that address management's role in controlling the behavior of patrons within the booths, such as requiring the management to ensure that "no sexual activity" (defined to include masturbation) occurs on premises. In addition, the licensing ordinance mandates that no more than one person can be present in a viewing room at any time; daily cleaning be done to remove, among other things, "bodily fluid"; and that a view of the interior of each viewing room be available from the manager's station.

Connie Cooper

"Live" lingerie sessions can result in the same kind of unwanted activities that can occur with lap dancing and other kinds of "touching" and live entertainment businesses. Those businesses should be restricted to locating in the same zoning district because they have the same kind of impacts.

Exotic Dancing and Clothing Modeling

Like video-viewing booths, live adult entertainment, such as exotic dancing (the industry's name for "erotic" dancing) and clothing modeling (the clothing is typically lingerie), presents unique challenges for cities trying to regulate such uses. Seattle requires that entertainers exposing specified anatomical areas be on a stage at least 18 inches above the floor and 6 feet from the nearest patron, and prohibits certain acts or simulated acts and most physical contact. Many adult entertainment ordinances limit the physical contact to a patron "tucking" the gratuity in the performer's costume or touching the performer's hand. In Denver, the Excise and Licensing Code permits totally nude entertainment but only in establishments that do not serve alcohol, and thus they are referred to as "pop shops." Some jurisdictions also call these juice bars. Topless dancing in establishments that serve alcohol is permitted in what Denver refers to as cabarets. In Phoenix, establishments serving alcohol with adult entertainment are restricted to specific com-

mercial and industrial districts and must be 500 feet from a residential district and 1,000 feet from other adult uses. As mentioned above, Atlanta imposes a much greater separation requirement from adult entertainment establishments that serve alcohol.

Charlotte recently amended its "Businesses and Trades" ordinance to include licensing of sexually oriented businesses, which include adult live entertainment and clothing modeling. The ordinance uses most of the traditional provisions but adds a few unique features. Live adult entertainment (meaning nude dancing) must be in spaces 750 square feet or greater, on a raised stage, and visible to other patrons and employees. The ordinance also prohibits private or semi-private room dancing (what are sometimes called VIP booths). Clothing modeling cannot result in the exposure of specified anatomical areas, nor touching by the model or patron below the waist and above the knee, or on the breasts, and no straddling is allowed. The ordinance further stipulates that the modeling must be visible to another employee who is not a model, and fees or gratuities must be offered and accepted before the modeling session begins.

Eric Damian Kelly

A real problem with the appearance of sex businesses is the treatment of windows. Windows end up being painted or boarded over to prevent visual access to the materials inside. In some locations, like this one, not only is ugliness an issue, but the copy area likely exceeds limits in the sign ordinance.

IMAGE IS EVERYTHING

The image that sexually oriented uses project to the passing public is often a major concern of local government. To address the image issue, Minneapolis limits signs to flat wall signs no more than a total area of one square foot of sign per foot of lot frontage; prohibits the display of merchandise that can be seen from the sidewalk; and requires that windows be covered with opaque materials. Whittier zoning officials prohibit temporary and changeable copy signs, outdoor loudspeakers, and "painting of the exterior with any design that would simulate a sign or advertising message" or maintaining the exterior "substantially inconsistent with the external appearance of structures of abutting properties." Although we have some concerns about the apparent subjectivity of a standard like this (see Chapter 5), a policy to ensure that adult businesses on the outside conform to the character of the area is a legitimate one. One city, which shall remain nameless, tests the Supreme Court's "time, place, and manner" rule. It established more restrictive regulations and conditions in certain zoning districts for adult uses. These restrictions included limiting signage to one wall sign of less than 10 square feet, barring flashing lights, and limiting sign content.

A real problem with the appearance of adult businesses involves the treatment of windows, particularly where such a business is located in an older, traditional business district. Most such businesses protect minors and the general public from accidental exposure to sexually explicit material by keeping it out of the windows, but that leaves open the question of what to do with the windows. Many adult businesses simply paint or board over their windows. Such a strategy, however, elicited protests from neighbors in one traditional Rochester neighborhood; they believed that neighborhood revival would depend in part on maintaining an interesting street front, with continuous rows of windows for pedestrians to view. On the other hand, a percentage store in Kansas City, with an eclectic mixture of adult and non-adult goods, upset neighbors with its creative display of Beanie Babies in the window; neighbors there argued that the Beanie Babies would encourage young children to want to go into the store, where they would be greeted inside the door with a variety of racy lingerie and leather goods.

In short, although there are legal hazards in treating adult businesses differently from other businesses, several local governments have attempted to address the issue of exterior appearance and compatibility.

There has been some support in the courts for special restrictions on signs for sexually oriented businesses (see Chapter 5), and at least the New York City study (Chapter 3) provides some basis for such regulations. Nevertheless, imposing special restrictions on the signs of adult businesses raises essentially a double First Amendment issue and places a great burden on the local government to defend its regulations.

AMORTIZATION OF SEXUALLY ORIENTED USES

It is often the case that undesirable or inappropriately located sexually oriented uses do not go away on their own; they often need encouragement. One city that has taken its fight against sexually oriented businesses to a new level and, consequently, has garnered a lot of national attention is New York City.

In 1995, the New York City Planning Commission approved amendments to the Zoning Resolution governing adult entertainment establishments. The resolution took effect on October 25, 1995. A key provision of the ordinance was the nonconforming use provision. This states, "Non-conforming adult establishments must, under the resolution, terminate within one year of the effective date of the resolution" (Article V, Section 52-77). The resolution included special "amortization" provisions, however, for owners of nonconforming establishments who have not recovered substantially all of their capital investment in the establishment (or a nonconforming sign). It permitted these owners to apply to the Board of Standards and Appeals for permission to continue for additional time sufficient for the owner to recover "substantially all of the financial expenditures incurred related to the non-conformity" (Article VII, Section 72-40.h). The impact of this amortization provision was a significant reduction in the number of adult establishments within the city. (See sidebar.) Note that New York City could make a compelling case for amortization, which was the need to change the combat-zone image of Times Square. Although there is little question that the city has succeeded in doing so, at least one critic argues that the real motive of the administration was to facilitate profitable real estate development rather than to benefit the general public (Delany 1999).

Oklahoma City provided for amortization of nonconforming adult novelty shops within three years of date of adoption of their ordinance regulating these businesses. Phoenix prohibits conversion of a nonconforming adult use to another adult use to reduce the likelihood of the use continuing.

Newport News, in creating a new regulatory scheme, requires conditional use permits for adult uses. The city did not automatically grant any of the existing establishments conditional use permits; thus, all are nonconforming, even where they exist in zones that would permit the uses, subject to the conditional use requirements. Newport News has observed that some nonconforming businesses have been abandoned for two years, which is the period required to lose protected status as a nonconforming use under their ordinance. In contrast to these cities, Manatee County provides specific protection for established adult uses that are classified as nonconforming uses.

LESSONS LEARNED

1. Regulating sex businesses is complex.
2. Zoning is an essential but inadequate tool to regulate sexually oriented businesses.

MAYOR GIULIANI"S PRESS RELEASE ON NYC SEX SHOPS

"Sex shops destroy neighborhoods," Mayor Rudolph Giuliani said. . . . "Our adult-use zoning regulations not only mean that valuable commercial areas like Times Square will be cleaned up, but that sex shops will no longer be allowed to destroy the quality of life in residential neighborhoods. And when our plan is fully implemented, only 29 of the 177 sex shops that existed in 1993 will be permitted to remain open. . . ." The new zoning requirements and combined efforts of the Mayor's Office of Midtown Enforcement and 42nd Street Development Corporation, have resulted in the closure of more than 80 percent of the adult-use establishments in the Times Square and 42nd Street Area (www.ci.nyc.ny.us, Release #554-97, September 1997).

3. As we demonstrate throughout this report, the sex business is really many businesses—in this chapter, we have found that at least some communities have recognized that fact in their zoning ordinances, treating retail sex businesses differently from those that provide on-premises entertainment
4. A handful of communities treat bookstores that feature mostly x-rated material the same as other bookstores
5. Most communities attempt to distinguish between "adult" bookstores and mainstream bookstores that happen to include some material that falls within the local definition of sexually oriented material.
6. The most effective units of measure for making a distinction between "adult" bookstores and mainstream bookstores that happen to include some material are those that are easiest to implement—percentage of stock, or percentage of floor area, or the fact that the business "holds itself out" or advertises itself as an adult use.
7. Most communities that regulate sexually oriented businesses require that they be separated by specified distances from uses likely to attract children and families—schools, houses of worship, parks, playgrounds, and daycare centers.
8. Today, most communities have rejected the "combat zone" approach (viz., concentrating adult uses) and also require that sexually oriented businesses be separated from each other.
9. A few communities prohibit the operation of multiple sexually oriented businesses in the same location.
10. The communities with the most detailed operational controls use business licensing ordinances coupled with zoning to implement those controls.

CHAPTER 5

Major Legal Issues In the Regulation of Sex Business

THE MATERIAL IN THIS CHAPTER, LIKE THE REST OF THE REPORT, IS PROVIDED FOR EDUCATIONAL PURPOSES ONLY. A local government or other interested party should take formal action in this field only with the advice of counsel licensed in the state. The material in this chapter may be useful to attorneys who do not regularly work in the field, and readers may want to provide copies of this report to their attorneys.

This chapter discusses legal issues involved in the regulation of lawful sexually oriented businesses. It thus deals with the regulation of movie theaters that show sexually oriented movies, stores that carry sexually oriented books and magazines, stores that carry sexually oriented novelties, stores that rent sexually oriented videos, and establishments dealing with a variety of live entertainment with a sexual orientation. The chapter consistently uses the term "sexually oriented business" or "sex business" to refer to businesses subject to special regulation because of their sexual focus. Although "adult business" is a somewhat more commonly used phrase, it is a broader concept that arguably includes businesses that sell lottery tickets, alcohol, and tobacco goods—all products limited to adult consumption in most states.

Local governments can regulate the location of sexually oriented businesses through zoning and can also regulate the conduct of the business directly through licensing.

CONSTITUTIONAL CONTEXT FOR THE AUTHORITY TO REGULATE

As the cases discussed in this chapter indicate, local governments clearly can regulate the location of sexually oriented businesses through zoning, and, in many states, some or all local governments can also regulate the conduct of the business directly through licensing. Zoning for sexually oriented businesses can be challenged on any of the same grounds on which other zoning can be challenged. The focus of this chapter, however, is on the interplay between the First Amendment and local regulation. Clearly some of the products handled by sexually oriented businesses—certain sexually oriented books, magazines, videos, and movies—enjoy First Amendment protection. The extent and nature of that protection, and the extent to which it applies to sexually oriented businesses (which in most cases are distinct from the materials handled) are far from clear.

This chapter was adapted from Chapter 11 of *Zoning and Land Use Controls*, edited by Eric Damian Kelly (New York: Matthew Bender & Co.) and is used with permission. The original source contains extensive statutory and case citations. For those without access to the complete 10-volume set of *Zoning and Land Use Controls*, the individual chapter can be purchased at http://www.bender.com.

Basic Constitutional Principles

The basic constitutional principles involved in the regulation of commercial speech 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 (1980), as summarized by the plurality in Metromedia, Inc., v. City of San Diego, 453 U.S. 490 (1981), a billboard case, 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.

Although sexually oriented communication is not necessarily commercial, virtually all the litigation in this field involves commercial enterprises offering adult fare. There are occasional news articles about controversy over an explicit book in a library, but in reviewing hundreds of cases in the field, we have encountered none involving a library or educational institution offering sexually oriented materials. All of the cases have involved the sex business. Although not often citing the *Central Hudson* test in adult use cases, the courts clearly apply the same standards to those cases.

Much of the work and the writing in the field focuses on the first part of the *Central Hudson* test, which recognizes that commercial speech involving unlawful activity is not protected by the First Amendment. Obscene material lacks First Amendment protection (see *Roth v. United States*, 354 U.S. 476 (1957)), although the Supreme Court and lower courts have had a good deal of difficulty in defining obscenity. In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court held that a work is obscene if:

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

Although most states have statutes on obscenity, the U.S. Supreme Court has held that a state statute is not determinative of "contemporary community standards" regarding obscenity, in part because the state is too large a geographical jurisdiction to be a "community" and in part because the issue of "contemporary community standards" is a factual one to be left largely to the jury.

Although most states have statutes on obscenity, the U.S. Supreme Court has held that a state statute is not determinative of "contemporary community standards" regarding obscenity, in part because the state is too large a geographical jurisdiction to be a "community" and in part because the issue of "contemporary community standards" is a factual one to be left largely to the jury (*Smith v. U.S.*, 431 U.S. 291 (1977)). The Court provided this further explanation:

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable. We have stressed before that juries must be instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority. . . . The type of conduct depicted must fall within the substantive limitations suggested in *Miller*. . . . The work also must lack serious literary, artistic, political, or scientific value before a conviction will be upheld; this determination is particularly amenable to appellate review. Finally, it is always appropriate for the appellate court to review the sufficiency of the evidence. (at 305-06)

The Nebraska Supreme Court has applied *Smith* in two cases there and in doing so has offered a useful explanation of the Supreme Court's guidelines on defining obscene material:

> We first independently review the material to determine whether the material in question depicts or describes patently offensive sexual conduct that may be regulated. The Court in *Miller* gave two plain examples of what a state statute could define for regulation: (1) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and (2) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. Therefore, our initial inquiry is not whether the material is obscene, but whether the material depicts or describes patently offensive sexual conduct that may be regulated as set forth in *Miller*. If the material does not, then as a matter of law the material cannot be found to be obscene. (*Main Street Movies, Inc., v. Wellman*, 598 N.W.2d 754, at 764-65 (Neb. 1999); see also *State v. Harrold,* 256 Neb. 829, 593 N.W.2d 299 (Neb. 1999), *cert. denied* 145 L. Ed. 2d 939, 120 S. Ct. 992 (U.S. 2000).

In *Wellman* the court went on to provide what amounts to a decision tree for dealing with obscenity:

> For purposes of our analysis, we designate this independent review [cited as "initial inquiry" in the quotation above] "part A." Part A of the independent review conducted by an appellate court in First Amendment cases is intended "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." [citation to its own decision in *Harrold*, quoting another Supreme Court decision, which has been omitted]
>
> In part A of the review, our initial focus is on the substantive content of the material. If we determine as a matter of law that the material depicts or describes patently offensive types of sexual conduct that may be regulated. . . , then we proceed with what we designate "part B" of our analysis. Part B is concerned with whether, as a matter of fact, the material taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, part B(1); is patently offensive, part B(2); and lacks serious literary, artistic, political, or scientific value, part B(3), as set forth in Section 28-807(10). Part B adopts the three-prong framework announced in *Miller*. . . . (at 760)

Applying this type of analysis in *Wellman,* in which it affirmed (with modifications) a trial court decision finding that the materials were not obscene, the Nebraska high court cited the trial court finding that:

> the existing contemporary community standard in Sarpy County permits the presence of sexually explicit films for sale or rent by the plaintiffs on the following conditions: (1) The films do not depict violence in sexual relations; (2) The films do not depict sexual relations with children or family members; (3) The films do not depict sexual relations with animals; (4) The films are not available to minors; and (5) The films are not displayed in a manner or place where they might be viewed, in whole or in part, by non-consenting adults. (at 761)

Although it is clear that obscene material lacks First Amendment protection, it may not be clear what is obscene. The *Harrold* case in Nebraska arose when an adult business operator brought a declaratory judgment action to determine whether the material was obscene; it was decided by

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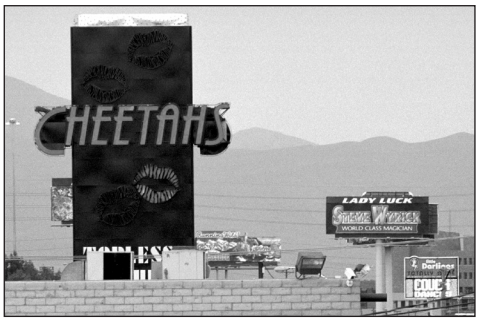


Steve Marks, *Las Vegas Sun*

"Contemporary community standards" play a role in determining what is obscene. What goes on in Cheetah's in Las Vegas might not be obscene by Las Vegas standards, even if someone deemed it "patently offensive."

The biggest problem that the borough had with many of its arguments was that there was no evidence in the record of the problems that it alleged to occur in and around sexually oriented businesses. It could not demonstrate from the record that a sexually oriented business was any more likely than a restaurant or other use permitted under the ordinance to lead to problems with trash, noise, or general disorderliness.

the courts under criminal standards because criminal standards would apply if the materials were found to be obscene and Harrold were prosecuted for distributing them. The only clear rules for a local government to understand are that:

1. if any part of the work has "serious literary, artistic, political or scientific value, it is not obscene;
2. only if the work includes material that is patently offensive may it be found obscene. From examples given in *Miller* and cited above in *Smith,* it appears that "patently offensive" material is generally what we have defined as "hard core," including in some cases what we have defined as extremely hard core;
3. if the work includes material that is patently offensive, then the question of whether the material is obscene is one to be resolved by a jury under "contemporary community standards."

Supreme Court Landmark Decisions

The United States Supreme Court has decided five major cases directly on the issue of substantive regulation of sexually oriented uses. In all five, the Court was concerned with the First Amendment issues raised by the ordinances in question.

Young v. American Mini Theatres, Inc. The first of the five cases was *Young v. American Mini Theatres*, Inc., 427 U.S. 50 (1976), in which the Court upheld a "dispersal" ordinance against constitutional challenge. The heart of the 1972 ordinance was a requirement that a sexually oriented business be separated by at least 1,000 feet from any two other such uses as well as 500 feet from any residential area. In a 5-4 decision, the Court found that this was a simple "time, place, and manner" regulation, rather than a prior restraint on protected speech. In a separate, concurring opinion, Justice Powell suggested that the ordinance was little different from any other zoning ordinance.

Schad v. Borough of Mt. Ephraim. Six years after Young, the Supreme Court again addressed the issue of zoning for sexually oriented businesses in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). The local government had adopted a simple zoning ordinance and claimed that it had tried to limit commercial uses to those designed to serve only its residents' needs. The defendants operated an adult bookstore, where they sold books, magazines, and films. They offered coin-operated video-viewing booths (discussed below in this chapter) and at some point installed a coin-operated device that opened a shade into a booth and allowed the customer to watch nude dancing in the privacy of a booth. The operators were prosecuted and convicted of municipal violations. The New Jersey court affirmed the conviction, framing the case by finding that the ordinance banned nude dancing. Defendants appealed, and the Supreme Court reversed the appellants' convictions.

This case directly confronted the First Amendment issue because it completely banned a form of communication that, at least as Justice White suggested, was entitled to First Amendment protection. The Court rejected the contention that the "alternative avenues" requirement was met by the fact that live entertainment, including nude dancing, was easily and widely available outside the borough, in nearby communities.

The biggest problem that the borough had with many of its arguments was that there was no evidence in the record of the problems that it alleged to occur in and around sexually oriented businesses. It could not demonstrate from the record that a sexually oriented business was any more likely than a restaurant or other use permitted under the ordinance to lead to prob-

lems with trash, noise, or general disorderliness. Clearly, in this case the Court began to lay the foundation for the now well-accepted requirement that a community must have objective evidence of the impacts of sexually oriented businesses if it treats such businesses significantly differently from other businesses that would otherwise seem to fall in the same use group.

Barnes v. Glen Theatre, Inc. A decade after its decision in *Schad*, the Supreme Court again dealt with a nude dancing case. In this case, *Barnes v. Glen Theatre*, Inc., 501 U.S. 560 (1991), the Court considered a constitutional challenge to an Indiana statute that prohibited all public nudity (Indiana Code, Section 35-45-4-1) and that had been interpreted by the parties to require that erotic dancers would have to wear at least "'pasties' and a 'G-string'" (at 563).

The action arose when two adult business operators sought an injunction against enforcement of the statute. Glen Theatre, Inc., was the operator of the Kitty Kat Lounge in South Bend, where it wished to offer nude dancing in a bar. The other challenger was an adult bookstore that wanted to have dancers perform in enclosed booths, separated by a glass partition from customers—much like the arrangement in Mt. Ephraim. The Supreme Court, in a confusing set of separate opinions, upheld the statute, with the leading opinion (signed by only three Justices) holding squarely that the statute did not violate the First Amendment. The case is discussed in more detail in this chapter, under the heading "Regulation of Nude Dancing."

City of Renton v. Playtime Theatres, Inc. Five years after confusing the issue of the regulation of nude dancing, the Supreme Court once again addressed the First Amendment implications of an ordinance limiting the locations of movie theaters showing primarily sexually oriented material. In *City of Renton v. Playtime Theatres*, Inc., 475 U.S. 41 (1986), Renton, a Seattle suburb, had enacted a zoning ordinance that prohibited any adult motion picture theater from locating within 1,000 feet of any residential zone, single-family or multifamily dwelling, church, or park, or within one mile of any school. The ordinance also specifically defined "adult motion picture theater." The parties challenging the ordinance had purchased two existing theaters with the intention of using them to show sexually oriented films. In the meantime, the city passed its ordinance, and the theater owners sued to invalidate it. The district court upheld the ordinance, but the Ninth Circuit found that the ordinance violated the First Amendment, reversed the trial judge, and remanded the case for reconsideration and the city appealed (*Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984), *rev'd*, 475 U.S. 41, 106 S. Ct. 925 (1986)).

The case involved two basic issues: (1) Did the ordinance substantially restrict First Amendment interests?, and (2) Could Renton rely on evidence or experiences from other cities in establishing proof of secondary effects of adult entertainment on surrounding areas? The Supreme Court reversed the Ninth Circuit and upheld the ordinance in a 6-1-2 decision.

Justice Rehnquist, writing for the majority, relied on *Young* to hold that the ordinance did not violate the First and Fourteenth Amendments per se. The Court held that the ordinance in question was a content-neutral time, place, and manner regulation, even though a motivating factor may have been control of protected speech. The Court found that the governmental interests asserted in this case, relating largely to quality of life, were valid grounds for the ordinance, and it further held that the city was entitled to rely on earlier Seattle studies of the problems with such businesses without conducting its own studies.

The Court found that the governmental interests asserted in this case, relating largely to quality of life, were valid grounds for the ordinance, and it further held that the city was entitled to rely on earlier Seattle studies of the problems with such businesses without conducting its own studies.

The aspect of the ordinance that distinguished it from *Young* was the fact that only about 5 percent of the commercial land in the city could

meet the separation requirements imposed under the ordinance. In language that remains important, the Court held:

> 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. [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters will be able to obtain sites at bargain prices. (at 54)

The dissenters were troubled by the extremely limited land area available to movie theaters intending to show sexually oriented film and by the lack of significant evidence in the record to show any likely adverse effects of the theaters on the city, on neighborhoods, or on other land uses.

City of Erie v. PAP's A.M. tdba Kandyland. The Supreme Court revisited this issue in 2000 in *City of Erie v. PAP's A.M. tdba Kandyland*, 146 L.Ed.2d 265, 120 S.Ct. 1382 (U.S. 2000). The case has a convoluted history. The trial court permanently enjoined enforcement of the City of Erie's ordinance regulating adult uses; the Commonwealth Court reversed that order, and the Pennsylvania Supreme Court reversed the Commonwealth Court (553 Pa. 348, 719 A.2d 273 (1998)).

The ordinance at issue made it a "summary offense" to appear in a "state of nudity"; the effect of that ordinance, as to an adult female, was a requirement that she wear "at a minimum, what are commonly known as 'pasties' and a 'G-string'" (719 A.2d, at 276).

After a lengthy recitation of the Pennsylvania court's decision (discussed in the "Regulation of Nude Dancing" section of this chapter), Justice O'Connor in the plurality opinion moved to the issues, first reiterating the plurality position from *Barnes*:

> Being "in a state of 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 that it falls only within the outer ambit of the First Amendment's protection. (2000 U.S.LEXIS 2347 at 23-24)

Her opinion went on to say:

> We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech. (at 23-24)

Applying that test, the plurality opinion found that the ordinance here was directed at public nudity in general and not at expressive conduct in particular. That opinion said more than once that it considered the ban on public nudity to be directed at the secondary effects of sexually oriented businesses, not at the expressive conduct.

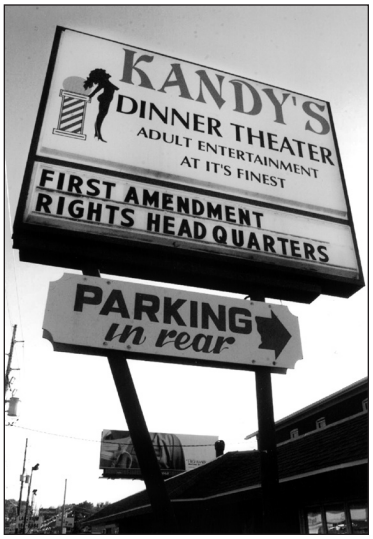
If an ordinance is not in violation of First Amendment doctrine given one of the bases discussed above, it is analyzed as a "time, place, and manner" restriction. The classic formulation of the four-part "time, place, and manner" test was presented by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968):

(1) the regulation is within the power of the government;

(2) it furthers an important government interest;

(3) the government interest is unrelated to the suppression of speech; and

(4) the incidental restrictions on free speech are no greater than are essential to further the interest.



AP/Wide World Photos

The U.S. Supreme Court has made it clear that nude dancing is not a protected form of speech, so Kandy's may have been (the business is closed) a headquarters for First Amendment rights, but it could no longer allow all-nude dancing. The recent decision is significant for the 3,000 adult cabarets nationwide.

ZONING TECHNIQUES APPLIED

Zoning is the basic technique used by local governments to regulate the location of sexually oriented businesses—just as it is the basic technique used by local governments to regulate the location of other businesses. In *Young* and *Renton,* the U.S. Supreme Court upheld the application of zoning techniques to sexually oriented businesses as a distinct category of land use.

Chapter 4, with specific examples from 21 cities, illustrates the variety of ways in which zoning is applied to sexually oriented businesses. Zoning restrictions follow standard zoning practice by restricting defined businesses to particular zones. Many local ordinances also include requirements that sexually oriented businesses be separated by a specified distance from one another and/or from residential and related uses. All of the communities studied allow adult uses as "uses by right" in at least some general commercial and industrial zones, subject to separation requirements.[1]

The much-publicized New York City adult entertainment ordinance of 1995 relied on a combination of traditional zoning and separation requirements to eliminate sexually oriented businesses in many areas near residences. In *Stringfellow's of New York v. City of New York,* 91 N.Y.2d 382, *cert. den.* 142 L.Ed.2d 658, the New York Court of Appeals upheld the ordinance, which limited such uses to commercial and manufacturing zones, removing them as permitted uses from several mixed-use zones that were designated commercial but that also permitted residential uses.

Most communities that regulate sexually oriented businesses include some sort of separation requirement that results in dispersal of the businesses, as upheld in *Young* and *Renton*. The distance requirements vary widely, as do the uses that are being "protected" from the adult entertainment. A typical ordinance prohibits adult uses from locating within 500 to 1,500 feet of certain other uses, such as residential areas, schools, and religious institutions. Although establishing specific separation requirements among uses is somewhat unusual in local zoning, it is a technique that is certainly consistent with both the purpose and the letter of most zoning enabling legislation.

Since the United States Supreme Court upheld dispersal-type ordinances in both *Young* and *Renton*, it would seem that such spacing requirements are generally permissible.[2] A Texas appellate court, in *Schleuter v. City of Fort Worth,* 947 S.W.2d 920 (Tex. App. 1997), specifically upheld a 1,000-foot separation requirement from residential neighborhoods in a case involving a topless bar. Less frequently used is the "combat zone" technique, which concentrates adult uses in one area. Kentucky's enabling statute, in Section 82.088 (1977), specifically addresses both approaches. The Supreme Court has never decided whether these "combat zone" regulations are permissible, but no doubt they would be subject to the same sort of analysis as the regulations in *Young* and *Renton*.

One of the issues discussed in some depth in Chapter 4 and in the drafting suggestions (Chapter 7) and recommendations (Chapter 9) is how to define an adult business under the zoning ordinance. An interesting New York case that supports one of the recommendations of the report is *City of New York v. J & J Yummies, Inc.*, 679 N.Y.S.2d 807 (S.Ct. Queens Co. 1998), which upheld the city's consideration of the business's own advertisement (in this case, "The Greatest Nude Club in New York") as a determining factor in deciding whether it should be treated as a sexually oriented business.

Zoning for sex businesses raises many of the same legal and practical issues raised by zoning for any business. Issues dealing with mapping, enforcement, administration, and other matters characteristic of zoning in general are beyond the scope of this report. The rest of this chapter focuses on those unique legal issues that arise in the context of regulating sex businesses.

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Patricia Jensen

Police in Tucson found liquid samples on the floors of video-viewing booths that were 96 percent semen. The presence of a tissue dispenser on the wall of this booth indicates that management knows exactly what patrons will be doing in those booths. Such findings based on studies would be useful for communities seeking support of restrictive regulations for booths.

One of the grounds for challenging zoning for sexually oriented businesses is that zoning may be so restrictive that it practically excludes a use from all or most parts of a community.

THE IMPORTANCE OF STUDIES

This report presents an approach to regulating sexually oriented businesses that focuses on the specific land-use activities characteristic of such businesses, thus allowing the application of zoning to sex businesses under traditional principles. Many existing regulations focus on the content of the message offered by the business; even our distinctions among businesses depend to some extent on a determination of the content of the message. The Supreme Court's decisions make it clear that a community cannot regulate the message directly but can limit the message if it is shown to have unacceptable secondary effects. The classic law school example of that principle is that one's free speech rights do not include the right to yell "fire" in a crowded theater—the public's interest in preventing the resulting panic overrides the individual's right to express herself or himself.

Applied to the regulation of sex businesses, this principle means that a community must document the secondary effects that it intends to address through any regulations that limit First Amendment rights. A number of communities have conducted studies of the secondary effects of sex businesses and other adult businesses. Chapter 6 of this report gives guidelines for conducting a local study. The material in this section discusses its legal significance.

It is in the context of addressing secondary effects that background studies, reflected in the legislative history, are critical. In *Stringfellows*, the New York Court of Appeals held that the city was justified in relying on a combination of studies from other jurisdictions, supplemented by specific local analysis and findings. The court included these comments:

> Based on the material before it, the Department of City Planning (DCP) determined that there were significant adverse impacts attributable to adult enterprises in the City, including downward pressure on property values and increased crime rate in areas where adult uses are most concentrated. A pivotal finding of the DCP was that a large majority of surveyed business and community organizations believe that their neighborhoods are adversely affected by the presence of adult uses and that this perception itself leads to disinvestment and a marked decline in economic and pedestrian activity. (at 412)

In analyzing the facts before it, the New York high court summarized the balancing test facing it as follows:

> [W]hether the "predominant purpose" of the challenged ordinance was to ameliorate the negative secondary effects of adult uses rather than to suppress their content, whether the ordinance was "narrowly tailored to affect only those uses shown to produce the unwanted secondary effects" and whether it provided adequate alternative locations for adult businesses within the Town. (at 415) [Citations, including *Young* and *Playtime*, as previously cited, omitted.]

REQUIREMENTS FOR AVAILABILITY OF SITES

One of the grounds for challenging zoning for sexually oriented businesses is that zoning may be so restrictive that it practically excludes a use from all or most parts of a community. With regulations of sexually oriented businesses, the basic zoning provisions may appear to allow the businesses to exist, but overlaying the separation requirements effectively removes many potential sites from consideration. The legal implications of practical exclusion of such uses are the subject of the following section.

Note that a community may also exclude most or all such uses through an onerous conditional use process. The courts have generally struck down local regulations that permit sexually oriented businesses only as

conditional uses, a topic that is addressed in a separate section, following the section on licensing, to which it is closely related.

An explicit principle established in *Renton* and addressed in subsequent cases is that the zoning or other restrictions must leave a reasonable number of alternative sites for such businesses. While various forms of restriction on adult uses have been upheld as constitutional, an ordinance that seeks to completely ban from a community a variety of sexually explicit forms of speech is likely not to survive constitutional scrutiny. Specifically, the Supreme Court's decision in *Renton* required that regulations restricting the availability of sites for protected businesses leave alternative avenues of access, generally interpreted as a requirement that there be some sites available in the community.

In *Renton*, the United States Supreme Court stated that while government may not "effectively deny" adult businesses "a reasonable opportunity to open and operate," adult businesses "must fend for themselves in the real estate market on an equal footing with other prospective purchasers and lessees. . . ." Since the *Renton* decision, courts have struggled to develop a standard for judging the reasonableness of location restrictions. The standard emerging from recent cases focuses on whether there are an adequate number of potential sites for adult businesses within the relevant local real estate market.

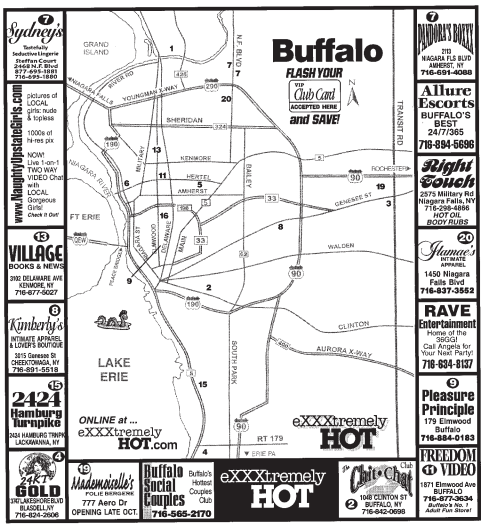
The 7th Circuit applied the *Renton* rule in Chicago and examined the realistic availability of opportunities for adult uses in *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441 (7th Cir. 1996). In doing so, it found that it was not necessary that Chicago follow any set formula in allowing for adult uses; although it had less land theoretically available for such uses than some other communities, evidence in the case indicated that there were more than enough sites reasonably available to satisfy current and projected demand.

An early decision addressing the availability of sites was *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Circ. 1991), modifying 950 F.2d 255, *cert. denied*, 113 S. Ct. 304 (1992), where, after recognizing that the Supreme Court in *Renton* had "contemplated that there was a market in which [adult] businesses could purchase or lease real property on which business could be conducted," the court ruled that "land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered 'available' as alternative sites under *Renton*." The appellate court declined to address "the relationship between the economics of site location and the constitutionality of an adult business zoning ordinance" (at 1306).

A leading case expanding upon and filling in some of the blanks in the Supreme Court's *Renton* decision is *Topanga Press v. City of Los Angeles*, a 9th Circuit decision, 989 F.2d 1524 (9th Circ. 1993), as amended, *cert. denied*, 511 U.S. 1030, 128 L. Ed. 2d 190, 114 S. Ct. 1537 (1994). There the court wrestled with the question of what makes a site "available" or "not available" under the *Renton* decision:

> This easily blurred line between economic and physical suitability creates doctrinal problems. If the unsuitability of a relocation site always can be couched in terms of economic suitability, under *Renton* no relocation site could ever be considered unreasonable. On the other hand, if a court attempts artificially to maintain the line between physical and economic suitability, it may often be led to consider the economic factor sub rosa which is forbidden under *Renton*. (at 1529)

The narrow issue in *Topanga Press* involved the availability of sites to which existing businesses, made nonconforming by a new ordinance, could



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The numbers on the map correspond to the ads in this magazine. The number of sites here indicates that this city has probably provided an adequate number of available sites for sex businesses, but there is no exact formula. Very small communities, in particular, may have a difficult time in determining, to a court's satisfaction, what presents an adequate number

move. The 9th Circuit set out the following five-part test, which, although referring to relocation sites, provides a good measure of the reasonable availability of sites as required by the Supreme Court in *Renton.* (Please note that we have substantially edited the following excerpt, primarily by deleting material, to highlight the five parts of the test.)

> *First,* although *Renton* stressed that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility.... [P]roperty is not potentially available when it is unreasonable to believe that it would ever become available to any commercial enterprise.
>
> *Second,* and focusing our attention on relocation sites that are within manufacturing or industrial zones, relocation sites that are reasonably accessible to the general public may also be part of the market.
>
> *Third,* areas in manufacturing zones that have a proper infrastructure such as sidewalks, roads, and lighting may be included in the market.
>
> *Fourth,* when a relocation site suits some generic commercial enterprise, although not every particular enterprise, it too may be said to be part of the real estate market. While it is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the particular needs of an adult business, potential sites must be reasonable relocation sites for some commercial enterprise before they can be considered part of the relevant market. Consequently, whether one defines a warehouse, a swamp, or a sewage treatment plant as physically or economically unsuitable, it is not reasonable to define these sites as part of the real estate market that any business would choose. We need not answer the question of whether, under *Renton*, a business has been afforded a reasonable opportunity to relocate if all relocation sites are within an industrial zone and no commercial zones are offered; in this case, the City has offered both commercial and noncommercial relocation sites.
>
> *Fifth,* and most obvious, those relocation sites that are commercially zoned are part of the market. We emphasize that, assuming a relocation site is part of the relevant market, it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business. The issue is whether any site is part of an actual market for commercial enterprises generally. (at 30-31)

Levi v. City of Ontario, 44 F.Supp.2d 1042 (C.D.Cal. 1999), applied *Topanga Press* in determining whether the Ontario, California, ordinance left open adequate alternative sites for the location of adult businesses. Although the city argued that there were 25 potentially available sites, the court found only one and held that the availability of that one site was inadequate to pass Constitutional muster:

> Whether an ordinance provides adequate alternative means of communication is measured according to a reasonableness standard taking into account community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plan works towards [sic]. Courts facing this question have implied that, at a minimum, there must be more sites available than existing businesses with a demand for them. At present, the Ontario ordinance permits only one site for which the two existing businesses must compete. Even if the 0.616-acre parcel, 23808124, were included, Ontario would permit only two possible locations for its two existing businesses. This is an unreasonably, and therefore unconstitutionally, low number of sites. (at 1052)

The *Levi* court's analysis of potentially available sites is one of the most detailed and helpful appearing in the case law:

> The Ontario ordinance, by its terms, requires all adult businesses to locate in areas zoned M2 or general industrial. Sites located in manufacturing or industrial zones may be part of the relevant market if (1) they are reasonably accessible to the general public; (2) they have a "proper infrastructure," such as sidewalks, roads and lighting; and (3) they suit some "generic commercial enterprise," even if the site is unsuitable for an adult business or any other specific business. [Citations to Ontario ordinance omitted.]
>
> Seven of the City's proposed sites…would have to be subdivided in order to meet zoning requirements for adult businesses. In other words, as a matter of law, an adult business could not locate on one of these sites without a change in the legal status of the site. It strains credulity to believe that sites on which an adult business cannot legally operate are reasonable adequate alternatives. These sites are thus not part of the relevant market and must be excluded from the analysis.
>
> Similarly, four of the City's proposed sites are contiguous parcels which are partially developed in a manner inconsistent with commercial use. Property is not "potentially"available when it is unreasonable to believe that it would ever become available to any commercial enterprise. [Citation omitted.] The fact that portions of these sites have been developed as warehouses or similar uses undermines the City's argument that these sites could become available for commercial use at some time in the future. Nor does the City provide any evidence of a reasonable expectation of mixed-use development of this sort on these or similar parcels. The Court thus concludes that these sites are not within the relevant market for a general commercial enterprise in Ontario.
>
> Thirteen of the remaining proposed sites are vacant land. Eleven of these sites are parcels of 3.2 acres or greater, with seven sites greater than 10 acres. Defendants contend that, notwithstanding the size of these parcels, they are "potentially available sites" because they could be either subdivided for freestanding structures or developed for multi-tenant use. As with those sites on which some development has already occurred, defendants provide no evidence of a real possibility of commercial development on these sites. Moreover, the City offers no evidence that the sites contain the required infrastructure—water, sewer, sidewalks, etc.—to support a generic commercial enterprise. Accordingly, the Court concludes that these sites are also outside the relevant market.
>
> Eliminating these locations leaves the City with three potential sites. Site 23808139 contains two multi-use, multi-tenant buildings on which one adult bookstore could locate. Because the Court has determined that site 23808138 is outside the relevant market, there is no need to subdivide this site. Moreover, although the [Ontario Municipal Code] prohibits some commercial businesses from locating in the M2 zone, it permits a sufficient variety of other businesses to make the zone available to the "generic commercial enterprise." The Court thus concludes that this site is potentially available to a generic commercial enterprise. See *Woodall*, 49 F.3d at 1126 (holding that large multi-tenant, office-warehouse buildings in which retail businesses could and occasionally did locate were part of the relevant market).
>
> The buildings on site 23808139 are nonconforming in that they do not comply with the setback requirements for the Vintage Industrial Overlay District. Ontario prohibits the conversion of "residential structure[s] or other nonconforming structures" for use as adult busi-

> nesses. Plaintiffs argue that they are prohibited from locating in these buildings by this code provision, and therefore this site is outside the relevant market. Scott Murphy, assistant City Planner for the City of Ontario, testified at trial that locating an adult bookstore in an existing commercial building was not a "conversion" and thus did not trigger the prohibition in [the ordinance]. The Court credits Murphy's testimony and holds that a change in use from a generic commercial enterprise to an adult bookstore is not a conversion. Site 23808139 is therefore not affected by [the ordinance].
>
> Two other sites are both vacant land comprising less than one acre. The Vintage Overlay District requires sites to be of a size greater than one acre. . . . [Absent the one-acre limit, one of these sites has no other defects which would remove it from the relevant market. Because of the size requirement, however, the Court must find that this site is not potentially available to a generic commercial enterprise.] The second site comprises 0.167 acres. This site is not serviced by an existing road. . . . Sites such as this, which lack "a proper infrastructure such as sidewalks, roads and lighting," are outside the relevant market. [Citation omitted.]
>
> In sum, only one of the 25 sites proposed by the City is, in fact, within the relevant market for a generic commercial business. (at 1051)

This detailed analysis by the California court that decided *Levi* is useful because it shows how a court approached the issue of site analysis, in this case rejecting most of the sites that the city claimed were available and thus striking down the ordinance.

This detailed analysis by the California court that decided *Levi* is useful because it shows how a court approached the issue of site analysis, in this case rejecting most of the sites that the city claimed were available and thus striking down the ordinance.

In *D.H.L. Associates, Inc., v. O'Gorman*, 199 F.3d 50 (1st Circ. 1999), the court upheld a local ordinance under which the only available sites were concentrated in one small area. Specifically, the available land area was 10.4 acres, which is a little more than two city blocks in a typical community; a rectangular parcel of 10.4 acres would be approximately 1,300 feet by 350 feet. D.H.L. owned a restaurant in the Town of Tyngsborough and had sought for many years to obtain an adult entertainment license to allow nude dancing at its establishment; the town had consistently denied the application because the restaurant was not located in the small area of the town that was zoned to allow such a use. Although the B-4 zone that would allow such a use applied to less than 1 percent of the acreage in the town, the court of appeals rejected D.H.L.'s claim that such area was too restrictive; in doing so, the court relied on the district court's findings that the town was a small, rural one with a limited commercial area and that all five lots located in the area zoned for B-4 were potentially available sites for adult entertainment establishments.

In contrast, in *N.W. Enterprises, Inc., v. City of Houston*, 27 F. Supp. 2d 754 at 864-65 (S.D.Texas 1998), a Texas court invalidated a new 1,500-foot separation requirement for such businesses, restoring the 750-foot and 1,000-foot separation requirements from an earlier ordinance because the legislative record showed that the intent of the new separation requirements was to limit unduly the number of available sites.

One of the questions that remains open is the extent to which a small community must address such needs. In *Diamond v. City of Taft*, 29 F. Supp. 2d 633 (E.D.Calif. 1998), a federal court in California found that three sites for sexually oriented businesses were adequate in a community of about 6,800 people.

An issue of application that is not discussed in the reported cases is the relevance of non-adult outlets for sexually oriented materials. Remember that two of the leading cases in the field involved adult movie theaters. For a movie theater, the building, the land use, and the medium are all the same thing.

Without that building, which is controlled by zoning, there is no way to convey the message, at least not in that format. In contrast, sexually oriented videos are available in the back rooms and on the top shelves of some mainstream video stores, sexually oriented books are similarly available in some mainstream bookstores, and sexually oriented magazines are often carried in back rooms or high shelves of newsstands. Bookstores, video stores, and newsstands are simply retail stores, adaptable to a number of purposes. Thus, while a limit on sexually oriented movie theaters will directly affect the offering of sexually oriented movies, restrictions on XXX bookstores and other media outlets will not necessarily prevent the wide circulation of sexually oriented media. It is thus very important to ensure that local ordinances aimed at the truly X-rated operations not be overbroad and restrict the merchandising policies of mainstream book and video stores and newsstands. See Chapter 7 of this report for a further discussion of these regulatory issues.

A community should also consider the availability of sexually oriented material through mainstream sources when it conducts studies related to such material, when it makes findings in support of the adoption of a new ordinance, and when it defends an ordinance against a challenge that the ordinance is unduly restrictive under the First Amendment. Although some local officials argue that the ready availability of such material on the Internet reduces or eliminates the need for local outlets, that is like arguing 10 years ago that people could get it through the mail and thus did not need to shop locally. This argument misses the point that the courts have established the principle that every community must allow relatively free distribution of all nonobscene material through outlets available in the community. Perhaps a small community with no retail outlets at all might succeed in arguing that the material is available from other sources without bringing in a local outlet, but any community that has bookstores and video stores and that attempts to restrict ones labeled XXX must be prepared to respond to a challenge by demonstrating that there are adequate alternative local channels through which such material is available.

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LICENSING ORDINANCES

A number of communities, including Cincinnati and Kansas City, use licensing to address operating issues related to sex businesses. Through licensing, a community can address:

- qualifications (and disqualifying characteristics) of owners, managers, and entertainers;
- responsibility for controlling behavior on the premises;
- operating hours;
- actions of employees, including entertainers;
- lighting and security in the premises; and
- maintenance of the premises.

Although some communities try to address such issues through conditions imposed on zoning, once zoning has been granted, it is difficult to take away. In contrast, a license typically must be renewed annually and is subject to revocation for cause.

Licensing requirements will usually be upheld unless the court finds that the licensing process vests too much discretion in the issuing authority. In *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), *modified*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), a majority of the court found that a licensing ordinance (here applied to a proposed adult motel)

amounted to a "prior restraint" on speech. Although prior restraints are not always found unconstitutional, the effect of classifying a regulation of speech as a "prior restraint" subjects the regulation to "strict" scrutiny, a standard under which the burden of proof essentially shifts to the local government. Although there was disagreement among the Court majority on the actual burden that should be imposed on a local government in such a case, all agreed that such ordinances:

- must not "place unbridled discretion in the hands of a government official or agency";
- must require a definite time limit within which the decision maker must issue or deny the license, during which time the status quo must be maintained; and
- must allow for prompt judicial review if the license is erroneously denied.

Later decisions applying the decision in *FW/PBS* have struck down licensing ordinances that lacked effective time limitations or failed to limit the discretion of city officials to grant or deny a license.

Later decisions applying the decision in *FW/PBS* have struck down licensing ordinances that lacked effective time limitations (*Chesapeake B & M, Inc. v. Harford County*, 831 F. Supp. 1241 (D. Md. 1993)) or failed to limit the discretion of city officials to grant or deny a license (*Wolff v. City of Monticello,* 803 F.Supp. 1568 (D. Minn. 1992)). Another ordinance was struck down where the newly adopted ordinance required any adult business operating at the time of adoption to cease operations until it obtained a license (*Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); see also, *T.K.'s Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994)).

The 9th Circuit has struck down a licensing ordinance for sexually oriented businesses as an unconstitutional prior restraint (*Baby Tam & Co., Inc., v. City of Las Vegas*, 199 F.3d 1111 (9th Circ. 2000); see also, *11126 Baltimore Blvd. v. Prince George's County*, 684 F.2d 884 (D. Md. 1988). In *Baby Tam*, the court provided this analysis and conclusion:

> Section (B) defines the Director's duty to act "within the thirty days." The use of the definite article "the" identifies this period as the thirty days just referred to in (A). Under (A) the thirty days begin to run "from receipt of a complete application and fees upon compliance with the requirements of this Section and any applicable provisions of Title 6 of this Code." Other applicable provisions of the Code include "the standards of the health, zoning, fine and safety laws of the State of Nevada and ordinances of the City of Las Vegas applicable thereto." No time limit is set within which satisfaction of these requirements must be found. The time is as indefinite as in the invalid Dallas ordinance. The thirty days within which the Director must act may be indefinitely postponed. The ordinance fails to meet the requirements of the First and Fourteenth Amendments. (at 1115) [Citations to local ordinance omitted.]

In *East Brooks Books v. City of Memphis*, 48 F.3d 220, (6th Cir. 1995), *reh. den., cert. den.* 516 U.S. 909 (1995), the court applied *FW/PBS* to the Memphis, Tennessee, licensing scheme for adult businesses and found it constitutionally infirm. In doing so, the court cited this language from *FW/PBS*:

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied. (at 224, citing *FW/PBS*, 493 U.S. at 230, and referring to *Freedman v. Maryland*, 380 U.S. 51 (1965))

One issue that arises in a licensing program is the effective control of the operator. Many sexually oriented businesses are incorporated. There is little point in conducting a criminal background check on a corporation. Thus, the local licensing laws, like alcoholic beverage and similar licensing laws, tend to require disclosure of the identity of officers, directors, and shareholders. The 11th Circuit has found unconstitutional for its chilling effect a requirement that a sexually oriented business disclose the names of principal shareholders, noting that the city could achieve adequate control of the conduct of the business through the officers and directors (*Lady J. Lingerie v. City of Jacksonville*, 176 f.3d 1358 (11th Circ. 1999), cert. den. 2000 U.S.LEXIS 2386 (April 3, 2000)). In contrast, the 6th Circuit has suggested that a requirement of disclosure for substantial shareholders may be defensible, although it did so essentially as dicta[3] in a case in which it struck down as "impermissibly broad" a provision requiring that every corporate shareholder sign a license application.[4]

In short, the law regarding the disclosure of and background checks on shareholders and partners is unsettled. Because of the 11th Circuit decision, communities in Alabama, Georgia, and Florida cannot require such disclosure or background checks. Communities in most other states probably can require such disclosure, although we recommend limiting it to substantial shareholders (i.e., those who own 10 percent or more of the business or are part of a "control group").

In short, the law regarding the disclosure of and background checks on shareholders and partners is unsettled. . . . Communities in most states probably can require such disclosure, although we recommend limiting it to substantial shareholders (i.e., those who own 10 percent or more of the business or are part of a "control group").

CONDITIONAL ZONING

Some communities have used conditional zoning essentially as an alternative to licensing, attempting to establish through zoning conditions the same types of operational controls and detailed review process that characterize licensing procedures.

Because zoning remains a legislative and largely discretionary action in most states, any requirement that all or most adult uses be subject to a discretionary zoning process is likely to be considered a prior restraint and be considered under essentially the same rules as those applied to licensing ordinances. A leading case holding that it is unconstitutional "prior restraint" to subject most sexually oriented businesses to such a review is *Lady J. Lingerie*, which followed *FW/PBS* in striking down a requirement that most sexually oriented businesses in Jacksonville apply for zoning "exceptions" before being allowed to operate; the facts of the case apparently showed that only two sites allowed such uses by right. The court found that, under the facts of this case, the "exception was the equivalent of a license" (at 1361), and it then applied the licensing criteria, providing the following analysis:

> As a form of prior restraint, licensing schemes commonly contain two defects: discretion and the opportunity for delay. An ordinance that gives public officials the power to decide whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is invalid. Licensing ordinances must also require prompt decisions. An ordinance that permits public officials to effectively deny an application by sitting on it indefinitely is also invalid. Jacksonville's zoning exceptions process contains both defects. (at 1361-1362) [Citations omitted.]

The district court had struck down and severed a provision of the ordinance that allowed the zoning board to impose additional criteria on the application, and that decision was not appealed. The district court, however, had upheld criteria related to "compatibility" and what the appel-

late court called "other, run-of-the-mill zoning criteria" (at 1362). The appellate court reversed that part of the decision, finding that the effect of the local ordinance was to give the officials unbridled discretion:

> None of the nine criteria is precise and objective. All of them—individually and collectively—empower the zoning board to covertly discriminate against adult entertainment establishments under the guise of general "compatibility" or "environmental" considerations. Even the seemingly innocuous fire safety provision is too broad. It does not say "there must be x number of doors per square foot"; it says that buildings must be "sufficiently accessible to permit entry onto the property by fire, police, rescue and other services." This is neither precise nor objective. (at 1362) [Citations to local code omitted.]

The court also found that the lack of a time limit on a decision was a fatal flaw in the scheme:

> The board must hold a public hearing within 63 days after a business applies for an exception. . . . But nothing requires a decision within 63 days, or any other time period. The ordinance's failure to require a deadline for decision renders it unconstitutional. (at 1363) [Citations to local code omitted.]

The court discussed a provision that allowed a business to begin operating 45 days after filing the license application, but it found that such a conditional right to operate temporarily was inadequate to cure the Constitutional defects in the ordinance. The court provided the operators with effective relief, striking the requirement for a zoning exception and allowing the businesses to operate in the zone in which the exception had been required subject only to the distance requirement:

> To conclude, we want to emphasize that it is not difficult to draft an ordinance that addresses the harmful secondary effects of adult businesses without running afoul of the First Amendment. This ordinance, however, is unconstitutional because it channels nearly all adult entertainment establishments through the exceptions process. That process in turn gives the zoning board discretion to delay a decision indefinitely or to covertly deny applications for content-sensitive reasons. The plaintiffs may operate as of right in the CCBD and CCG-2 zones, as long as they comply with the distance limitations. We leave it to the district court on remand to decide whether they may also operate in other parts of the City. (at 1363)

To conclude, we want to emphasize that it is not difficult to draft an ordinance that addresses the harmful secondary effects of adult businesses without running afoul of the First Amendment. This ordinance, however, is unconstitutional because it channels nearly all adult entertainment establishments through the exceptions process.

—*Lady J. Lingerie v. City of Jacksonville*

REGULATION OF NUDE DANCING

The Supreme Court's first nude dancing case was *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). The defendants operated an adult bookstore, which included video-viewing booths. The dispute with the borough arose when the operators began to offer live, nude performances in a booth with a coin-operated device that opened a window shade to allow a view of the dancer for a limited period of time. The operators were prosecuted for violating the live entertainment provisions of the ordinance. The ordinance appeared to prohibit all live entertainment within the borough. The Supreme Court reversed the appellants' convictions in a 6-1-2 decision.

Justice White's opinion for the majority noted that even live nude dancing had some First Amendment protection, but that this ordinance went beyond the regulation of that protected activity and prohibited all live entertainment. He concluded that the asserted government interests were insufficient to support such a total ban. The Court rejected the borough's

argument that the ordinance was a simple "time, place, and manner" regulation. The Court relied on its decision in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), which first requires a showing that the restricted use is inconsistent with the other, permitted uses in the zone. The Court had already rejected that argument since other commercial uses were permitted and the Court could perceive no inherent incompatibility, nor had the borough introduced evidence of any. Second, in order to be a reasonable "time, place, and manner" regulation, there must be adequate "alternative avenues" of communication open. Here, the borough excluded all forms of the protected activity. The Court rejected the contention that the "alternative avenues requirement was met by the fact that live entertainment, including nude dancing, was easily and widely available outside the borough, in nearby communities" (at 77). The Court held that the fact that one could exercise the right to free speech somewhere else did not justify its suppression in Mt. Ephraim.

A decade after its decision in *Schad,* the Supreme Court again dealt with a nude dancing case. This case, *Barnes v. Glen Theatre,* Inc, 501 U.S. 560 (1991), tested an Indiana statute that prohibited all public nudity (Indiana Statutes, Section 35-45-4-1) and that had been interpreted by the parties to require that erotic dancers would have to wear at least "pasties" and a "G-string" (at 563). The action arose when two adult business operators sought an injunction against enforcement of the statute. Glen Theatre, Inc., was the operator of the Kitty Kat Lounge in South Bend, where it wished to offer nude dancing in a bar. The other challenger was an adult bookstore that wanted to have dancers perform in enclosed booths, separated by a glass partition from customers.

After numerous decisions by the district court and the 7th Circuit, the case went to the full Court of Appeals, where it ruled that nonobscene nude dancing was protected by the First Amendment (904 F.2d 1081 (7th Circ. 1990)) and, thus, the statute did violate the First Amendment. The case was appealed to the U.S. Supreme Court.

The Supreme Court, in a leading opinion (5-4) written by Chief Justice Rehnquist, held squarely that the statute did not violate the First Amendment. The leading opinion applied the four-part *O'Brien* test (discussed above) and found that the Indiana statute passed muster. It noted specifically:

- the long history of regulation of public nudity and indecency and the state's clear constitutional authority to regulate those;
- the substantial governmental interest in regulating public indecency, citing the long history of regulating such matters;
- the fact that "The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition," illustrating the point that the statute met the third part of the *O'Brien* test, that the state's primary interest was not in limiting free expression. On this point, the Court further noted, "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." [citation omitted]; and
- essentially a factual finding that the covering by pasties and a G-string is the "bare minimum necessary to achieve the state's purpose" (at 569).

Citing *O'Brien* repeatedly, the leading opinion cited *Schad* only once, noting essentially in passing that "as the state courts in this case recog-

In order to be a reasonable "time, place, and manner" regulation, there must be adequate "alternative avenues" of communication open. Mount Ephraim excluded all forms of the protected activity. The Court rejected the contention that the "alternative avenues requirement was met by the fact that live entertainment, including nude dancing, was easily and widely available outside the borough, in nearby

nized, nude dancing is not without its First Amendment protections from official regulation" (at 565), but going on to say, "We must determine the level of protection to be afforded" (at 566). The opinion then went on to say "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board" (at 569).

The dissenting justices agreed with the Court of Appeals that dance is protected expression, citing a list of references on dance as an art form (at 587-88). They also distinguished between the public interest in preventing nudity in truly public places and preventing it in this context:

> The purpose of forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. (at 590-91)

Being "in a state of 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 that it falls only within the outer ambit of the First Amendment's protection.

—U.S. Supreme Court Justice Sandra Day O'Connor

The Supreme Court revisited this issue in 2000 in *City of Erie v. PAP's A.M. tdba Kandyland*, 146 L.Ed.2d 265, 120 S.Ct. 1382 (U.S. 2000). The case has a convoluted history. The trial court permanently enjoined enforcement of Erie's ordinance regulating adult uses; the Commonwealth Court reversed that order, and the Pennsylvania Supreme Court, in this decision, reversed the Commonwealth Court (553 Pa. 348, 719 A.2d 273 (1998)).

The ordinance at issue made it a "summary offense" to appear in a "state of nudity"; adult females were required to wear "at a minimum, what are commonly known as 'pasties' and a 'G-string'" (at 276).

The Pennsylvania high court began its analysis by determining that:

> The act of being in the nude is not, in and of itself, entitled to First Amendment protection because no message is being conveyed.[5] The court continued with this analysis, however, when it wrote, Yet the act of dancing nude, with its attendant erotic message, is an expressive act entitled to First Amendment protection. (at 276)

The Pennsylvania court then applied the *O'Brien* test to determine if the ordinance was content neutral or related to the suppression of expression. It found that "Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance" (at 279).

Having found clearly that the ban on public nudity was unconstitutional, the court went on to determine that the public nudity ban was distinct from and severable from the other bans contained in the ordinance (at 281). The other prohibited activities were: publicly engaging in sexual intercourse; publicly engaging in deviate sexual intercourse; and publicly fondling genitalia (at 281, note 11).

The background on the state court decision in this case is important to an understanding of what the Supreme Court did when it decided the case, ruling in favor of the city and upholding its ordinance requiring that dancers wear at least "pasties and a G-string." After a lengthy recitation of the Pennsylvania's court's decision, Justice O'Connor in the plurality opinion moved to the issues, first reiterating the plurality position from *Barnes*:

> Being "in a state of 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 that it falls only within the outer ambit of the First Amendment's protection. (2000 U.S.LEXIS 2347 at 23-24)

Her opinion went on to say:

> We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech. (at 23-24)

Applying that test, the plurality opinion found that the ordinance here was directed at public nudity in general and not at expressive conduct in particular. That opinion said more than once that it considered the ban on public nudity to be directed at the secondary effects of sexually oriented businesses, not at the expressive conduct (at 31). The majority considered the impact of the ordinance on expression to be minimal (at 32-33). The plurality held:

> We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing. The ordinance prohibiting public nudity is therefore valid if it satisfies the four-factor test from *O'Brien* for evaluating restrictions on symbolic speech. (at 37-38)

Justice Stevens wrote a dissenting opinion, joined by Justice Ginsburg and, in part, by Justice Souter (at 61). Stevens distinguished the "pasties and G-string" ordinance from land-use ordinances addressing similar businesses:

> But if Erie is relying on the Seattle study as well . . . , its use of that study is most peculiar. After identifying a problem in its own city similar to that in Seattle, Erie has implemented a solution [pasties and G-strings] bearing no relationship to the efficacious remedy identified by the Seattle study [dispersal through zoning].
>
> But the city of Erie, of course, has not in fact pointed to any study by anyone suggesting that the adverse secondary effects of commercial enterprises featuring erotic dancing depends in the slightest on the precise costume worn by the performers—it merely assumes it to be so. . . . If the city is permitted simply to assume that a slight addition to the dancers' costumes will sufficiently decrease secondary effects, then presumably the city can require more and more clothing as long as any danger of adverse effects remains. (at 67)

Stevens carried the analysis further, relating it squarely to the background studies:

> The reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: A dispersal that simply limits the places where speech may occur is a minimal imposition whereas a total ban is the most exacting of restrictions. The State's interest in fighting presumed secondary effects is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden. (at 68-69)

REGULATION OF SEX TOYS AND NOVELTIES

The sale of sex toys and novelties raises different issues from the sale of books, magazines, and videos. Unlike the media with adult messages, the sex toys have no First Amendment protection.[6] Although several states, through statutes cited in the material that follows, have attempted to limit or ban the sale of sex toys,[7] the courts have found some degree of protection for these items. The legal principle that underlies most of the cases

The sale of sex toys and novelties raises different issues from the sale of books, magazines, and videos. Unlike the media with adult messages, the sex toys have no First Amendment protection.

dealing with sex toys is the right to privacy, an issue litigated earlier in the context of the dissemination of birth control information and devices.

Typical of the sex-toy bans challenged in the cases discussed below is the Georgia law that prohibits the sale of obscene matter and that includes this language:

> Additionally, any device designed or marketed as useful primarily for the stimulating the human genital organs is obscene matter under this act. (Georgia Code Annotated, Section 26-2101(c), cited in *Sewell v. State of Georgia*, 238 Ga. 495, 233 S.E.2d 187, 188 (1977), *app. dism.* 435 U.S. 982, 56 L. Ed. 2d 76, 98 S. Ct. 1635 (1978))

The U.S. Supreme Court has not addressed the validity of statutes banning or limiting the sale of sex toys, and it appears that only one Federal Circuit court has addressed the issue. Nevertheless, there are decisions of the Supreme Court that are relevant to the resolution of these cases.

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Essentially the sex toy cases are resolved on the basis of the "right to privacy." In this context, *Stanley v. Georgia*, 394 U.S. 557 (1969), is a defining case—it was in *Stanley* that the Supreme Court held that the right to privacy protected the possession of even obscene material. Perhaps in a nod to *Stanley,* the statutes involved in the cases discussed in this section all addressed the sale of sex toys rather than the possession of them, and some specifically provided that possession of "six or more" similar devices established a presumption that they were held for sale;[9] the corollary, of course, is that mere possession of such devices for personal use does not violate those statutes.

That, however, is where the law in this field gets interesting. The statutes typically prohibit the sale but not the possession of the devices. Thus, those challenging the statutes are typically retailers facing actual or potential civil or criminal penalties for selling the devices. How can they raise the "right to privacy" of the ultimate users, whose possession of such devices is not directly addressed by the statute? A key case in answering that question is *Carey v. Population Service Int'l.*, 431 U.S. 678 (1977, as amended), which addressed the right to privacy in the context of sexual matters (in this case dealing with contraceptive devices).

Population Service International was a nonprofit organization that distributed contraceptive information and devices; in this case, the organization challenged a New York statute that: (1) made it unlawful to distribute contraceptives to anyone younger than 16; (2) allowed the distribution of contraceptives only by registered pharmacists; and (3) prohibited the advertising of contraceptive devices. The Court framed the privacy issue in this way:

> Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." (at 684, citation omitted)

The Court, however, went on to address directly the crux of this problem, which amounts to a standing issue:

> A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception. (at 687-88)

Sex Toy Limits Upheld

The Georgia statute quoted above is one that has been upheld. *Sewell v. State of Georgia*, 238 Ga. 495, 233 S.E.2d 187 (1977), *app. dism.* 435 U.S. 982 (1978), was the appeal of the conviction of the owner of an adult bookstore for selling an allegedly obscene magazine and an artificial vagina. The sale of the artificial vagina allegedly violated the state obscenity statute (quoted above). In another case, the Georgia Supreme Court in *Chamblee Visuals, LLC v. City of Chamblee*, 270 Ga. 33, 506 S.E.2d 113 (1998), upheld the denial of a building permit for a store that apparently would have been used for the sale of "obscene devices," among other items, in a location near a middle school.

The other state in which the constitutionality of a statute prohibiting the sale of sex toys has been squarely upheld is Texas. *Regalado v. State of Texas*, 872 S.W.2d 7 (Tex.App. 1994), *cert. den*., 513 U.S. 871 (1994), affirmed the action of the trial court, in which a jury found Regalado guilty of selling obscene devices and the court sentenced him to a $250 fine and 30 days in jail (at 7). Regalado was a clerk in a store called After Hours News. He was arrested and charged after a police officer found 17 "Flexilover" devices in the store. Under the applicable state statute, possession of more than six obscene devices was presumed to indicate intent to sell them (at 8). Although the court acknowledged the right to privacy under both U.S. and Texas Constitutions, it said:

> However, we do not agree with appellant that the right to privacy protects the use of or possession with intent to promote obscene devices. (at 9)

Although the defendant introduced a doctor who testified that he frequently prescribed similar devices for medical use by patients, the court held that Regalado had no standing to raise that issue—that he could only challenge the statute as it applied to him (at 9). (Note that the court's conclusion on this issue appears to be at variance with the Supreme Court's conclusion in *Carey* and is at variance with other decisions cited in this section.) Chief Justice Brown, who sat as a member of the three-judge panel, joined in the decision without enthusiasm. His opinion, in full, reads:

> Here we go raising the price of dildos again. Since this appears to be the law in Texas, I must concur. (at 11)

The other Texas decision on the subject seems better reasoned, although it is a decision to which three members of the appellate court vigorously dissented. *Yorko v. State of Texas*, 690 S.W.2d 260 (Tex. App. 1985), also affirmed a conviction for selling an obscene device. A midlevel court had previously affirmed the conviction, which resulted in a fine of $750 and a three-day jail sentence.

The Texas Appeals Court characterized the case this way:

> Thus the question is: Does the due process clause of the Fourteenth Amendment guarantee a citizen the right to stimulate his, her or another's genitals with an object designed or marketed as useful primarily for that purpose? Put another way, is there a right to stimulate

Here we go raising the price of dildos again. Since this appears to be the law in Texas, I must concur.

—Texas Appeals Court Chief Justice Brown

> human genital organs with an object designed or marketed as useful primarily for that purpose, such that the right is a "fundamental" one "implicit in the concept of ordered liberty"? . . .
>
> The statute does not criminalize the use of obscene devices, or the mere possession of such devices without the intent to promote them. Nevertheless, appellant argues that by inhibiting the citizen's ability to acquire obscene devices, the statute unconstitutionally burdens the citizen's fundamental right to possess and use them. . . . (at 263)

The Texas court expressly rejected the *Carey* analysis regarding the standing of a retailer to raise the issue of the right of privacy of a consumer. The court did so by distinguishing between contraceptives and sex toys (at 265).

Sex Toy Limits Struck Down

In contrast to the decision in Texas and the seemingly inconsistent decision in Georgia, other state courts that have considered the issue have struck down bans on the sale of sex toys, generally acting under interpretations of state rights to privacy. In *State v. Brenan*, 739 So.2d 368 (La. App. 1999), *affirmed,* La. 99-2291, 2000 La. LEXIS 1271, Brenan had been charged with two counts of promoting obscene devices, in violation of an anti-obscenity law (Louisiana Statutes Annotated, Section 14:106.1). Brenan was convicted and sentenced to two years at hard labor, plus a $1,500 fine on each count, although the trial court suspended the sentences and put her on five years' probation (at 369).

The Louisiana appellate court relied heavily on the right-to-privacy provision of the Louisiana constitution in reversing the decision and finding the statute unconstitutional (at 370, citing the Louisiana Constitution, Article I).

The Kansas high court has also found a statute prohibiting the sale of sex toys to be unconstitutional, although on somewhat more narrow grounds. In *State of Kansas v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990), the trial court in a criminal case found that the statute was unconstitutionally overbroad and thus refused to convict the operator of a bookstore for selling two "obscene devices." The only witness in the case was a psychologist, who testified about the therapeutic uses of dildos (at 1025). The statute provided this definition:

> "Obscene device" means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs. (Kansas Statutes Annotated, Section 21-4301(c)(3))

Concerned with the fact that the statute, on its face, applied even to a device obtained for a woman and provided to her by her therapist, the court held that the statute was overly broad, invading the right of privacy both in the home and in the office of a therapist.

Concerned with the fact that the statute, on its face, applied even to a device obtained for a woman and provided to her by her therapist, the court held that the statute was overly broad, invading the right of privacy both in the home and in the office of a therapist (at 1032). The statute remains on the books, with an amendment to the definition:

> "Obscene device" means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy.

The Colorado statute on the sale of obscene devices received its test in a civil action, *People ex rel Tooley v. Seven Thirty-Five East Colfax, Inc*., 697 P.2d 348 (Colo. 1985). The case tested the combination of two parts of the statute; namely, Colorado Revised Statutes, Section 18-7-102(2)(a)(I), pro-

vides that a person is guilty of a class 2 misdemeanor if he "promotes or possesses with intent to promote any . . . obscene device . . .". An obscene device was separately defined as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs" (Colorado Revised Statutes, Section 18-7-101(3)). In the case, the people sought injunctive relief, declaring that certain novelties were obscene and thus unlawful to display. It was consolidated on appeal with two other cases; the district judges in all three had held that the statute was unconstitutional as applied:

> A number of the parties who challenge the Act contend that the provisions regulating the promotion of obscene devices unconstitutionally infringe on their free speech rights and on the due process rights of purchasers of those devices. We hold that the statutory scheme impermissibly burdens the right of privacy. (at 368)

The court held:

> We need not decide whether the state may properly regulate the kinds of devices sought to be prohibited by this statute. Sections 18-7-101(3) and 102(2)(a)(I), however, sweep too broadly in their blanket proscription of all devices "designed or marketed as useful primarily for the stimulation of human genital organs." The statutory scheme, in its present form, impermissibly burdens the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices. The effect of the statute as now written is to equate sex with obscenity. The state has demonstrated no interest in the broad prohibition of these articles sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways. Thus, we hold the statutory prohibition against the promotion of obscene devices to be unconstitutional. (at 369-70)

The case remains good law in Colorado and has been cited a dozen times by the state high court since it was decided, although the citations focus on several different issues in the case.[10]

A federal court in Alabama similarly found Constitutional fault with a statute that included this prohibition:

> It shall be unlawful for any person, being a wholesaler, to knowingly distribute, possess with intent to distribute, or offer or agree to distribute, for the purpose of resale or commercial distribution at retail, any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. (Alabama Code, Section 12A-12-200.2(2))

An assistant attorney general was quoted in the *Birmingham News* (February 19, 1999) as saying that there is no "fundamental right for a person to buy a device to produce an orgasm," and the federal court that considered the case appeared to agree, although it still struck down the statute in *Williams v. Pryor*, 41 F.Supp.2d 1257 (N.D. Ala. 1999). The case differed from most litigation over sexually oriented businesses because it included female users of vibrators as plaintiffs and included evidence that, in addition to the availability of such devices at some retail stores, they were also available at "Saucy Lady" parties, which had been attended by more than 7,000 Alabamans in the previous year, resulting in retail sales of $160,000 in one year (at 1263-64). The retail stores, which were owned by the lead-named plaintiff focused on lingerie, oils, and sex toys, with only a limited supply of "R-rated" media (at 1261-62). The *Brandeis*-like opinion featured discussion of therapeutic uses of the devices, includ-

ing citations to Food and Drug Administration regulations addressing but not banning such devices (at 1265-67). The judge wrote thoughtfully about the use of vibrators for sexual pleasure as an alternative to casual sex or unwanted or unavailable love affairs (at 1267). The judge cited a number of magazines and books available at well-known booksellers that advocate or describe the use of the devices and, in a bow to technology, also cited websites to the same effect (at 1267-69). He cited two prospective expert witnesses, both involved in research and treatment of women with sexual problems (at 1269-72). On appeal, the Eleventh Circuit Court of Appeals reversed the district court's finding of unconstitutionality (229 F.3d 1331, 11th Circ. (2000)), holding:

> We conclude the district court erred in determining the statute lacks a rational basis. The State's interest in public morality is a legitimate interest rationally served by the statute. The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny. A statute banning the commercial distribution of sexual devices is rationally related to this interest. Alabama argues "a ban on the sale of sexual devices and related orgasm stimulating paraphernalia is rationally related to a legitimate legislative interest in discouraging prurient interests in autonomous sex" and that "it is enough for a legislature to reasonably believe that commerce in the pursuit of orgasms by artificial means for their own sake is detrimental to the health and morality of the State." Appellant's Brief at 13, 16. The criminal proscription on the distribution of sexual devices certainly is a rational means for eliminating commerce in the devices, which itself is a rational means for making the acquisition and use of the devices more difficult. Moreover, incremental steps are not a defect in legislation under rational basis scrutiny, so Alabama did not act irrationally by prohibiting only the commercial distribution of sexual devices, rather than prohibiting their possession or use or by directly proscribing masturbation with or without a sexual device. Thus, we hold the Alabama sexual devices distribution criminal statute is constitutional under rational basis scrutiny because it is rationally related to at least one legitimate State interest. (229 F.3d at 1335).

The appeals court remanded the case to the district court for more thorough examination of the "as-applied" Constitutional issues raised by the individual plaintiffs described above. Because the district court had found the statute unconstitutional on its face, it did not engage in a detailed legal analysis of the status of those plaintiffs, although it provided factual background about them and their use of the devices. The appellate court suggested in its analysis that the district court might still find the statute unconstitutional as applied to such individuals (229 F.3d at 1341-43).

REGULATION OF ARCADES AND PEEP SHOWS

Video-viewing booths, or peep shows, create their own set of problems. One approach is to prohibit enclosed individual booths for viewing adult entertainment or to require their construction in such a way that they are open to public view. Courts have not been very sympathetic to the booths. A New Jersey court upheld the constitutionality of a statute that provides as follows:

> In addition to any activities proscribed by the provisions of [New Jersey Statutes, Section 2C:33-12], a person is guilty of maintaining a nuisance when the person owns or operates a sexually oriented business which offers for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons. (New Jersey Statutes, Section 2C:33-12.2.b)

The statute was upheld in *Chez Sex VIII, Inc., v. Poritz*, 688 A.2d 119 (N.J. Super 1997), *cert den*., 694 A.2d 114 (N.J. 1997), *cert. den*. 118 S.Ct. 337 (1998), where the court found that, based on studies in other states and cited cases, the legislature had adequate evidence of the public health hazards of the sort of "anonymous sex" facilitated by such booths. The Third Circuit upheld an open booth statute in Delaware, finding that it met all three prongs of the *Renton* test, noting specifically that the open booth requirement was content neutral and would "apply to the showing of *Rebecca of Sunnybrook Farm* as well as to the showing of adult videos."[11] In *Ben Rich Trading, Inc., v. City of Vineland*, 126 F.3rd 155 (3rd Circ. 1997), the Third Circuit interpreted an ordinance banning the use of "conversation booths" in adult establishments as an open booth ordinance and sustained it. An appellate court in Pennsylvania reached a similar conclusion in *Adult Golden Triangle News, Inc., v. Corbett*, 689 A.2d 974 (Pa. Comm. 1997), regarding a statute addressing both openness and lighting for such booths. The Eighth Circuit has upheld open booth requirements three times, most recently in 1998, in *Scope Pictures of Missouri, Inc., v. City of Kansas City*, 140 F.3rd 1201 (8th Circ. 1998).

The Georgia Supreme Court has directly addressed this issue, upholding a local ordinance banning "one-on-one activity between customers and employees where the employees display their bodies in order to excite customers sexually."

REGULATION OF MASSAGE AND OTHER TOUCHING BUSINESSES

The most problematic types of sexually oriented businesses are those that involve actual or potential direct contact between an entertainer (or other employee) and a customer. Examples of those that include direct contact include nontherapeutic massage and lap dancing. Examples of businesses that include a significant risk of direct contact include "conversation studios," "nude photography studios," "body painting studios," and "lingerie modeling studios." Of the six activities listed here, all but lap dancing typically occur in a booth or closed room, virtually eliminating any effective social (or other) control on sexual behavior.

The Georgia Supreme Court has directly addressed this issue, upholding a local ordinance banning "one-on-one activity between customers and employees where the employees display their bodies in order to excite customers sexually." In *Quetgles v. City of Columbus,* 491 S.E.2d 778, (Ga. 1997), the city's ordinance was challenged by a lingerie modeling studio. A federal court of appeals, in *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 139 (3rd Circ. 1993), has referred to "massage parlors, conversation parlors and call services [as operations], which have no First Amendment protection." Another federal appellate court rejected a First Amendment challenge, as well as vagueness challenge, to an ordinance setting out a dress code for massage parlors in *Mini Spas, Inc., v. South Salt Lake City Corp*., 810 F.2d 939 (10th Circ. 1987).

In *People v. Janini*, 75 Cal. App. 4th 347, 89 Cal. Rptr. 2d 244 (1999), a California court considered an appeal of a decision that had found seven lap dancers and two managers guilty under a local ordinance barring prostitution. The court upheld civil (licensing) penalties imposed for lap dancing but found that the application of local criminal penalties to the same act to be preempted by California law. *In Tily B., Inc., v. City of Newport Beach*, 69 Cal. App. 4th 1, 81 Cal. Rptr. 2d 6 (1998), *reh.den.; review den.*, 1999 Cal. LEXIS 1621, the same court had separately upheld noncriminal anti-touching provisions. It described those provisions this way:

> The [plaintiff] challenges three no-touching rules. One prohibits, in general terms, "physical contact between entertainers and patrons." Two others are more detailed. The city code also states that "[n]o operator, entertainer, or employee . . . shall permit to be performed, offer to perform, perform or allow patrons to perform" sexual intercourse, copulation, "fondling or stimulation" of the genitals, breasts, buttocks or pubic

> area. And it also says that no "operator, entertainer, or employee . . . shall encourage or permit any person" to touch, caress or fondle the breasts, buttocks, anus or genitals of "any other person."
>
> The remaining rules attacked by the *Mermaid* deal with stage height and distance, tipping, and restroom attendants. Newport Beach requires entertainers to perform on a stage at least 18 inches high and 6 feet away from patrons. It prohibits direct tipping of entertainers by patrons, and requires an attendant be stationed in the restroom to prevent specified activities. (at 19-20) [Citations to local ordinance and one note omitted.]

The court held:

> In enacting the general no-contact rule prohibiting patrons from having physical contact with entertainers, the city could reasonably conclude that separating entertainers from customers reduces the opportunity for prostitution and drug dealing. The restriction is no more than necessary, for the message of the erotic dance is not lessened by allowing customers to look but not touch, and the provision is constitutional. (at 20) [Citation to local ordinance and one note omitted.]

Courts have had little difficulty in dealing with businesses that operate unlawful massage parlors.

Another approach to the problem of businesses that do or may involve touching is to keep them out in the open. The 11th Circuit, in *Lady J. Lingerie v. City of Jacksonville*, 176 f.3d 1358 (11th Circ. 1999), *cert. den*. 2000 U.S.LEXIS 2386 (April 3, 2000), upheld a requirement that adult live entertainment take place in a room of at least 1,000 square feet.

Courts have had little difficulty in dealing with businesses that operate unlawful massage parlors. The Babins operated a massage parlor in Lancaster, Pennsylvania, under a special exception allowing operation of a "health club" in an industrial zone. The case, *Babin v. City of Lancaster*, 89 Pa. Commw. 527, 493 A.2d 141 (1985), arose from a zoning enforcement action to close the operation because it was operating in violation of its special exception.

The appellate court upheld the trial court's dismissal of the Babins' complaint, challenging the enforcement action. In a subsequent proceeding, the same appellate court upheld the collection by the city of a $200 per day fine for 851 days during which the business continued while the case was on appeal; the court held that a court order in the case had the effect of delaying collection of the penalty and enforcement of the rest of the original order, but the order, including the penalty, remained in effect for implementation when they were sustained on appeal (125 Pa. Commw. 470, 557 A.2d 464 (1989)).

A Kansas City sexually oriented massage parlor lost its legal nonconforming use status when it was closed for a year under court order after the county gathered evidence that prostitution was occurring there (*Acton v. Jackson Co*., 854 S.W.2d 447 (Mo.App. 1993)). When the owner attempted to reopen the massage parlor, the county refused to allow it, determining that during the closure the massage parlor lost its legal nonconforming status. Although the trial court ruled for the massage parlor operator, the court of appeals reversed.

In short, the authors have found no Constitutional or other protection for the touching businesses, ranging from lap dancing to massage and body painting.

In short, the authors have found no Constitutional or other protection for the touching businesses, ranging from lap dancing to massage and body painting. None of the nude dancing cases goes so far as to protect lap dancing or other contact dancing. Of course, a community is free to permit these businesses if it chooses to do so to the extent that they do not violate a state law. Just as some communities in Nevada continue to allow regulated prostitution, other communities may choose knowingly to

allow these touching businesses. They should do so, of course, with full knowledge of the facts and with no misconception that there is Constitutional protection for these businesses.

Of the touching businesses, the massage parlors are the ones that seem most difficult to regulate. There are, of course, entirely legitimate therapeutic massage parlors. Some operate as part of medical clinics and can be protected as incidental uses there. But there are independent massage therapists who are no more in the sex business than is the average physician or lawyer. How can a community distinguish between such businesses and others that are mere fronts for prostitution? Through licensing.

Many states have licensing laws for massage therapists. For example, New York's law (New York Education Law, Section 7804) requires that a massage therapist complete at least 500 hours of training in a prescribed program and pass an examination administered by the state. In those states that do not have licensing statutes, local governments may want to consider adoption of local licensing ordinances. The National Certification Board for Therapeutic Massage and Bodywork (www.ncbtmb.com) has established a 500-hour educational requirement for the massage therapists, administers an exam, and certifies educational programs, providing an easy model for a local ordinance or a state law. Having established massage therapy as a certified profession, a local government should be able to ban massage establishments other than those operated by a certified massage therapist or supervised by a medical professional.

Connie Cooper

There is limited judicial support for special sign regulations for sex businesses. The justification for those limits is to protect the public from "lurid advertising." These signs are clearly not a problem. Efforts to get sex businesses to employ simplicity, innuendo, moderate colors, and less graphic symbols in their signage, however, may prove to be an uphill battle.

SIGNAGE AS A REGULATING FACTOR

The city of Houston enacted a provision that required sexually oriented businesses to employ only "simple signs" in advertising their businesses. In *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1278 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989), the 5th Circuit upheld the provision since the government interest in shielding the public from "lurid advertising" was strong and legitimate. An appellate court in New Jersey, in *Hamilton Amusements v. Poritz*, 689 A.2d 201, 203 (N.J. Super. 1997), *cert. granted* 695 A.2d 667 (N.J. 1997), considered the constitutionality of a statute that restricted signs on sexually oriented businesses:

> No sexually oriented business shall display more than two exterior signs, consisting of one identification sign and one sign giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size. (citing New Jersey Statutes Annotated, Section 2C:34-7(c))

The trial court had ruled for the operator, applying a "strict scrutiny" standard normally applied only to noncommercial speech. The appellate division reversed that decision, applying an "intermediate scrutiny" standard and upholding the sign limits.

Although content-based limits on signs are always risky, there is at least limited judicial support for special sign regulations affecting sexually oriented businesses. Certainly to the extent that such regulations carry out a public policy of banning the public display of sexually explicit images and messages, they are fully defensible. Local governments should go beyond that basic limit only with care and with explicit legal advice.

Eric Damian Kelly

LESSONS LEARNED

Drawing from all of the analysis above, without additional citations, here are some clear lessons from the cases. All recommendations throughout this report are governed by these lessons.

1. Regulations of sex businesses should, to the maximum extent practicable, avoid First Amendment issues. Regulations should focus on the land-use activities and impacts of sex businesses, not the content.
2. Where regulation of sex businesses is defined in part by the content of materials or performances offered by the businesses, the regulations must be supported by studies or other findings. Those studies will need to show that there will be unacceptable "secondary impacts" from the offering of such materials or performances in some locations.
3. Obscene materials lack First Amendment protection. It follows that the rule stated in the previous paragraph does not apply to businesses offering obscene materials or performances.
4. Obscenity is defined through a combination of laws and factual findings. Specifically, if any part of the work has "serious literary, artistic, political or scientific value," it is not obscene; only if the work includes material that is patently offensive may it be found obscene (from examples given in Miller and cited above in Smith, it appears that "patently offensive" material is generally what we have defined as "hard core," including in some cases what we have defined as extremely hard core); if the work includes material that is patently offensive, then the question of whether the material is obscene is one to be resolved by a jury under "contemporary community standards."
5. Studies in support of the action are essential. Local studies are better than studies from other communities, but the Supreme Court has been willing to accept the use of studies from other communities.
6. General regulations are the most likely to withstand scrutiny. Banning all public nudity or the showing of any movies in enclosed booths is much safer than regulating a particular class of performance or movies.
7. Content-neutral regulations are more likely to withstand scrutiny than those that are content oriented. This recommendation is similar in principle to the preceding one; banning all video-viewing booths is a general regulation, but banning all video-viewing booths in sexually oriented businesses (regardless of what videos are actually available in them) is not general but is arguably content-neutral.
8. Making all sexually oriented businesses conditional uses appears to be unconstitutional, although the Supreme Court has not directly addressed the issue.
9. Permitting systems (licensing and conditional use) should have standards. Discretionary permitting systems (including conditional use zoning) run the risk of being found to be prior restraints on speech. Standards should be clear.
10. Permitting systems must have time limits on the decision. Simply requiring that the hearing be held within a specified time or that the decision be made within 30 days after completion of all inspections or some other open-ended process is inadequate; there must be a firm deadline within a reasonable period after the submission of a complete application.
11. Licensing offers a means of continuing control. The industry often challenges local regulations on the theory that they are directed at theoretical problems that will not occur. A local government can use licensing to allow those businesses where in fact there are no problems to operate and to shut down those where problems occur repeat-

edly. Note that licensing is most relevant and most defensible in dealing with businesses that involve on-premises consumption of entertainment; it is much less relevant and less defensible in dealing with bookstores and other protected retail uses.

12. Reasonable operating restrictions are acceptable. Standards on lighting, monitoring of booths, control of age of customers, and even on operating hours are generally acceptable. Operating hours are most likely to be troublesome where many other businesses are allowed to operate 24 hours per day but sexually oriented businesses are not; where operating hours are generally applicable, they are probably a safe approach.

13. Separation requirements (namely, separating sexually oriented businesses from specified other uses) make sense and are defensible, but they must be reasonable. If they have the effect of eliminating most practicable sites for such businesses, they are too stringent. Certainly separation requirements keeping sex businesses off residential blocks are reasonable and defensible.

14. There must be actual sites available for uses protected by the First Amendment. The courts have been clear in requiring that there must be sites reasonably available on the open market; the courts are much less clear about how many sites is enough. As a practical matter, if a community can show that there are enough available but unused sites to increase the number of local businesses by a reasonable percentage, the limits are probably defensible.

15. Dispersal ordinances are common and defensible. Note that dispersal ought to apply to multiple sexually oriented businesses in a single building (book store, theater, arcade) as well as to separate enterprises located near each other.

16. Jurisdictions must ensure that uses protected by the First Amendment are allowed by right somewhere.

17. Nude dancing is at the outer edge of First Amendment protection. Except in states like Washington, Oregon, and New York, which have strong freedom of expression provisions in their state constitutions, communities can probably ban and can certainly limit nude dancing.

18. Prostitution is not protected by the First Amendment. These concerns ought to be addressed directly through criminal ordinances rather than used as the basis for regulating legitimate adult businesses.

19. Touching businesses, including lap dancing and nontherapeutic massage, are not protected by the First Amendment. Local governments should permit such businesses only because they want to, not because officials believe that they are entitled to the same protection as other sexually oriented businesses.

20. Businesses that create the risk of touching can be regulated. Typical regulations include requirements that activities be carried on only in a large and thus presumably fairly public space. It is also possible to ban many of these businesses. There is simply no Constitutional protection for body painting and similar activities.

21. Although the courts have become confused on the issue, it is important to remember that the First Amendment protects the message and, indirectly, its medium, not the business. With a movie theater, the medium and the business are essentially the same. With books and videos, they are quite different. Stay focused on protecting the message.

NOTES

1. Atlanta Code, Section 10-89 (from Code of 1977, amended through 1995), Section 16-28-016 (from Code of 1977), and Section 16-29.001; Austin Ordinance No. 86-1023-G and Chapters 8-2 and 8-8 (both from 1981 Code); Charlotte Code Section 12.518 and Section 2.201 (1994); Cincinnati Ordinance No. 231 (1996); Cleveland Ordinance No. 876-97 (1997); Indianapolis-Marion County Comprehensive Zoning Ordinance (adopted 1993, amended through 1997); Denver Municipal Code, Zoning Section 59-2 [definitions], various parts of Chapter 59 [specific districts] (1997); Manatee County Land Development Code Section 707 (1997); Minneapolis Zoning Code Section 540.10 (1997); Newport News Zoning Ordinance, Definitions and Section 45-524 (1997); Phoenix Zoning Code, Chapters 2 [definitions] and 6 [regarding specific districts]; Portland Code Chapter 14 (1997); St. Paul Municipal Code Section 60.201 [definitions] and 60.544(9)—(17) [typical conditions on adult uses, this in B-3 district]; San Diego Municipal Code Section 101.1800-1899 (1997); Tucson Ordinance No. 7411 (1990); Whittier Ordinance No. 2630 (1994).

2. See, for example, *D.G. Resturant Corp. v. Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991); *Thames Enters. v. City of St. Louis*, 851 F.2d 199 (8th Cir. 1988); and *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

3. A term used to describe legally irrelevant comments of a court in the context of an opinion; the comments typically relate to the subject matter but, because they go beyond the issues squarely presented in the case or are not material to the decision, are not considered a binding part of the court's decision.

4. *East Brooks Books v. City of Memphis, 48 F.3d 220, (6th Cir. 1995), reh. den., cert. den.* 516 U.S. 909, 133 L. Ed. 2d 198, 116 S. Ct. 277 (1995). The court said:

   > We agree that the City has a legitimate interest in identifying those who are legally accountable for the operation of a sexually oriented business, and perhaps those who have a controlling or significant share in such a business. The requirement that every person with any ownership interest, regardless of how small, sign the application, however, is impermissibly broad. (at 226)

5. 719 A.2d at 276, citing *Texas v. Johnson*, 491 U.S. 397 (1989), a case holding that the mere act of desecrating a flag is not in itself protected communication.

6. The issue appears to have been raised only rarely. The courts that have addressed the issue have found squarely that there is no First Amendment protection for sex toys and novelties. See, for example, *Hall v. State of Texas*, 661 S.W.2d 101 (Ct. Crim. App. 1983), and the subsequent *Southwick v. State of Texas*, 701 S.W.2d 927 (Tex.App. 1985).

7. The devices involved in the cases cited here were mostly dildos, although one case involved an artificial vagina.

8. See general discussion of sex toys and novelties in Chapter 2. See, for example, the Texas statute, Texas Penal Code, Section 43.23, challenged in *Regalado v. State of Texas*, 872 S.W.2d 7 (Tex.App. 1994), *cert. den*., 513 U.S. 871, 130 L. Ed. 2d 126, 115 S. Ct. 194, (1994).

9. See, for example, *Lorenz v. State*, 928 P.2d 1274 (Colo. 1996), *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306 (Colo. 1995), and *Tattered Cover, Inc., v. Tooley*, 696 P.2d 780 (Colo. 1985), a case involving explicit materials in a general bookstore.

10. *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123, 140 (3rd. Circ. 1993); see, also, *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1245-46 and note 2 (9th Cir.1982).

11. Note that the court ruled against the city on other issues in the case, discussed elsewhere in this chapter.

CHAPTER 6

How to Prepare a Study of Sexually Oriented Businesses

TO REGULATE SOMETHING EFFECTIVELY, YOU REALLY NEED TO UNDERSTAND IT. TO REALLY UNDERSTAND IT, YOU NEED TO STUDY IT. This chapter provides what we believe are the basic components for preparing a study of sexually oriented businesses in a community. We describe the value of such a study, who should play an active part in the design of the study and its conduct, what the study should contain, and the value of the findings and recommendations that come out of that study

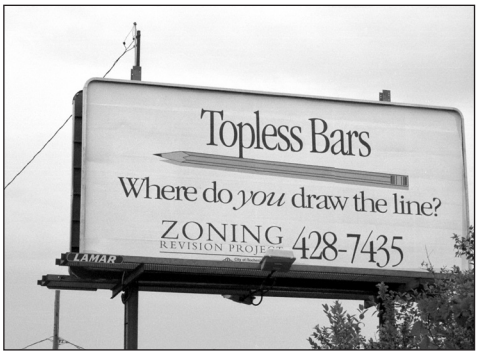
A study will help you understand, among other things, what specifically needs to be regulated.

WHAT IS THE VALUE OF A STUDY?

Studies of sexually oriented uses within a community are almost always undertaken as a basis for making changes in the regulatory approach to these uses. There are a number of key benefits to doing such a study. The following paragraphs explain those benefits.

Better understanding of the businesses to be regulated. Fully understanding the differences in sexually oriented merchandising, on-site entertainment, and operations of the variety of sexually oriented businesses helps a city tailor its regulations to address the specific issues related to specific businesses.

Better understanding of the problem. The study also helps a community, its citizens, its regulating authorities, and even the businesses being regulated gain a better grasp of the nature of the problem. Too often regulations are drafted without understanding the real problem that the community wants to address. We have found that many objections to adult businesses relate to operational issues (e.g., inadequate monitoring of customer activities, limiting access to minors, loitering, or hours of operations) rather than to the materials themselves (consider the fact that neighborhood video stores may be renting x-rated videos). Without an on-site assessment of operations and neighborhood concerns, regulations may miss the real issues.



City of Rochester

Rochester, New York, sought citizen input in its redraft of its regulations for sexually oriented businesses. This billboard provides the phone number for the city's zoning revision project and focuses on gathering input on citizens' opinions about topless bars.

Identification of what is important politically. In addition to identifying the nature of the problem, a study makes clearer what is important politically. Local studies provide opportunities for elected officials, the planning commission, community groups, and staff to share their opinions before undertaking the often contentious task of actually promulgating new regulations. Findings, assessments, and recommendations can be hammered out before entering the amendment or drafting process.

Identification of what needs to be regulated. Finally, a study goes a long way in identifying more specifically what needs to be regulated. Regulation for the sake of regulating is pointless and, when dealing with First Amendment issues, risky. A local study provides a road map for developing regulations that focus on substantive issues. For example, consider the video store with a substantial back room with adult videos. As long as the store stays under a reasonable floor area, it only needs to limit access to the adult section. In contrast, video-viewing booths that prove to be "masturbation booths" or related to activities associated with prostitution will require much stronger regulations regarding loitering, access, visibility, lighting, surveillance, and penalties, including the suspension or revocation of the business's license.

WHO SHOULD BE INVOLVED AND WHY

It is important to make sure that key people are involved in designing and/or conducting the study. The government, community citizens, and even the owners of sexually oriented businesses offer valuable input. Their respective expertise ensures that no important topic is skipped and no perspective overlooked. This makes for a comprehensive study that provides all the necessary information to complete a local regulatory program governing sexually oriented businesses. Getting outside expertise is also helpful in drafting and carrying out such a study. It helps guarantee that political motives do not jeopardize the fairness in the design of the study or its execution.

Elected officials. From the government's side, elected officials, the planning commission, the planning staff, legal counsel, licensing officials, the building inspections staff, the police department, and even health officials may all play a part in helping design the study. The following paragraphs describe briefly their respective roles.

The buck stops with elected officials, so they must be on board of any study effort. They provide feedback on how far they feel the regulations need to go while remaining comfortable that they have responded to community needs. Their involvement is educational for them and provides a basis for support when it comes time to have the regulations passed by the legislative body.

The planning commission. The planning commission considers any changes to zoning regulations. Their comments should be sought early and often.

The planning staff. The planning staff should be strongly involved in the study. Knowledge of regulatory control and land-use issues as well as the use of mapping capabilities makes the planning staff a natural.

The legal staff. Legal staff needs to be involved from the start since, as the material in Chapter 5 made clear, the legal issues affecting the regulation of sex business are complex. If the attorneys are not familiar with this area of the law, suggest that they start by reviewing Chapter 5 of this report and then refer to the additional resources identified there.

Licensing officials. Licensing officials address issues related to the local government's business privilege licensing function. In some communities, this function is largely a matter of registering local businesses and

may be handled through the local government clerk or tax administrator. In other communities, there is a regulatory licensing function dealing with businesses that involve alcohol, coin-operated amusement machines, or live entertainment. If there is a regulatory licensing function in the community, a representative of that office or department should be included in the study.

Building inspectors. The building inspections staff helps address any issues dealing with building code requirements (e.g., acceptable standards for public gathering places, such as lighting, access and size of rooms). This staff is usually responsible for approving new construction or renovations of establishments housing sexually oriented businesses; therefore, review of adult use facilities must be integrated into the existing building inspections process.

The police. The police department can provide valuable information on complaints and criminal activity occurring within or near sexually oriented uses. These problems may be related to prostitution, indecent exposure, public drunkenness, loitering, robberies, burglaries, and other criminal activities or nuisances that may have occurred at specific adult establishments. The police department may also be responsible for site visits to determine violation of the respective ordinances. Having police as participants in the study process and in the development of the regulations enhances the prospect that the regulations are something that they can and will enforce.

Health inspectors. Health inspectors may need to be involved in cases where the community suspects that sexual encounters are taking place on the premises. These personnel can provide advice as to what constitutes a public health hazard and what does not, thereby creating more defensible findings of fact. In some communities, the health department takes no interest in sexually oriented businesses. It is useful to know early in the process whether local health officials will participate in design and implementation of the regulations and ordinance.

Neighborhood and other activist groups. Residents of the neighborhood and other community activist groups should always be involved. All of the usual reasons for involving citizens in the process apply here, along with an additional one—it is important for citizens who are concerned about pornography to understand the legal context in which the city regulates these businesses. When Kansas City had its public hearing on its new standards for regulating sex businesses, one religious group testified that it would like to see the regulations go further, but it understood that the city had gone as far as it could reasonably go legally; consequently, the group supported the regulations. They had been part of the process and clearly learned from it. Involve citizens but make it clear from the beginning that the First Amendment that protects their right to express opinions on such matters also constrains the extent of public regulation of sexually oriented businesses.

Owners and operators of businesses. The 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. Having a working relationship with the owners and operators and their legal counsel provides for open discussion of issues and a better understanding of what are reasonable regulatory controls from their perspective and what are not. This open dialogue may avoid litigation of the ordinance. It is also true that, like other businesses, it is in the best interest of these owners to support regulations that make it difficult for poorly run sex businesses to continue to operate in their present manner, thereby continuing to create problems for well-run establishments.

BASIC PRINCIPLES FOR CONDUCTING A STUDY OF SEX BUSINESSES

When undertaking any study about how to appropriately regulate sexually oriented uses, some basic principles should be kept in mind.

- Be inclusive, include proponents and opponents to the issues
- Be fair
- Fully understand how businesses in your community operate
- Document the problems and the lack of problems
- Keep facts separate from supposition
- Be well-versed on existing regulations, both local and state
- Be well-versed on the legal framework
- Understand the prospective impacts of your recommendations
- Recognize enforcement staff limitations
- Use experts for sound advice and guidance

Applying these basic principles will help ensure that the end product of your study provides regulations that are legally defensible and that can be implemented. In our research, we have found that well-run adult establishments do not mind regulations if they feel the regulations were fairly constructed and they had an opportunity for input.

Consultants. Finally, 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. The process must be above question and thorough. Much is gained by employing experts to either complete the study or assist in an advisory capacity. We have also found that perception is important. It is often the opinion of adult business operators that a city "has it out" for the industry; bringing in outside experts can go a long way in allaying these fears. It brings to the process an atmosphere of fair and unbiased deliberation, as well as some well-versed expertise.

STUDY CONTENTS

Now that you know who should be involved, the next step is determining what should be included in the study of adult uses. There is no "standard" study because different cities have different needs. The following paragraphs describe the key elements that we believe are beneficial to a study of sexually oriented businesses.

You must review local codes and ordinances, state statutes, and court decisions because they may already regulate the operations of sexually oriented businesses.

Studies from other jurisdictions. We can always learn from someone else's efforts, so including studies and ordinances from other jurisdictions is a good start. In fact, the courts have recognized the transferability of findings from adult use studies from one city to another. These studies as well as a city's own are helpful in substantiating findings of fact that are included in the preamble or purpose section to your regulations. Chapter 3 discusses the adult use studies from some of the cities we surveyed and summarizes some key findings in those studies. In addition, reviewing zoning and licensing ordinances from other jurisdictions will provide you with ideas. Before implementing any ideas from other jurisdictions, however, make sure they are reviewed by your local counsel who will check state enabling legislation and other local laws (see the next section) to make sure that you are in compliance and that you are not repeating a legal "mistake" adopted by another jurisdiction.

A review of local codes, state law, 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. You need to be aware of:

- county or state statutes that might regulate health-related issues;
- licensing standards for massage therapists;
- separation requirements for businesses serving alcohol;
- licensing provisions for businesses serving alcohol;
- limitations in state law on businesses that combine nudity and serving alcohol; and
- specific statutes defining various types of adult uses or establishing minimum setback provisions for adult uses.

Georgia, for example, not only prohibits nudity and the performance of sex acts on premises licensed for service of alcoholic beverages, but it prohibits allowing patrons of the licensed establishment to view nudity or sex acts on other premises ("by glass partition or other device") or to carry alcoholic beverages to another premises to view nudity or sex acts (Official Code of Georgia Annotated, Sections 3-3-41, 3-3-43, and 3-3-44).

A CHECKLIST FOR EFFECTIVE ON-SITE VISITS for A STUDY OF SEXUALLY ORIENTED BUSINESSES

- *Make multiple site visits.* The number and character of the business clientele changes based on the time of day and day of the week; multiple visits at varying times provide a more accurate reflection of business operations. The most interesting visits will be outside your normal working hours.
- *Inspect exterior and interior conditions.* Is the establishment clean and well maintained on the interior and exterior?
- *Examine the mix of merchandise (videos, magazines, books, sex toys and novelties, creams, oils, type of non-adult merchandise).* It is important to understand the mix of merchandise, what is available, and how it is displayed, and the context of the merchandise layout. Although the First Amendment protects much sexually oriented merchandise, it does not protect leather goods and lingerie—and the mix of merchandise ultimately defines the type of land use within the broad category of retail sales.
- *Assess operations and activities*. Negative impacts are often due to operational characteristics; it is helpful to provide a general description of the business operation, the level of comfort felt during the visit, what type of on-site entertainment is offered, and how it is presented. This should include an estimate of the percentage of floor area devoted to adult and non-adult merchandise. Having a complete understanding of the good and the bad operational practices will help you craft the regulatory content of the ordinance.
- *How are operations monitored?* Most ordinances aimed at sexually oriented businesses require that management prevent sexual acts and other activities on the premises, but management can only prevent what it can see. Some businesses are designed to provide good visual control of the premises from a central counter; others use video cameras or mirrors to monitor remote parts of the store; others, deliberately or otherwise, isolate parts of the store from public and management view.
- *Note store layout.* Note how the store is arranged. Where is merchandise displayed? Where does on-site entertainment take place? What size are the rooms or booths? As noted above, can the manager see what's going on in the store?
- *Examine lighting*. Is there adequate lighting to deter potential sexual encounters and to provide a measure of security to customers?
- *Describe the customers*. Who are the clientele? You may discover that it's not only the "seedier" characters who frequent such establishments.
- *Are people loitering*? Is this an establishment where people hang out in the halls or outside? Does it appear that there is a potential for solicitation?
- *Is there control of access?* To what extent does the business limit access to minors? Is the adult section physically separated from any non-adult section? Is access controlled by the management?
- *What are the hours of operation*? Does the business stay open 24 hours or well past traditional business hours, creating potential problems with late night disturbances for adjacent properties?
- *Did you observe any illegal activity*? Was there any illegal activity observed during the site visit or activities that appeared suspicious?
- *Parking lot condition, lighting, and surveillance*. Is there enough parking and is it well lit? Is it n good condition? Can outside activities be monitored from inside?
- *What are the adjacent land uses*? The potential for impact on adjacent land uses is important to record. Are there residential properties or public gathering places in proximity to the adult business?
- *Consider the existing zoning*. How is the business zoned? Does it have nonconforming use status? What is the zoning of adjacent land uses?

One example of a state law establishing setback or separation requirements for sex businesses is a 2000 Mississippi law requiring a 1,500-foot separation between "strip clubs" (defined as any place where "public displays of nudity are present") and "any church, school, kindergarten or courthouse" (2000 General Laws of Mississippi 558). Oklahoma requires a 1000-foot separation between an "adult novelty shop" and a religious institution, public or private school, public park or playground, or land zoned or used for residential purposes (Oklahoma Statutes Title 22-109.1). In addition, there are state and federal court decisions that provide guidance as far as what the courts have deemed as reasonable regulatory actions. (See Chapter 5 of this report for a summary of those rulings.)

Reports from city departments. Beyond local codes, state statutes, and court decisions, reports from city departments can be useful inclusions to the study. The police department, health department, or another organization within city government may have prepared reports 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. Review the files and reports from other departments as background information early in your study.

Reports about on-site visits. Carrying out the study should involve on-site visits. These visits, like the ones we conducted for our work in Kansas City and Biloxi, 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. (See the sidebar for a checklist of things to keep in mind.) Such visits also give insight into the differences in the types of sex businesses and why there is a need to treat different businesses differently. This is particularly important in establishments that carry sexually oriented material but should not be considered as sex businesses. It is desirable to visit the businesses without disrupting their normal operations. Although we saw many prosperous looking customers in these establishments, we saw very few in business clothes. Dress casually and leave the clipboard for notes in the car. Take a colleague or a friend; extra eyes are always good, and you will be more comfortable with another person.

We have found that group interviews and meetings with similar types of adult businesses work well; often proposals can be "floated" out to the group for reactions. Open dialogue with these persons will enhance your understanding of their operations, and yield a better end product that may actually avoid costly litigation.

Results from meetings with owners, operators, and their legal counsel. You should provide an opportunity for those potentially most affected by prospective regulations to share their views; these are the owners and operators and their legal counsel for adult business operations within your community. We have found that group interviews and meetings with similar types of adult businesses work well; often proposals can be "floated" out to the group for reactions. Open dialogue with these persons will enhance your understanding of their operations, and yield a better end product that may actually avoid costly litigation.

Results from meetings with citizens and activist groups. Like meetings with the owners and operators of sexually oriented businesses, information gained from meetings with neighborhood groups can prove helpful to the study's effort. Residents can provide information on land-use and operational problems they have encountered, as well as their perspective on what types of regulations they feel are appropriate. What works best are public meetings at the start of the process, followed by meetings at the point recommendations are drafted. As with meetings with owners and operators, these meetings can serve as forums for proposals to be floated out to the group for reactions. Keep in mind that information gained through the public process should be used as a backdrop for the study effort; the study may, in fact, prove that the information is inaccurate, incomplete, or both.

FINDINGS AND RECOMMENDATIONS

Upon completion of the "inventory and assessment" portion of the study, the preparation of findings is essential to capture what you have learned as a foundation for your licensing and zoning ordinance provisions. Findings essentially build "legislative history." Courts often consult this legislative history when interpreting the intent of laws. For findings to be most effective, it should be clear that they are findings of the governing body, not simply material drafted by legal and planning staff. Thus, copies of all studies—or at least executive summaries of all studies—should be provided to governing body members. It is also important to note that the members of the legislative body have been provided these summaries or the actual studies. In addition, it is a good idea for a staff member testifying in support of the study's recommendations to direct the specific attention of governing body members to central findings and to ask the recording clerk or secretary to make specific note of that discussion in the record.

The final section of the study is the "recommendations" section. These recommendations can be general or quite specific. The study's recommendations might identify zoning districts that would be appropriate for the location of specific sex businesses, appropriate separation standards between adult uses and from protected uses such as residences, schools, and parks, and general licensing and operation standards. The recommendations may begin the process of crafting definitions and regulations that recognize distinctions between sexually oriented businesses and other businesses that offer some sexually oriented materials but would not be classified as adult uses. Based on the findings from the study, a community may be able to establish percentage standards for floor area, material, or sales that clearly make these distinctions. Imagine creating standards that inadvertently result in a local bookstore or local video store suddenly being "converted" into an adult use.

Based on the findings from the study, a community may be able to establish percentage standards for floor area, material, or sales that clearly make these distinctions. Imagine creating standards that inadvertently result in a local bookstore or local video store suddenly being "converted" into an adult use.

It is important that recommendations build on the information presented in the study findings. The findings, for example, might document that sexually oriented uses have the potential to have a negative effect on family-oriented land uses. A general recommendation building on this finding would be to "create adequate distance separations between sexually oriented uses and family oriented land uses and other public gathering places." A more specific recommendation would take this a step further and recommend a certain amount of separation between the two uses, such as a 1,000 feet, and would identify the types of family-oriented land uses (i.e., residences, parks, schools, day care centers, and places of worship) to be protected through the regulations. We have found that the more specific the recommendations, the better everyone can respond to them.

Participants must remember that they are reviewing "recommendations for regulations" and not actual regulations. In the best of circumstances, both proponents and opponents should feel that there is opportunity for discussion and, if needed, modification and compromise. Full discussion of the recommendations also makes for more streamlined ordinance drafting for all concerned.

CHAPTER 7

How to Prepare Zoning Regulations for Sexually Oriented Businesses

COMMUNITIES HAVE HISTORICALLY USED ZONING TO CONTROL LAND USES RELATED TO THE SEX BUSINESS. Zoning is ideal for identifying appropriate districts for a variety of sexually oriented businesses as well as noting in which districts such uses are inappropriate. Zoning works well to differentiate between purely retail activities and on-premise entertainment, such as the differentiation between liquor stores and nightclubs.

A basic purpose of zoning is to separate uses that are not compatible. To do this effectively, it is best to differentiate among the types of sexually oriented land uses. Some categories of sexually oriented uses have little if any impacts, while others have significant land-use impacts. Define the differences and then identify appropriate locations within your community.

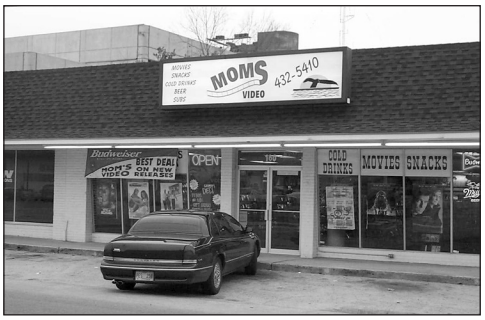
This chapter discusses what land-use issues zoning effectively addresses, offers some suggestions for improving land-use distinctions and calculating separation standards, and describes ways to ensure that your regulations provide sufficient areas for sexually oriented businesses to locate.

A basic purpose of zoning is to separate uses that are not compatible. To do this effectively, it is best to differentiate among the types of sexually oriented land uses.

DEFINITIONS

Following are definitions that we recommend for use in a zoning ordinance addressing sexually oriented businesses. Note that many of these definitions are also transferable to a licensing ordinance, although they are not repeated there. Terms in italics are defined elsewhere in the list.

adult cabaret A building or portion of a building regularly featuring dancing or other live entertainment if the dancing or entertainment that constitutes the *primary live entertainment* is distinguished or characterized by an emphasis on the exhibiting of *specific sexual activities* or *specified anatomical areas* for observation by patrons therein.



Eric Damian Kelly

Many neighborhoods contain "media shops," like "Mom's," that rent x-rated videos. The definitions and regulations in a zoning ordinance governing sexually oriented businesses need to make clear that, unless a business exceeds a community-established threshold for either floor area or stock in sexually oriented materials, it should be treated as a regular business.

adult media Magazines, books, videotapes, movies, slides, cd-roms or other devices used to record computer images, or other *media* that are distinguished or characterized by their emphasis on matter depicting, describing, or relating to *hard-core material*.

adult media store An establishment that rents and/or sells *media*, and that meets any of the following three tests.

1. 40 percent or more of the gross public floor area is devoted to *adult media*.
2. 40 percent or more of the stock-in-trade consists of *adult media*.
3. It advertises or holds itself out in any forum as "XXX," "adult," "sex," or otherwise as a *sexually oriented business* other than an *adult media store*, *adult motion picture theater*, or *adult cabaret*.

adult motion picture theater *A*n establishment emphasizing or predominantly showing sexually oriented movies.

display publicly The act of exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway, or public sidewalk, or from the property of others, or from any portion of the premises where items and material other than *adult media* are on display to the public.

establishment Any business regulated by this Article.

explicit sexual material Any *hard-core material*.

gross public floor area The total area of the building accessible or visible to the public, including showrooms, motion picture theaters, motion picture arcades, service areas, behind-counter areas, storage areas visible from such other areas, restrooms (whether or not labeled "public"), areas used for cabaret or similar shows (including stage areas), plus aisles, hallways, and entryways serving such areas.

hard-core material Media characterized by sexual activity that includes one or more of the following: erect male organ; contact of the mouth of one person with the genitals of another; penetration with a finger or male organ into any orifice in another person; open female labia; penetration of a sex toy into an orifice; male ejaculation; or the aftermath of male ejaculation.

lingerie modeling studio An establishment or business that provides the services of live models modeling lingerie to individuals, couples, or small groups in a room smaller than 600 square feet.

massage studio An establishment offering massage therapy and/or body work by a massage therapist licensed under [REFERENCE] or under the direct supervision of a licensed physician.

> ***Commentary:*** *The space for a reference should be used to point to state licensing law for massage therapists or, if there is no state law, to a local licensing ordinance or requirements stipulated by the National Certification Board for Therapeutic Massage and Bodywork (www.acbtmb.com) or other recognized national group; see discussion of licensing ordinances in Chapter 8.*

media Anything printed or written, or any picture, drawing, photograph, motion picture, film, videotape or videotape production, or pictorial representation, or any electrical or electronic reproduction of anything

that is or may be used as a means of communication. Media includes but shall not necessarily be limited to books, newspapers, magazines, movies, videos, sound recordings, cd-roms, other magnetic media, and undeveloped pictures.

media shop A general term, identifying a category of business that may include sexually oriented material but that is not subject to the special provisions applicable to *adult media shops*. In that context, media shop means a retail outlet offering media for sale or rent, for consumption off the premises provided that any outlet meeting the definition of *adult media shop* shall be treated as an adult media outlet. See special conditions in [REFERENCE] for media shops in which adult media constitute more than 10 percent but less than 40 percent of the stock in trade or occupy more than 10 percent but less than 40 percent of the floor area.

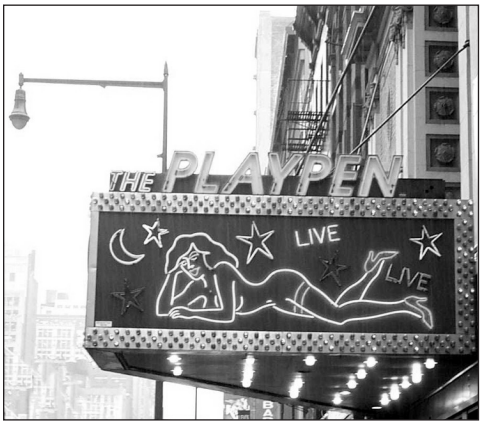
> ***Commentary:*** *The definitions section of an ordinance is not the ideal place for standards or conditions; in a community that lists conditions applicable to a number of permitted use, this language should also be included in that section. The 10 percent benchmark is intentionally high. Our estimate is that, after counting marriage manuals, health guides, art books, and some explicit novels, a major bookstore may have up to 5 percent ot its stock comprised of sexually oriented material; the intent of choosing 10 percent was to avoid any sort of dispute with mainstream retailers. Note that the 40 percent benchmark can be adjusted to fit local circumstances. A store with more than 50 percent of its floor area or stock in sexually oriented media is making a statement that its focus is on such material; thus the benchmark should be less than 50 percent. We observed two businesses in Kansas City that devoted a third or a little more of their floor area to sexually oriented material but neither turned up as problem uses on our neighborhood surveys; we thus selected a number that was less than 50 percent but large enough to include those businesses in regulations that controlled access to the adult material. The "reference" should point to language discussed in the next section of this Chapter about the conditions applicable to mainstream media outlets with more than 10 percent sexually oriented material.*

primary live entertainment On-site entertainment by live entertainers that characterizes the establishment, as determined (if necessary) from a pattern of advertising as well as actual performances.

sadomasochistic practices Flagellation or torture by or upon a person clothed or naked, or the condition of being fettered, bound, or otherwise physically restrained on the part of one clothed or naked.

sex shop An establishment offering goods for sale or rent and that meets any of the following tests.

1. The establishment offers for sale items from any two of the following categories: (a) *adult media*, (b) lingerie, or (c) leather goods marketed or presented in a context to suggest their use for *sadomasochistic practices*; and the combination of such items constitutes more than 10 percent of its stock in trade or occupies more than 10 percent of its floor area.
2. More than 5 percent of its stock in trade consists of *sexually oriented toys or novelties*.
3. More than 5 percent of its gross public floor area is devoted to the display of *sexually oriented toys or novelties*.



Eric Damian Kelly

The "pattern of advertising" at The Playpen makes it clear that the club is characterized by "primary live entertainment" of a sexually oriented nature.

sexually oriented business An inclusive term used to describe collectively: *adult cabaret*; *adult motion picture theater*; video arcade; bathhouse; massage shop; and/or *sex shop*.

sexually oriented toys or novelties Instruments, devices, or paraphernalia either designed as representations of human genital organs or female breasts, or designed or marketed primarily for use to stimulate human genital organs.

specified anatomical areas (1) Less than completely and opaquely covered: human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and (2) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

specified sexual activities Human genitals in a state of sexual stimulation or arousal or acts of human masturbation, sexual intercourse, sodomy, or fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

video-viewing booth or arcade booth Any booth, cubicle, stall, or compartment that is designed, constructed, or used to hold or seat patrons and is used for presenting motion pictures or viewing publications by any photographic, electronic, magnetic, digital, or other means or *media* (including, but not limited to, film, video or magnetic tape, laser disc, cd-rom, books, magazines, or periodicals) for observation by patrons therein. A video-viewing booth shall not mean a theater, movie house, playhouse, or a room or enclosure or portion thereof that contains more than 600 square feet.

If there is one principal lesson that we believe everyone who reads this report should remember, it is that the sex business is many businesses—and zoning should treat it accordingly. Different uses should be subject to different regulations, placed in different zoning districts, and subject to different separation standards.

LAND-USE CLASSIFICATIONS

If there is one principal lesson that we believe everyone who reads this report should remember, it is that the sex business is many businesses—and zoning should treat it accordingly. Different uses should be subject to different regulations, placed in different zoning districts, and subject to different separation standards.

Recommended Land-Use Classification System

Our suggested hierarchy of uses, from those with the least impact to those with the most, is:

- mainstream media outlets with less than 10 percent sexually oriented material;
- mainstream media outlets with less than 40 percent sexually oriented material and complying with conditions outlined below;
- sexually oriented media outlets;
- sex shops;
- sexually oriented motion picture theaters;
- sexually oriented cabarets;
- any of the touching businesses.

Note that this classification system does not include video arcades or video-viewing booths. If a community wants to allow them, which we do not recommend, they have the same potential impact on the community as the touching business in that they either encourage or attract sexual acts in quasi-public places.

Simplified Land-Use Classification System

A simpler classification system would include the the following:

- Mainstream media outlets, including those that include less than 40 percent sexually oriented material but that comply with the conditions outlined below
- Sexually oriented retail establishments, including sexually oriented media shops and sex shops
- Establishments with on-premise sexually oriented entertainment, including motion picture theaters and cabarets

Explanation of the Land-Use Classification Systems

At the root of both classification systems are two guiding principles that we have found to be important in the regulation of sexually oriented businesses.

1. Establishments where people enjoy sexually oriented entertainment on the premises have a higher impact than sexually oriented retail outlets, just as bars (with on-premise consumption of alcoholic beverages) have a higher impact than retail liquor stores.
2. Distinctions among retail outlets should be based on the character of the use, as it is presented to the community. As we found in the Kansas City study and have confirmed in many field visits, the businesses that include sex toys or that add racy lingerie and leather goods to an inventory of sexually oriented media appear to the community to be selling sex, in contrast to a video store that sells (or rents) videos, of which a substantial number happen to be sexually oriented. A subcategory of this principle is that a business that holds itself out as sexually oriented should be considered sexually oriented. (See the definitions of "adult media store" and "sex shop" above.)

We have indicated above that the most important land-use distinction among types of sex businesses is the one between retail businesses and establishments that offer on-premises entertainment. Another distinction that is also important is among establishments with on-premises entertainment. Establishments with live entertainment are likely to have greater impacts than those that simply show movies. The reason is simple—at the live entertainment establishments, there is a risk of inappropriate interactions between entertainers and patrons, regardless of whether the establishment's management encourages such activities.

The businesses that pose the greatest risk of creating undesirable secondary effects are the touching and encounter businesses—the massage parlors, lap dancing establishments, sex encounter parlors, body-painting studios, bath houses, lingerie modeling businesses, and nude photography studios. Such businesses often seem to invite sexual activity between customers and entertainers; when such activity occurs and money changes hands, it begins to look a lot like prostitution—which is currently illegal in 49 states and much of Nevada.

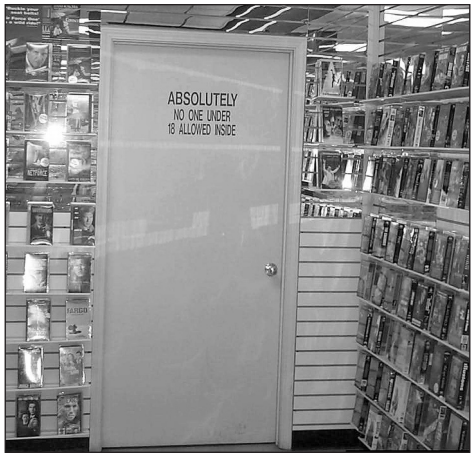
DESIGNATION AS PRINCIPAL USE

Every defined sexually oriented business should be defined as a principal use. If a community allows more than one such principal use in one building or otherwise on one premises, it should do so explicitly. Sexually oriented businesses should not be allowed as accessory uses. The industry

"PORNOSPRAWL": IS YOUR COMMUNITY READY?

According to Ellen Perlman in an article, "Pornosprawl," in *Governing* (October 1997), many x-rated businesses are moving out of large cities that have cracked down on them in an attempt to clean-up their image and improve the quality of life for their citizens. Where are they going? To surrounding small towns and suburbs who do not have zoning or licensing regulations in place to deal with the businesses. Jan Larue, former senior counsel for the National Law Center for Children and Families (www.nationallawcenter.org), which focuses on the protection of children and families from the harmful effect of illegal pornography by assisting in law enforcement and law improvement, describes the typical situation: "If neighboring small cities don't have ordinances, these business do pop up in strip malls, . . . And the problem with strip malls is there's usually a residential area right behind the parking lot."

has been particularly effective at persuading local governments to allow it to install video-viewing booths as accessory uses to sexually oriented bookstores. As our discussion here illustrates, video-viewing booths are a high-impact form of on-premise entertainment and thus of an entirely different character than a retail bookstore; if video-viewing booths are allowed, they should be allowed in a zone suitable for on-premise entertainment, not in one that just happens to allow sexually oriented retail media outlets.



Eric Damian Kelly

Mainstream media outlets that carry, for example, x-rated videos should be considered mainstream businesses rather than a sex business as long as access to sexually oriented materials is restricted physically and visually and signs clearly indicating limited access are appropriately sited

Conditions for Mainstream Media Outlets

Mainstream video stores, bookstores, and newsstands that carry *some* sexually oriented media should be expressly protected and not made subject to the zoning and separation requirements applicable to sexually oriented media outlets, even if they carry some material that may be considered hard-core pornography. We recommend that the treatment of a store with more than 10 percent sexually oriented material but less than 40 percent (unless the community chooses a different higher benchmark) should be the same for zoning purposes as any other media outlet, subject to the following conditions:

> Adult media in a shop to which this section is applicable shall be kept in a separate room or section of the shop, which room or section shall:
>
> a) not be open to any person under the age of 18;
>
> b) be physically and visually separated from the rest of the store by an opaque wall of durable material, reaching at least eight feet high or to the ceiling, whichever is less;
>
> c) be located so that the entrance to it is as far as reasonably practicable from media or other inventory in the store likely to be of particular interest to children;
>
> d) have access controlled by electronic or other means to provide assurance that persons under age 18 will easily not gain admis sion and that the general public will not accidentally enter such room or section or provide continuous video or window surveillance of the room by store personnel; and
>
> e) provide signage at the entrance stipulating that persons under 18 are not permitted inside.

IN WHAT ZONING DISTRICTS ARE THESE USES APPROPRIATE?

Several operators of sexually oriented businesses—particularly sex shops—have told us that their preferred location is in a highway-oriented commercial area. To the business operators, such locations offer an ideal combination of good visibility to passersby and reasonable anonymity, with most people passing by too quickly to recognize the cars, read the license plates, or see the faces of patrons who may be parked there or walking in or out of the business. Sexually oriented cabarets also thrive in such locations, although they also do well in convention-oriented downtowns.

From a community perspective, these locations can also work well. Often, a highway-oriented or intensive commercial area is well separated from residential and other protected land uses, and the surrounding car dealers, truck stops, convenience stores, and overnight accommodations are auto-oriented uses unlikely to attract wandering youths or pedestrians likely to stumble accidentally into one of the adult businesses. A community concerned about location of such businesses along a major

entrance corridor can allow the businesses in the appropriate zone but ban them along certain sections of certain streets.

Most communities we surveyed allowed sexually oriented businesses in one or more of their commercial zones and within their industrial zones. Today's light industrial and business park zones can sometimes provide an appropriate environment for auto-oriented uses, as most sexually oriented businesses are. It is rarely appropriate, however, to encourage retail and entertainment activity in heavy industrial areas or along roads characterized primarily by heavy truck traffic. Although an industrial zone may be one appropriate choice in which to allow sexually oriented businesses, in most communities they are more appropriately located in commercial zoning districts, in accordance with the following guidelines.

- Mainstream media outlets with less than 40 percent sexually oriented material should be allowed in all zones that allow other media outlets, subject to the "back room" conditions outlined in the previous subsection.
- Sexually oriented media outlets should be allowed in all zones that allow other media outlets, subject to separation conditions from protected uses.
- Sex shops should be limited to intensive commercial zones (shopping center, highway commercial), subject to separation conditions from protected uses.
- Sexually oriented motion picture theaters should be allowed in the same zones that allow motion picture theaters, subject to separation conditions from protected uses.
- Sexually oriented cabarets should be allowed only in the zones that allow high-impact live entertainment, subject to separation conditions from protected uses.
- None of these businesses, other than the mainstream media outlets, with conditions, should be allowed in neighborhood business districts or residential/office transitional districts.
- Massage studios for certified or licensed massage therapists or persons working under medical supervision should be permitted in any district where professional or personal services are permitted. The zoning ordinance should clearly differentiate them from sexually oriented massage studios, which we recommend prohibiting unless the community provides a compelling reason to allow them.
- Touching and encounter businesses should be allowed only with caution and then only in zones designed to deal with high-impact uses.
- Video-viewing booths, if allowed, should be allowed only in zones designed to deal with high-impact uses with on-premise entertainment.

SHOULD SEXUALLY ORIENTED BUSINESSES BE CLUSTERED?

Combat zones do not work. Placing multiple sexually oriented businesses in one area creates much greater impacts on the community than separating the businesses. As a matter of fact, there is a good deal of evidence that impacts on the crime rate and on property values are minimal for a single, well-managed sexually oriented business, separated from other such businesses. Disaggregation standards limit or prohibit the co-location of multiple sex businesses and require the separation of establishments that include sex businesses.

Corbis

Placing many businesses in one area has greater impacts on the community. Times Square in New York City gained an infamous international reputation because of such clustering.

We would not recommend more than one type of on-premise entertainment, such as a sexually oriented video arcade, be allowed, whether as a principal or an accessory use. Likewise, we do not recommend that video arcades be permitted as an accessory use to a retail store in a zone that does not permit on-premise entertainment.

Co-location of multiple sex businesses is common in the industry. We have seen all of the following combinations:

- Sex shops with video-viewing booths
- Sexually oriented media outlets with video-viewing booths
- Sexually oriented motion picture theater with sexually oriented video rentals
- Sexually oriented cabaret with motion picture theater, video-viewing booths, and rentals of sexually oriented videos
- Sexually oriented cabaret with related touching and encounter businesses, including booth dancing, and table dancing

Because such co-location is so common in the industry and because there is some reason to try to satisfy market demand while reasonably limiting the proliferation of businesses, we have concluded that there is a reasonable basis for allowing the co-location of sexually oriented *retail* business with an *on-premise* entertainment business, but only in a district that permits on-premise entertainment businesses. We would not recommend more than one type of on-premise entertainment, such as a sexually oriented video arcade, be allowed, whether as a principal or an accessory use. Likewise, we do not recommend that video arcades be permitted as an accessory use to a retail store in a zone that does not permit on-premise entertainment. If a community so chooses, there is certainly ample evidence to justify a prohibition on co-location of multiple sex businesses. (See Chapter 3.)

SHOULD THESE BUSINESSES BE SEPARATED FROM OTHER USES?

One of the most common provisions in local zoning for sexually oriented businesses is a requirement that a sexually oriented business be separated from certain protected uses. There is ample legal precedent for such separation requirements and substantial factual evidence from studies to support the imposition of such standards. (See Chapter 3.)

Which Uses Should Be Protected?

The object of the separation standards is to protect uses that attract substantial numbers of impressionable youth or that attract people who go to that use with a reasonable expectation that they will not accidentally encounter a sex business. Thus, religious institutions and schools serving children in the K-12 grades are at the top of any list of uses that should be protected. A list of some uses commonly protected through separation requirements for sexually oriented businesses, with a brief discussion of each, follows.

Religious institutions. There is a solid philosophical and legal basis for protecting religious uses from sexually oriented businesses. It should go without saying that the protection should apply to "religious institutions" or "houses of worship," not "churches," as many ordinances still provide.

K-12 educational institutions. There is similarly a solid basis for protecting K-12 schools from sexually oriented businesses.

Parks and playgrounds. Because parks and playgrounds also attract youths, there is a good basis for protecting the parks—but the size and shape of such parks may turn out to eliminate so many sites from consideration that it becomes necessary either to remove parks from the list of protected uses or to reduce the separation requirement from parks. Separation from linear parks such as greenways or parkways, in some communities, will drastically limit the number of suitable sites.

Libraries. Some local ordinances treat libraries as protected uses, although many libraries include a good deal of material that would be placed in the "adult" section at a media store. Because libraries attract youths, there is a solid basis for imposing such a separation requirement.

Colleges and universities. Far more than 90 percent of college and university students are legally adults (if the local legal age is 18) and entitled to make their own decisions about what they read and what movies they see. There is no practical or legal basis for imposing a separation requirement from a typical college or university. A small theological seminary might be treated as a religious institution and protected. While there is an argument for similarly protecting a college with a religious affiliation, the size and shape of the campus may make it impractical to protect it after taking into consideration the impact on the availability of sites.

Day-care centers. If the day-care centers serve school-age youth, there is a solid basis for including them on the list. If they serve pre-schoolers, the children should be under constant supervision and there is little basis for imposing anything more than a very minimal (not next door or on the same block) separation requirement.

Government buildings. Although we have seen "government buildings" included on lists of protected facilities, we are not aware of any facts or findings that support including government buildings, such as city hall, the planning office, or the water department, on a list of protected uses.

Gateways. There is certainly good reason to consider banning or limiting sexually oriented businesses along major gateway corridors. A number of the surveyed jurisdictions require separation distances from entryways. Where a community has a corridor ordinance that requires extra landscaping or otherwise provides special protection for a corridor or entryway, there is certainly a strong argument in favor of limitations on sexually oriented businesses as potentially detracting from the gateway image.

Pool or billiard halls. Some communities require separation of sex businesses from pool or billiard halls. The purpose of such a separation requirement is not to protect the pool hall or its patrons from the impacts of the sex business, but to prevent the concentration of different types of adult businesses. See discussion of the concentration issue in Chapter 3.

How Much Separation Should There Be?

How far should such establishments be separated from protected uses? A separation requirement of 1,000 to perhaps 1,500 feet is defensible if it leaves a reasonable number of sites available in the community. At a minimum, a community should discourage multiple sex businesses on the same block and within 500 feet of one another. The following discussion provides additional insight into specific separation standards.

The surveys of appraisers in Indianapolis and Rochester, as well as the neighborhood surveys in Kansas City, (see Chapter 3) provide support for the following separation standards.

- Where practicable, the regulated, sexually oriented business should not be located on a block if any part of that block is zoned and used for exclusive residential uses.
- A sexually oriented business located on the same street as a protected use will have more impact on the protected use than a sexually oriented business located the same distance from the protected use but on a different street.

How far should such establishments be separated? A separation requirement of 1,000 to perhaps 1,500 feet is defensible if it leaves a reasonable number of sites available in the community. At a minimum, a community should discourage multiple sex businesses on the same block and within 500 feet of one another.

Connie Cooper

When a sex business is part of a multitenant property (as Exotic Video is in this commercial strip, where it is, ironically, located next to Skip's Meat Market), separation distances to protected uses need to be measured from the walls of the sex business, not from the parking lot or other businesses.

If the initial testing of a proposed separation requirement indicates that there will be few or no available sites and it is thus necessary to make adjustments, consider adjusting the methods of measurement rather than the distances.

- Sexually oriented businesses are very likely to have at least some impacts on protected uses located within 500 feet.
- Sexually oriented businesses may have measurable impact on protected uses located more than 500 feet away and up to 1,000 feet away.
- There is some evidence to indicate that there may be some impacts at distances of as much as 1,500 feet, but there is no evidence of impacts past that distance.

One question is how the distances should be measured. Most communities measure as a straight line, without regard to intervening structures (meaning "as the crow flies"), from property line to property line, or from the property line of the sexually oriented business to the protected residential district boundary line. The Oklahoma statute dealing with "adult novelty shops" requires that they be separated from protected uses by a distance "measured from the nearest property line of such church or school to the nearest public entrance door of the premises of the adult novelty shop along the street right-of-way line providing the nearest direct route usually traveled by pedestrians between such points" (11 Oklahoma Statutes Annotated, Title 22-109.1). There is a good deal of logic in using a measurement that approximates pedestrian routes by following property lines as they adjoin public rights-of-way. Using the walking-distance measurement serves several useful purposes.

- It recognizes the fact that a use encountered while walking along the same street will have a greater impact than one located on a different street.
- It is easier to defend the relationship between the measurement and the impacts, whether to public officials or a judge.
- It addresses the problem of linear commercial zones with protected residential areas located on adjacent blocks to the rear because it can still allow for some sites in such areas, particularly in the middle of the major street side of an all-commercial block.
- It allows public officials to adopt a higher separation distance, which may please some constituent groups, without unduly restricting the availability of sites.

In establishing methods of measurement, it is important to recognize the difference between multitenant properties and single-tenant ones. If a sexually oriented business moves into a shopping center, the measurement should run from the walls of the sexually oriented leased premises, not from the parking lot or from the other buildings within the shopping center.

Local ordinances commonly use measurements from the property lines of protected uses. The courts have been willing to accept such measurements, but there are logical reasons for using other forms of measurement. If the initial testing of a proposed separation requirement indicates that there will be few or no available sites and it is thus necessary to make adjustments, consider adjusting the methods of measurement rather than the distances. It might be worthwhile to measure the separation distances from the entrance of the sexually oriented use to the entrance of the protected use or boundary line of the protected district. For example, it may make sense to measure distances from religious institutions from the buildings or even from useable entrances

rather than from the edge of the property. While it would not be desirable to have a sexually oriented business located right next to the parking lot of a house of worship, an ordinance might impose a minimum separation of 100 or 200 feet from any part of the property and a separation of at least 500 feet from the principal entrance to the house of worship. Such an approach may make sense especially in a situation where one or two large institutional properties have the effect of eliminating multiple potential sites from consideration.

What if a Protected Use Moves in Later?

Basic principles of fairness and equity suggest that the separation standards should be enforced against the sexually oriented business only for uses that exist when the sexually oriented business first opens at a location. The doctrine of vested rights will have the same effect in many states.

There are also practical reasons for taking that position. First, it would be relatively easy in some locations for an anti-pornography group to obtain a short-term lease on a storefront and open up a small-scale house of worship or day-care center; to the extent that such a technique were used to defeat the right of a sexually oriented business to operate, it would amount to the local government's endorsement of a form of third-party censorship. Second, if the use that moves in does so in good faith, it, like any other land buyer or lessee, must be presumed to have done so with knowledge of the conditions surrounding it—in other words, if a particular day-care operator or religious group decides that it can peacefully co-exist with an established sexually oriented business, there is no reason for the community to intervene.

WHAT IS THE EFFECT OF THE PROPOSED RESTRICTIONS?

It is essential to do a reality check on proposed zoning and separation requirements for sexually oriented businesses. If the practical effect of the new regulations will be to eliminate most or all possible future sites for sexually oriented businesses, the courts are likely to strike the ordinance down. (See the discussion in Chapter 5.) Although we have suggested that a 500-foot separation requirement between sexually oriented businesses and protected uses is readily defensible, the effect of requiring that sexually oriented businesses be separated by 500 feet from residential areas in a community with a lot of linear commercial zoning may be to eliminate most possible sites.

There is no clear answer to the question of how many sites must be available, but there certainly must be some sites available without zoning changes, conditional use permits or other discretionary approvals. If there are several good sites (good access, good visibility) actually available (for lease, for sale, vacant, or grossly underused), a city can use that fact to demonstrate that demand is at least temporarily satisfied and may be able to defend the availability of a smaller number of potential sites. If all of the potential sites have problems with access, visibility, or availability, the separation standards or permitted zoning districts should be reexamined to allow for more sites. If in doubt, prepare a preliminary analysis of available sites and show it to a couple of local real estate professionals—ask them if, based on this study, they would tell a prospective client that they could find a reasonable selection of available sites for a sexually oriented business. Measure distances for this purpose the same way the enforcement officers will measure them, which is likely to require hand measurements on a map or even field measurements, rather than Geographic Information System (GIS) calculations.

There is no clear answer to the question of how many sites must be available, but there certainly must be some sites available without zoning changes, conditional use permits or other discretionary approvals.

Be sure to test the effect of the regulations for all types of sexually oriented businesses. As a land-use, movie theaters have the clearest Constitutional protection; yet, following our recommendations, a community may apply greater separation requirements to movie theaters than to bookstores. The fact that there are sites available for bookstores will not excuse the lack of potential sites for theaters.

If the initial testing of the proposed regulations shows that there would be no sites, very few sites, or only sites with major problems, adjust the proposed regulations. If one of the protected uses is blocking a large number of sites, consider taking it off the list or changing the separation requirement from it; if the separation requirements are simply too large to work in your community, reduce them. By the time of the public hearing on proposed regulations, planners or other staff responsible for preparing the ordinances should be able to testify as to the availability of sites under the new ordinances.

CAN SIGNAGE FOR SEX BUSINESSES BE LIMITED?

Some communities impose specific limitations on signs for sex businesses, often prohibiting sexually explicit messages or drawings. Although content-based restrictions on signs must always be approached carefully, there is no doubt that a community can ban sexually explicit matter on signs under state laws intended to protect minors from being exposed to such material. In addition, there is evidence from the New York City study (see Chapter 3) and some judicial support (see Chapter 5) for additional restrictions on the quantity and nature of signage allowed for sexually oriented businesses.

Many communities prohibit window displays of adult products. (See definition of "display publicly" above.) In a pedestrian-oriented commercial area, a community may want to consider a combination of a ban on public display of explicit sexual material and a requirement that existing windows be maintained as visual "neutrals" in the store façade with non-explicit displays.

OTHER ISSUES

In our recommendations for a licensing ordinance in Chapter 8, we address some issues that relate to the physical space in which business is conducted; these issues might also be addressed through zoning, including the following.

1. *Requirements for a stage for live entertainers, with specified physical and horizontal separation between performers and audience.* The licensing ordinance controls the conduct, but the zoning ordinance could provide physical specifications for the stage.
2. *Bans on showing videos or movies in small spaces.* As with the stage for performers, our licensing ordinance is directed at the conduct, but the zoning ordinance could address the construction of the small spaces.
3. *Bans on individual performances in small spaces.* Again, zoning could address the construction of the spaces.

These last three items are best addressed through licensing, where that is legally and politically possible. For a community that must rely entirely on zoning to regulate sexually oriented businesses, however, it may be possible to include these and some other physical limitations on the operating space in the zoning ordinance.

CHAPTER 8

How to Prepare a Licensing Ordinance for Sexually Oriented Businesses

THERE ARE MANY POTENTIAL SECONDARY EFFECTS AND COMMUNITY CONCERNS RELATED TO ADULT BUSINESSES. Most involve the operation of these businesses, particularly the management of the businesses and the behavior of the customers. It is, however, appropriate and necessary to continue to address certain land-use issues related to such businesses through the zoning ordinance. It is however, also important to focus separately on the operating issues that can be addressed through licensing. We have provided a series of checklists for those who are drafting or amending their licensing provisions for sexually oriented businesses. The lists below address the issues of license administration, application content and review criteria, standards for physical design, basic operating standards, categories for license violations, and, finally, procedures for licensing suspension and revocation.

It is important to focus separately on the operating issues that can be addressed through licensing.

WHY, WHEN, WHAT, AND WHO TO LICENSE

Use licensing to address operational issues at all establishments that offer entertainment on the premises. One of the major goals of licensing is to encourage establishments to manage their customers. Such management and operational control are particularly critical in entertainment establishments because of the amount of time that customers spend on the premises. A customer in a book or video store may spend 10 or 15 minutes making a selection, but a customer at a movie theater or nude bar is likely to stay for an hour or more. Likewise, the existence of video-viewing booths clearly attracts loitering, which extends the length of visits.

Do not use licensing to control shops that deal only in media. We have found no evidence that the sale or rental of books, magazines, newspapers, or videos results in the kinds of operational problems that licensing is intended to control. Because these are forms of communication that generally enjoy the highest level of

First Amendment protection, courts will subject regulations affecting them to "strict scrutiny," and the lack of evidence of operational problems with such stores means that the licensing regulation is likely to fail such scrutiny. We do, however, recommend that your zoning ordinance specifically define media stores that include more than 10 percent hard-core sex materials and specify how access to these materials will be controlled.

Licensing should impose a minimal burden on sex shops because the operational issues in them are much less significant than in establishments with on-premise entertainment. We believe that a licensing ordinance for sex shops will withstand even a "strict scrutiny" test.

Consider licensing sex shops. Sex shops are retail operations that sell sex (see the glossary for definition). Although some of the best business operations we have seen in our fieldwork have been sex shops, the perception that they sell sex affects customers and neighbors, and selling sex can result in operational problems that concern both neighbors and public agencies. Licensing should impose a minimal burden on sex shops because the operational issues in them are much less significant than in establishments with on-premise entertainment. We believe that a licensing ordinance for sex shops will withstand even a "strict scrutiny" test. Since we do not recommend licensing stores that carry only sexually oriented books and videos (protected media), operators would continue to be allowed to sell the protected media without a license simply by giving up such unprotected products as sex toys, lingerie, and leather goods.

License managers. Adult businesses operate for long hours, and the owner or store manager will not be there during all of those hours. It is very much in the public's interest to have someone on the premises at all times who feels directly responsible for compliance with the law and for responding to inquiries from law officers or other public officials. Although it is unrealistic to think that the owner or principal manager will always be on the premises, through licensing a community can require that there be a designated licensed management representative on the premises at all times. By requiring that a licensed business have a licensed manager on the premises at all times, the local government increases the probability of continuous, voluntary compliance with the ordinance.

License entertainers. Performance in adult cabarets can come from many backgrounds. There are college students, housewives, moonlighting secretaries, and mechanics who perform in adult cabarets and other sex businesses. There are also, without doubt, some prostitutes. The best way to separate those who have a history of engaging in illegal acts from those who do not is to license them, using background checks in the licensing process—and to revoke the licenses of those who breach the public trust by engaging in prohibited activity while holding a license.

By establishing "affirmative duties," a government places the responsibility of compliance squarely on the shoulders of management.

Establish "affirmative duties." Some of the operational problems that we have observed in sex businesses include burned-out light bulbs in dark hallways—providing a convenient venue for pickups—tissues and other debris on the floor of viewing booths, two persons in viewing booths, and individuals seeking pick-ups or some sort of anonymous human connection. By establishing "affirmative duties," a government places the responsibility of compliance squarely on the shoulders of management. For example, most licensing laws include expectations for their holders; liquor establishments are expected to be diligent in controlling who is on the premises and where they buy their supplies, and taxi drivers have a responsibility to charge the fare shown on the meter. Through "affirmative duties" in licensing ordinances, a local government can turn operational expectations for sex businesses into requirements that, if not met, result in penalties for businesses that do not attend to those duties and can lead to the closing of the business.

Consider a point system. Most states use point systems to assess drivers for infractions that may lead to the suspension or revocation of a license. We recommend the same system for licenses of establishments and individuals engaged in adult businesses.

- *A point system provides a convenient way to deal with cumulative violations and to distinguish among minor violations (inadequate lighting, poor maintenance) and more serious ones (prostitution or drug dealings on the premises)*. It would be difficult to justify suspending a license because of a single instance of multiple persons being found in one video booth if the management had no knowledge of it; on the other hand, if there are several of these occurrences over a period of months, either management must know about it or management is too oblivious to its surroundings to hold a license. States take the same position with regard to a speeding ticket for five miles per hour over the speed limit—anybody could get one such ticket, but most drivers know that receiving three or four for even minor infractions in a short period of time can affect one's license.

- *Assessing points for violation of "affirmative duties" does not require proof of intent*. Unlike criminal convictions that generally require proof of criminal intent, licensing ordinances establish "affirmative duties" of management to abide by certain operating rules and penalizes them for failing to do so—regardless of intention. In some cases, police obtain solid evidence showing that an employee engaged in illegal conduct but not clearly showing a role of management in the activity. Under the licensing ordinance, the police can prosecute the employee and the licensing officer can assess points against the establishment, based on the same evidence.

- *The point system is much easier to administer than a criminal prosecution*. Our recommendation is that violations of licensing standards be handled like a traffic ticket, with an automatic assessment of points, subject to a request by the violator for a hearing. Even where there is a hearing, there is a much lower burden of proof on the government in the licensing matter—usually a "substantial evidence" or "preponderance of the evidence" test, compared to the "beyond a reasonable doubt" test that applies to criminal prosecutions.

Keep the criminal or municipal penalties, in addition to penalties imposed by the point system. The purpose of the licensing ordinance is to improve operations, in part by making management attentive to matters that go far beyond what a community can regulate through criminal or similar laws. Local governments should retain their criminal laws dealing with prostitution, indecent exposure, sale of drugs and drug paraphernalia, and other criminal activities. Where the police or prosecutor have sufficient evidence, those crimes should be prosecuted.

Licensing fees should be designed to help defray the substantial expenses incurred in processing applications for licenses and permits issued. License fees should not be—and in most states cannot be—used as a sort of tax on engaging in a particular business. On the other hand, background checks and inspections of establishments are expensive, and it is perfectly legitimate for a local government to expect that such a program will be self-supporting.

Licensing standards must be clear. See Chapter 5. Any licensing ordinance giving the licensing official discretion is vulnerable to successful Constitutional challenge.

"LICENSING DECISIONS SHOULD BE CLEAR AND EASY TO APPEAL"

A case from Cincinnati illustrates the consequences of not following the principle we recommend in the text of this report. A Cincinnati bookstore owner was accused by the city of operating a sexually oriented business without a license. The business sued the city and won. The reason—too much discretion given to a local official and an illegal appeal process. According to an article in the *Cincinnati Enquirer* Metro Section, "Sex Shop Restrictions Tossed" (October 18, 2000), the judge deciding the case did not find in favor of the business because of First Amendment concerns. Rather, "the judge focused on the technical issue of how the city handles applications for licenses. Under the law, store owners apply for a license with the city treasurer. The treasurer then reviews the case and either accepts or rejects the application. If the application is rejected, the store owner's only option is to ask the treasurer to reconsider. [The judge] said that's not good enough. He said the constitution requires a 'prompt judicial review' of the treasurer's original decision."

Licensing review processes must be clear and of limited duration. An applicant who files a complete application should receive a prompt, written decision on that application. The courts have generally held that the ordinance itself must set a time limit for approving or denying a license application. Note that the courts have been particularly critical of delays in the process to allow other public agencies to complete site inspections or background checks—all of those must be completed within the time limit.

Licensing decisions should be clear and easy to appeal. Penalties related to violations of the terms of a license as well as the denial, suspension, or revocation of a license must be eligible for appeal, and the appeal process should offer prompt access to the courts. In an ordinance we recently helped draft, we recommended to a client that the ordinance give the appealing party a choice of going to a local hearing officer and then to court, or going directly to court. If there is an interim appeals step at the local level, it should be a quasi-judicial appeal and not a political one—and, like the licensing process itself, it should have a defined schedule.

APPLICATION CONTENT AND REVIEW CRITERIA

Require a complete application. Once a local government accepts an application for a license for a sexually oriented business, it must complete the processing of that application promptly, in accordance with an established schedule. It is impractical and sometimes impossible to meet a review deadline if the application is incomplete. Thus, a local government should simply refuse to accept an incomplete application. Although it may be impractical to review the application for completeness at the precise time that it is delivered, such a review should occur within two or three days of the physical arrival of the application at a public office—a rejection of an application as incomplete should be made in writing, mailed to the applicant, and specify exactly what is missing.

The ordinance should be very specific about what types of criminal convictions will disqualify an applicant; a simple way to do that is to refer to specific sections of the state criminal code dealing with sex and related crimes.

Require information sufficient to run basic background checks on applicants; provide for the denial of a license to persons based on specific background deficiencies. One of the goals of a licensing ordinance is to deny licenses to those who have a history that indicates that they are not likely to uphold the operating standards imposed on licensees. Relatively recent convictions of related crimes or revocations or suspensions of similar licenses (say, within the past five years) are indications that an applicant may not be someone who should hold a license. Note that the courts have been sympathetic to the denial of licenses based on relevant background deficiencies only—for example, while a community can clearly justify denying a sex business license to someone who has recently been convicted of prostitution, rape, or even indecent exposure, it probably cannot justify such a denial based on a conviction for burglary or check fraud. The ordinance should be very specific about what types of criminal convictions will disqualify an applicant; a simple way to do that is to refer to specific sections of the state criminal code dealing with sex and related crimes.

Require information on shareholders, partners, and officers. A corporation or a partnership is an artificial person created by the law. Because such an entity is easily created, a corporation or partnership named as a license applicant may have no relevant background. Thus, in the case of such an application, it is important to obtain background information on the people who control the entity that is listed as the applicant. Look at state or local licensing laws for establishments that sell alcoholic beverages and model the application requirements for "interested parties" or "control persons" on that. The same background qualifications should apply to such interested persons or control persons as would apply to an

individual applicant. Please note that this requirement cannot be used in Georgia, Alabama, or Florida (see discussion in Chapter 5).

Impose age standard and require proof. Most communities will require that owners, managers, and entertainers be at least 18. Some may follow the pattern of the liquor laws and require that these persons be 21. We express no opinion on that choice, but whatever minimum age the local government selects should be set out in the ordinance and not assumed.

Impose standards based on license history. If suspension or revocation of a prior license will be considered in deciding whether to issue a new license (and we believe those factors should be considered), the licensing ordinance should make that clear. A license revocation within the previous two or three years should typically be grounds for denial. An older revocation or violations not leading to revocation might be the basis for issuance of a provisional license.

Be site specific and require control of the premises. A license for a sexually oriented business should be site specific. Such a license should be issued only to an applicant that controls the premises through ownership or a valid lease.

Specify that the license is not transferable. This license is issued to licensee only and that any successor operator or owner will be required to go through the application process.

Condition issuance of license on payment of fees. No license should be issued unless the license fee has been paid.

Address relationship of license to other licenses. If local policy makers want to prevent the issuance of such licenses to establishments that sell alcohol or that have gambling, those criteria should be specified in the ordinance. Some local governments may limit the number of licenses that can be issued for a single premises or to a particular operator; again, those issues should be addressed in the ordinance.

Require tax compliance. A license is by definition a privilege, not a right. A local government need not issue a license to an individual or entity deficient in payment of tax obligations to the local government. It is less clear whether a local government can deny a license based on deficiencies in other tax obligations. Note that a licensing standard based on tax compliance is a curable condition—a license that is denied only on that basis should be issued once taxes are brought current.

Require code compliance for the premises. At a minimum, the licensing ordinance should require that the proposed premises meets the zoning standards—including separation requirements—for such a business. It is reasonable to require compliance with other codes to the extent that those codes are consistently enforced against other businesses moving into similar buildings. In other words, if a mainstream cinema moving into a particular building would be required to add one or more fire exits, it is reasonable to ask that a sexually oriented movie theater do the same. On the other hand, communities that have attempted to use overly rigorous code compliance requirements to discourage sexually oriented businesses have lost their cases in court. As indicated above, any public inspections of the premises to ensure compliance must be accomplished promptly and within a general time limit imposed on the licensing decision.

Require design compliance. If the zoning or licensing ordinance contains particular standards that affect the design or layout of the premises, either the existing premises or plans submitted with the application should show that the premises will comply with those standards. Examples of the types of standards that would affect the premises would

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Connie Cooper

Mirrors like the one prominently displayed here help management keep visual control of a premises. This is particularly advisable for booth areas, which are often poorly lit and the least public places, making it possible for activities that can lead to the loss of a license for an establishment. In other words, such visual control is also in the best interest of the business.

be: standards requiring that someone working at the manager's station have a clear view of all parts of the premises; requirements that live performers be on a raised stage with a bar or wall providing horizontal separation from customers; requirements that live performances occur in a room of a minimum size; prohibition on performances or showing of videos in enclosed booths. Where a license is approved based on plans, the actual license should not be issued until the construction is complete and a certificate of occupancy issued.

Specify operating hours. Some communities limit the operating hours of some or all adult businesses. If a community decides to establish limited operating hours, those hours should be specified in the licensing ordinance.

Establish the license period and expiration date, and put the renewal burden on the applicant. The period of the license will usually be one year. Some licensing officials recommend cycled expiration dates (end of calendar month falling one year after original application filed or something similar) to eliminate peak work periods on licenses; others prefer to coordinate with sales tax filings or business privilege licenses that often occur on a single, specified date. The applicant should be the one who initiates any request for renewal and that should be made clear in the original application process.

STANDARDS FOR PHYSICAL DESIGN OF THE PREMISES

General Standards

Require design to ensure that manager has visual control of the premises. Where the cashier's or manager's station will not have a clear view of the entire premises, require the use of wide-angle mirrors or video systems to provide continuous monitoring of blind spots or remote parts of the premises.

Require design to ensure access control. The cashier's or manager's station should be located so that someone working there can quickly move to halt physically any attempted or accidental entry by a minor.

Address window issues. It is desirable to prevent the display of sexually explicit material to the general public. Many adult businesses, however, address that issue by painting over or other means of obscuring windows, resulting in an entirely blank storefront that may detract from an otherwise pleasant commercial strip. If the community would prefer non-sexual displays in "unblocked" windows, it should specify that in the licensing ordinance.

Address signage issues. It is better to address the matter of sexually explicit messages on signs through the sex business licensing ordinance than through a sign ordinance; through the licensing ordinance, the restriction is clearly a limitation on a privilege, reducing the First Amendment concerns involved in any restriction on sign messages.

Address separation standards for sexually oriented inventory. Some licensed businesses may carry products of interest to the general public and even children. There is no reason for a local government to prevent a sex business from carrying other merchandise, but it may want to require in the licensing ordinance that any youth-oriented merchandise be kept physically separate from the sexually oriented goods. Alternatively, licensed establishments may be required to exclude persons under 18 years of age (or 21 years of age).

Establish restroom standards. The lack of restrooms at licensed businesses where customers may spend an hour or more can result in customers finding ways to relieve themselves in the neighborhood—a fairly

common complaint around some sexually oriented businesses. On the other hand, a restroom can provide a place for sexual activity. A reasonable compromise may be to provide locked restrooms for customer use, requiring that the customer request a key from the manager. There is no easy answer to this issue, but public officials with a preference about how to handle it should address that preference in the licensing ordinance.

Design Standards for Particular Types of Business

For a business with live entertainment, consider requiring a stage. To minimize the risk of physical contact between customers and entertainers, the specifications for the stage should require that it be elevated 24 to 36 inches above floor level and that there be a railing in one of two locations—on the floor in a place that keeps customers at least 36 inches away from the stage; or on the stage to keep performers at least 36 inches away from the edge.

Consider establishing a minimum size space for live performances. The goal of such a standard is to eliminate what we call the "dancer in a box." Although some ordinances require the live entertainment occur in a space of at least 1,000 square feet (or 40 feet by 25 feet), even a requirement for a space of 500 or 600 square feet (20 feet by 25 feet or 20 feet by 30 feet) essentially requires that performances take place before an audience much larger than one—and in full visibility of lots of people, including any visiting enforcement officials.

Consider establishing a minimum size space for showing movies or videos. The effect of a minimum size of 500 or 600 square feet or more is to eliminate video-viewing booths, which is something we recommend doing. If a local government rejects this recommendation or determines that operators may have vested rights to keep existing booths, the community should consider including the following provisions in the licensing ordinance.

- *Require doors off the booths and monitoring of area.* By removing doors from the booths and requiring monitoring of the booth area, it is possible to gain substantial visual control over activity in the booths.
- *Require firewalls between booths.* "Glory holes," which may permit anonymous viewing or even anonymous sexual activity between booths, have been a significant concern in some communities. Managers have reported that some booth users even bring battery-powered drills to create such holes. The best way to ensure that there are no glory holes is to have a firewall or some sort of metal or other durable barrier in the wall.
- *Require porous, easily cleaned surfaces in the booths.* Despite all other efforts, there is likely to be some sexual activity—at least masturbation—in the booths and basic principles of public health dictate that the surfaces that receive the resulting bodily fluids should be easily cleaned.
- *Require adequate lighting.* Establish specific lighting requirements for the hallway or lobby providing access to booths. We encountered loiterers, suggestive looks, and direct pick-up attempts in those hallways; obviously better lighting limits the likelihood of such encounters and increases the security of patrons.
- *Require adequate hallways.* Video booths are essentially small rooms and should have adequate access and egress. Wider hallways to the rooms also facilitate monitoring of booth activity and, if well lit, discourage loitering. Odd corners in hallways can create ideal places for loiterers to lurk, often unseen by casual monitoring.

Connie Cooper

Licensing standards should require the removal of doors from booths. These booths, although in a clean and orderly hallway, allow patrons to hide from management and create private spaces that allow unsavory and even illegal activities.

Our only really nervous moments in our visits to sexually oriented businesses involved encounters with people who were clearly loitering on the premises—typically in the halls leading to video-viewing booths. Most appeared to be seeking an encounter of some sort.

BASIC OPERATING STANDARDS

General Operating Standards for All Licensed Businesses

Require posting of the license. Provide that the failure to post the license is prima facie evidence that there is no license and that the lack of a posted license puts licensed managers and entertainers on notice that the premises may be unlicensed.

Require that a licensed manager or licensed designee be on duty when the premises is open to the public. Such a requirement should be explicit.

Require posting of the name of the manager on duty and the manager's license. Another option should be to post the licenses of all eligible managers and use a changeable nameplate (like those seen at many hotel front desks) to designate "manager on duty."

Require that entertainers' licenses be available on premises for inspection by law officers but not that they be posted. Many entertainers at adult establishments perform under assumed names and want to maintain their privacy and personal security; protecting those private interests also serves the public by reducing the risk of off-the-premises contact between performers and customers. The manager on duty should have ready access to a file containing the licenses of current performers and should offer that file for inspection on request of law enforcement or other designated enforcement officials.

Require posting and enforcement of a "no loitering" policy. Our only really nervous moments in our visits to sexually oriented businesses involved encounters with people who were clearly loitering on the premises—typically in the halls leading to video-viewing booths. Most appeared to be seeking an encounter of some sort. Clearly an adult business can serve as a pick-up place for casual sexual encounters, but it need not. Such sexual encounters are among the undesirable side effects that most communities strive to avoid when they pass an ordinance dealing with sexually oriented businesses. One way to limit the number of such encounters is to motivate management to eliminate loitering on the premises.

Require cooperation with enforcement officials and the availability of the premises for full inspection at any time during business hours. Holding a license is a privilege on which the local government may impose conditions—one condition ought to be that it is not necessary to obtain a search warrant to determine whether a licensee is complying with the ordinance.

Require posting of age-specific restrictions. Whether the age limit is 18 or 21—or some other locally defensible age—should be clear, and it should be clear whether that age limit applies to the entire premises or only specified portions of it.

Establish "duty of the operator" to ensure that minimum lighting standards are maintained. Where enforcement staff has the equipment and training to measure lumens or footcandles, the ordinance should use such a performance measure; otherwise, the ordinance should specify the number of fixtures per square foot of floor space, the fixture height, and the minimum wattage of bulb.

Establish "duty of the operator" to ensure that no sexual or other illicit activity occurs on premises. One of the great concerns of public officials and neighbors is that there will be prostitution or other sexual acts associated with an adult business. Acts of prostitution may be arranged between customers and entertainers or other employees without knowledge of management, virtually eliminating any chance of showing criminal guilt

on the part of the operator—even if the employee is convicted. Thus, it is essential to require that management act diligently to prevent such acts from occurring on the premises.

Establish "duty of the operator" to ensure all the standards and obligations of the license are maintained. It is always useful to have a catch-all clause, although it is also desirable to be specific about as many types of violations as possible.

Operating Standards for Establishments with Live Entertainment

Require that performances take place on a raised stage. See the related design specification standard above. Require that the performers remain on the stage, at least during the performance; some ordinances—and some operators, of their own volition—prohibit entertainers from mingling with customers on the night of a performance.

Establish touching limits between performers and customers. If performers are required to perform on stage and not allowed to mingle with customers, this provision may be unnecessary. On the other hand, many adult entertainers work primarily for tips and may want to collect those tips in person. A local ordinance can allow touching but prohibit contact between the body parts of one person and the genitals or breasts of another person. An ordinance could even limit touching only to contact between human hands. In a community with a history of "lap dancing" or "friction dancing," local policy makers may want to ban those acts with express language in the ordinance.

A local ordinance can allow touching but prohibit contact between the body parts of one person and the genitals or breasts of another person. An ordinance could even limit touching only to contact between human hands.

Where presence of a customer and a model or entertainer together in a booth is permitted (which we do not recommend), require that activity be visible to an employee who is not a model. If an entertainer or model and a customer are in a closed room together, there is significant risk that some prohibited sexual activity will occur. Requiring visibility of activity in the booth provides a degree of security to the employee and to the customer, and the visibility makes for easier enforcement of operating standards.

Specify clothing or body coverage requirements. See Chapter 5 regarding the somewhat confused status of the law of nude dancing. At this time, local governments in many states can require that performers in adult establishments cover at least some body parts; if that is a concern in a particular community, it should be addressed in the ordinance. We believe that maintaining physical separation between patrons and entertainers is far more important than regulating the clothing of entertainers, but we recognize that policy makers in some communities may disagree.

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Operating Standards for Establishments with Video-Viewing Booths

Establish "duty of the operator" to ensure that not more than one person is present in a viewing room at any time. One of the major concerns with viewing booths is that there will be sexual activity in them—obviously the risk of such activity increases with the presence of more than one person in a booth.

Establish "duty of the operator" to ensure that no openings of any kind exist between adult video-viewing rooms. Customers sometimes create their own "glory holes" between booths. The design criterion requiring fire walls or other durable material between booths is a starting point, but the operator should have a duty to ensure that the wall remains solid and opaque.

Establish "duty of the operator" to clean booths regularly and to preclude the presence of bodily fluids on the floors, walls, or other surfaces. This is a obvious health issue.

We have encountered loiterers, suggestive looks, and direct pick-up attempts in hallways; obviously better lighting limits the likelihood of such encounters and increases the security of patrons.

Require that operator maintain lighting for hallway or lobby providing access to booths. We have encountered loiterers, suggestive looks, and direct pick-up attempts in those hallways; obviously better lighting limits the likelihood of such encounters and increases the security of patrons. We have observed missing bulbs in fixtures in such hallways, so merely requiring that the fixtures be installed does not fully address the issue. There may even be reason to specify that the bulbs in these fixtures be protected in some way from tampering.

CATEGORIZING LICENSE VIOLATIONS

Whether using a point system or some other method, a community must specify a relationship between violations of the ordinance and the potential for suspension or revocation of the license. We suggest consideration of these groupings.

Serious Violations Forming Basis for Immediate Suspension or Revocation

- Conviction of the license holder of a crime that is also a license violation—typically, prostitution or dealing in controlled substances
- Revocation or suspension of a similar license held by the same person at another location
- For an individual, conviction of a crime that would preclude the issuance of a license
- For a partnership or corporation, conviction of a control person of a crime that would preclude the issuance of a license
- Operating without a license or with a suspended license

Other Serious Violations

- Interfering with inspections or enforcement
- For an establishment, conviction of a manager on duty for a crime that is also a license violation
- Hiring an unlicensed entertainer or manager
- For an establishment, the occurrence on the premises of prostitution or sale of a controlled substance, with or without the knowledge or participation of management

Moderately Serious Violations

- Allowing a minor on the premises
- Allowing more than one person in a viewing booth
- Allowing performance in a prohibited area—off the stage or in a private booth
- Allowing prohibited touching between customer and entertainer
- Failing to maintain required visibility of activity in booths, or of activity in modeling or other rooms
- Allowing the display of full nudity or sexually explicit material in an area visible to the general public
- Allowing performance without required clothing.
- For an establishment, failing to have a licensed manager on duty

Less Serious Violations (Of Concern Primarily if Repeated or Cumulative)

- Failure to post a license
- Failure to post a no-loitering policy
- Allowing loitering on the premises
- Failure to maintain required lighting
- Failure to maintain required standards of cleanliness
- Conviction of a customer for criminal activity (including a municipal infraction) while on the premises where there is no evidence of participation by the establishment or its management

PROCEDURES FOR LICENSE SUSPENSION AND REVOCATION

1. Specify the grounds for suspension or revocation. Most enforcement systems are progressive, and a suspension should usually precede a revocation, except in case of a very serious violation.
2. If using a point system or other cumulative assessment not leading to a license suspension or revocation hearing, allow the licensee to protest the point or other assessment and to have a hearing. The system can work like the one for minor traffic offenses in many communities: 1) the licensee receives a "ticket," which is notice of a violation and of the related financial and point penalties; 2) the licensee then has the choice either to accept the penalty or to request a hearing and challenge it. This approach provides the basic elements of due process without burdening the local government with a hearing for every assessment of points.
3. Provide for notice and a hearing before any suspension or revocation. Note that due process also requires that such a hearing should be before an "impartial tribunal," which may suggest the use of a hearing officer. The rules of evidence and witnesses should be made clear to the affected party, either in the notice or in a document to which it refers. [Note: This is a quasi-judicial hearing, not a "public hearing" at which the opinions of citizens should be heard. Such a hearing will be open to the public under the laws of most states, but that means that citizens have the right to observe, not to participate.]
4. Provide for a prompt review and specify the license status during the review. From a Constitutional perspective, the safe course of action is to allow the business to continue to operate until the hearing process is complete. However, if this is a hearing to protest the assessment of points, operational infractions that led to the assessment should not be allowed to continue.
5. Provide for judicial review. An aggrieved licensee should have immediate recourse to the courts.
6. Specify the relationship between suspension and revocation. If the grounds for suspension recur within a specified period (for example, one year) after a previous suspension, the ordinance may provide for mandatory revocation.

   In general, review state or local standards and procedures for suspending or revoking an alcoholic beverage license—state and local licensing agencies now have decades of experience in enforcing licensing standards in that field and we can learn from their experience.

Recommendations

IN THE PRECEDING CHAPTERS, WE HAVE TAKEN YOU THROUGH 500 YEARS OF HISTORY. We have gone from censorship by religious leaders to twentieth century controversies over films such as *Deep Throat* and *Behind the Green Door* and onto the availability of x-rated home videos. We have shared with you the magnitude of the sex business as Big Business and introduced you to sex business venues including mainstream retail, adult media stores, sex shops, video-viewing booths, movie theaters, and exotic dancing establishments. We have delved into surveys and studies completed by jurisdictions across the U.S. to ferret out salient findings about the secondary impacts and the non-impacts of sexually oriented businesses. We have reviewed the variety of regulatory measures these jurisdictions have implemented to address potential impacts and the courts' response in light of the Constitution's First Amendment protection for freedom of speech and expression. Finally, we have provided you with several "how to" chapters for guidance in undertaking adult-use studies and crafting zoning and licensing ordinances.

Recognize that sexually oriented uses have a place in a community.

This final chapter wraps it all up with a summary of the recommendations we have provided throughout the report.

GENERAL RECOMMENDATIONS

Recognize that sexually oriented uses have a place in a community. Appropriately sited, well-operated, sexually oriented uses are a reasonable land-use activity within a community.

Do not think the First Amendment gives unlimited protection to all sexually oriented activities. The courts have recognized reasonable restrictions on commercial speech (sexually oriented business media and performances are deemed as a form of commercial "speech"). As Chapter 5 indicates, the Supreme Court in *Central Hudson Gas & Electric Corp v. Public Service Commission*, 447 U.S. 557 (1980), established a four-part test involving the regulation of commercial speech. First, the First Amendment protects commercial speech only if that speech concerns *lawful* activity and is not misleading; second, third and fourth, 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.

Do not assume there is a relationship between criminal activity and sexually oriented businesses. Studies we have reviewed give conflicting evidence that there is a relationship between criminal activity and sexually oriented uses. New York City's very thorough study reached no clear conclusion regarding a relationship between sexually oriented businesses and criminal activity. Denver, Colorado, and Whittier, California, however, which studied the issue, clearly had prostitution flourishing in some of their adult businesses.

Recognize that sexually oriented uses do have negative secondary impacts. Studies completed in Kansas City, Missouri; Rochester, New York; New York City, and other communities substantiate the fact that sexually oriented uses can create secondary impacts such as lowering of property values, and, if not appropriately regulated, provide the opportunity for minors to be exposed to adult materials and performances.

Classify businesses that involve sexually oriented materials or activities into two categories—*retail* and *entertainment* businesses and regulate the land-use impacts accordingly.

Regulate sex businesses based on their retail or entertainment characteristics. Classify businesses that involve sexually oriented materials or activities into two categories—*retail* and *entertainment* businesses and regulate the land-use impacts accordingly. Retail businesses include:

- mainstream bookstores, newsstands, and video stores with sexually oriented materials;
- adults-only or sexually oriented outlets, including adult media outlets and sex shops; and
- percentage stores and retail stores with back rooms containing adults-only materials.

On-site entertainment businesses include:

- movie theaters;
- video-viewing booths, mini-booths, and preview booths;
- live entertainment on stage, "participatory" entertainment, and live entertainment in booths; and
- touching and encounter businesses.

Treat each sex business use as a separate land use. Include in the definitions and interpretation of adult uses that each type of adult uses is a *separate* land-use category.

The terms "a preponderance," "substantial" or "significant" are open to interpretation. To use them in defining adult uses is to invite legal challenge. What is "significant" to the citizens of one community and their lawmakers may be "insignificant" to others—most importantly, a court.

RETAIL BUSINESSES

Quantify the terms "a preponderance," "substantial," or "significant." The terms "a preponderance," "substantial" or "significant" are open to interpretation. To use them in defining adult uses is to invite legal challenge. What is "significant" to the citizens of one community and their lawmakers may be "insignificant" to others—most importantly, a court. The retail value of the materials in stock might be the best measure as to whether a business was really a sex business, but most local governments are not equipped to do full retail inventory audits. Therefore, we recommend a dual threshold for identification of sex businesses—inventory and floor area. In this report, we have used a measure of 40 percent of inventory items and 40 percent of floor area open to the general public; stores

exceeding *either* of those thresholds as regards the presence of sexually oriented materials are treated as sex businesses. The exact percentage can vary and need not be the same percentage for floor area as for inventory. The important message is the use of the percentage and the use of two different measures, making it more difficult for a business that specializes in sex to be classified as a business that does not.

Some local governments might effectively use 30 percent as the threshold. We think that using a threshold of less than 30 percent leaves the community open to the argument that the amount of area or inventory devoted to sexually oriented materials is not "significant." Likewise, we would not recommend the use of 50 percent because there is too much room for error on either side of that mark to make it perfectly clear whether a business is or is not a business dealing primarily in sexually oriented materials.

Classify as a sex business any retail operation[s] that "self-designate" as a sexually oriented business. Another measure of whether a retail store is an adult use is what we refer to as self-designated sexually oriented retail uses. This works well for retail operations with inventories and floor space devoted to sexually oriented materials that appear to fall below the percentage that the jurisdiction establishes to define a sexually oriented use. Use the business's own advertisement in sex business directories and other media geared to adults-only merchandise to show that they have designated themselves to be sexually oriented uses.

Treat bookstores, video stores, and newsstands that have isolated backrooms with sexually oriented material like other retail operations. "Mainstream" bookstores, video stores, and newsstands with backrooms containing hard-core, adults-only material should be treated under zoning just like stores that do not carry such materials, subject to the condition that the explicit material is kept in an access-controlled back room. We like to refer to these stores as "media stores" because they devote less than the suggested 40 percent of their floor area or inventory to adult media. If the percentage of floor area or inventory rises to the suggested 40 percent or greater, the store should be treated as an adult use.

Classify bookstores, video stores, newsstands and other businesses that carry sexually oriented novelties as sex shops. We recommend that stores carrying only media-related merchandise (books, videos, magazines, newspapers) be treated as media stores unless their stock exceeds the prescribed threshold for meeting the definition of a sexually oriented use. If such a store, however, also sells sexually oriented novelties, it should be classified as an adult store even if the percentage of media items is below the threshold for an adult use. The inclusion of these other items suggests that the business is primarily in the business of selling sex.

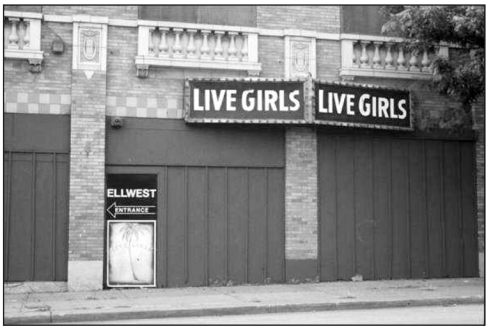
Provide for reasonable control of public display and access to sexually oriented media. Media stores or video stores carrying hard-core media should prevent the public display of adult media at or within the portions of the business open to the general public. Stores should be required to keep adult media in a separate room of the store not open to persons under the age of 18, and that space needs to be controlled by electronic or other means.

Stores that carry a mix of sexually oriented merchandise should be designated as sexually oriented uses and be classified as "sex shops." Mixing lingerie, leather goods, and sexually oriented media or adding sex toys to the product mix of a retail outlet causes it to take on the image of selling sex, which makes it very different from a store that sells books or videos, some of which happen to be sexually oriented. We recommend

Mixing lingerie, leather goods, and sexually oriented media or adding sex toys to the product mix of a retail outlet causes it to take on the image of selling sex, which makes it very different from a store that sells books or videos, some of which happen to be sexually oriented. We recommend these stores be referred to as "sex shops."

Eric Damian Kelly

The 25-cent mini-movies and private viewing booths are accessory uses to this adult bookstore. The booths provide on-site entertainment that changes the land-use impacts of the bookstore. If a jurisdiction opts to allow such accessory uses to bookstores, the bookstores should be sited in locations suitable to those for businesses with on-site entertainment.



Eric Damian Kelly

Except in states like Washington, Oregon, and New York, which have strong freedom of expression provisions in their state constitutions, communities can probably ban and can certainly limit nude dancing, which our society has clearly come to understand is meant by the expression"live girls."

these stores be referred to as "sex shops." These stores should be treated more restrictively than adult media stores (adult media stores contain 40 percent or greater adult media). We do not believe that zoning for sex shops is essential to the protection of First Amendment values in the same way as zoning for adult theaters. (See our recommendation below.)

Do not automatically permit video-viewing booths as accessory uses to bookstores or newstands. In many jurisdictions, video-viewing booths have been allowed to evolve as accessory uses to bookstores in locations that may be entirely appropriate for retail uses like bookstores but that are not appropriate for video-viewing booths. Video-viewing booths provide on-site entertainment; their presence creates different land-use impacts than those of retail operations that provide adult media. If a jurisdiction permits co-location of video-viewing booths with bookstores, it should site them in locations suitable for on-site adult entertainment activities.

ON-SITE ENTERTAINMENT BUSINESSES

Motion picture theaters specializing in sexually oriented movies enjoy considerable Constitutional protection. An adult movie theater is a building, a land use, and a physical entity that, under applicable decisions of the U.S. Supreme Court, is entitled to certain First Amendment protections.

Provide stringent regulatory control for adult uses that offer on-site entertainment. The most significant impacts of sexually oriented businesses on neighborhoods involve businesses with on-site entertainment, particularly those with direct interaction between patrons and entertainers. These businesses should be regulated through both zoning and licensing ordinances. Zoning should be used to control land-use impacts, and licensing should be used to address operational issues.

The simplest way to limit sexual contact between dancers and customers is to keep the dancers on stage and the customers in the audience. The problem with allowing any contact is that enforcing community standards to allow some types of contact but not other types is impractical—it would essentially require one or more full-time vice officers stationed in every such establishment. By using a raised stage and barriers to keep the patrons or the performers away from each other, a community can make any physical contact difficult and make the enforcement effort much easier—if the dancer is off the stage or the customer is on it, there is a violation.

Nude dancing is at the outer edge of First Amendment protection. The Supreme Court has concluded that nude dancing has very limited Constitutional protection. (See Chapter 5.) But jurisdictions can regulate nudity in public places if done in a content-neutral manner; such prohibition does not suppress expression. Except in states like Washington, Oregon, and New York, which have strong freedom of expression provisions in their state constitutions, communities can probably ban and can certainly limit nude dancing.

Lap dancing is not a protected form of entertainment. It is our opinion that the lap dancing is not dancing. Whether it is inherently immoral or ought to be illegal is an issue for local determination. In our opinion, however, this is much closer to prostitution (sexual services for a price) than to any other form of dancing that we have encountered; it should be treated accordingly under local law and policy.

There is no reason for entertainment to take place in a closed booth or private room. Like lap dancing, entertainment in an enclosed booth or private room bears no resemblance at all to dancing and is not the type of

performance protected by the First Amendment. It is certainly something that a community can allow if it chooses to do so—but no community should do so under the delusion that it is entertainment protected by the First Amendment.

There is no compelling reason to permit video-viewing booths within a jurisdiction. Video-viewing booths generate a lot of revenue but often have the undesirable impact of serving as "masturbation booths" and environments for prostitution. We can conceive of no compelling reason why any jurisdiction should facilitate the proliferation of this behavior in a quasi-public location. We can find no public benefits that offset the significant public health and safety concerns that we have identified in earlier chapters. Time and technology make a difference. Thirty years ago, when the current booth technology was first distributed, the only medium through which sexually oriented moving pictures were available to many people in many cities was through peepshows or video-viewing booths. The courts might reasonably have found that video-viewing booths were protected by the First Amendment because of the uniqueness of their content. Today, the facts have changed. Video cassette recorders first became generally available to consumers about 25 years ago. Today, they are almost as common as television sets. Furthermore, local governments have permitted the establishment and open operation of adult movie theaters offering the same material. Finally, the Internet is rapidly making available similar content to those with computers. In short, we believe there is substantial ground for banning new viewing booths; that is, of course, one of many matters that ought to be reviewed carefully with local counsel before making a public policy decision. Dealing with existing viewing booths is more difficult—that must occur in the context of state law regarding vested rights and nonconforming uses in general.

A jurisdiction should strictly regulate or ban "touching and encounter businesses." "Touching and encounter businesses" have little if any Constitutional protection (see Chapter 5) and come closest to constituting a form of legalized prostitution in a community. A community may choose to allow one or more of these businesses, but a local government should not provide for them in a zoning ordinance because of any misunderstanding that they share the same Constitutional protection as movie theaters and stores dealing in sexually oriented books and videos. These businesses include: nude encounter studios; lingerie modeling studios; nude photography studios; adult motels; sex clubs; "bath houses"; massage studios not operated by medical professionals or certified massage therapists; and body-painting studios.

Require massage therapists to meet professional certification standards. We recommend that jurisdictions adopt massage therapist licensing ordinances based on the certification program of the American Massage Therapy Association (www.amtamassage.org) or The National Certification Board for Therapeutic Massage and Body Work (www.ncbtmb.com). (See "certified massage therapist" in the definitions section of Chapter 7.) If a state provides for licensing of massage therapists, a community should require them to hold a state license.

SEPARATION REQUIREMENTS

Separation standards for adult uses are justifiable. Requiring the separation of adult uses from residential uses and certain institutional uses is justifiable based on findings from studies that have shown that secondary impacts, including negative impacts on property values and problems

"Touching and encounter businesses" have little if any Constitutional protection . . . and come closest to constituting a form of legalized prostitution in a community.

Connie Cooper

Playland Gifts offers video-viewing booths next to lots of other types of merchandise. There is no compelling reason to permit video-viewing booths within a jurisdiction. There are no public benefits that offset the significant public health and safety concerns related to behavior in and around video-viewing booths that the authors and city studies have identified.

A principal purpose of zoning is to separate incompatible uses, and there is a basic incompatibility between an entirely adult-oriented entertainment use and a use or activity that regularly includes youth.

with land-use compatibility, exist. Specifically, there is evidence of an adverse effect on real estate values of residential properties and some businesses uses within the proximity of sex businesses. Religious, educational, and other institutional uses commonly found in residential neighborhoods are generally afforded—and typically need—the same protection from incompatible land uses, including sexually oriented businesses, that is offered for residential uses.

Establish minimum separation distances between adult uses and family-oriented uses. A principal purpose of zoning is to separate incompatible uses, and there is a basic incompatibility between an entirely adult-oriented entertainment use and a use or activity that regularly includes youth. In addition, studies in Indianapolis and Rochester show that sex businesses are likely to have negative effects on the property values of residences and similar uses within 500 to 1,000 feet. Based on these findings, cities should consider separation distances between adult uses and "protected uses or districts," which include:

- exclusively residential uses or districts;
- houses of worship;
- public or licensed educational institutions that serve persons younger than 18;
- day care centers;
- a public park, recreation area, or playground;
- libraries, museums, and other public buildings;
- entranceways into the community;
- historic districts; and
- transit malls.

Note that it may be necessary to adjust the separation requirements for some or all of these uses if the effect of application of the separation requirements is to eliminate most or all practical sites for sex businesses.

Impact of adult uses vary based on distance. Real estate professionals believe that there is a significant negative impact of sexually oriented businesses on both residential and business properties within 500 feet. These impacts are less significant if the separation between the studied use and the other use is 500 to 1,000 feet. Beyond 1,000 feet, there may be some impact, but beyond 1,500 feet, there is no basis for believing that there will be any impact on property values. The greatest impacts on property values are on other properties on the same block.

Communities should consider using pedestrian or driving distances in measuring the separation. Separation requirements should be measured from property line to property line, following the route of property lines along public rights-of-way (in order to approximate pedestrian distances). For leased spaces in multitenant properties, the measurements should be from the outer boundaries of the leased space (projected to ground level, if applicable); for leased space in single-tenant properties, the measurements should be from the property lines. If, once separation standards are set, it is found that the number of sites for sex businesses are nearly eliminated, separation might need to be measured differently. (See below for a discussion of site availability.)

Separation between adult uses. To reduce the concentration of adult uses and thus their impact on non-adult-oriented uses, it is appropriate to

require a reasonable separation between one adult use and another. Typical separation between uses ranges from 500 feet to 1,000 feet.

Separation requirements are defensible, but they must be reasonable. If separation requirements have the effect of eliminating most practical sites for sex businesses, they are too stringent. Certainly, separation requirements keeping sex businesses off residential blocks are reasonable and defensible.

If separation requirements have the effect of eliminating most practical sites for sex businesses, they are too stringent.

There must be actual sites available for uses protected by the First Amendment. The courts have been clear in requiring that there must be sites for sexually oriented businesses reasonably available on the open market; the courts are much less clear about how many sites is enough. As a practical matter, if a community can show that there are enough available but unused sites to increase the number of local businesses by a reasonable percentage, the limits are probably defensible. It is difficult to give numerical guidelines. If a community has only one sex business, there should probably be sites available for several more, depending on the size of the community. If a community has 80 sex businesses and there are practical sites available for 20 more, with some of those sites actually vacant and available for sale or lease, the community should be able to demonstrate that it has allowed a reasonable number of sites.

APPROPRIATE DISTRICTS FOR ADULT USES

Adult uses are not appropriate for neighborhood-oriented business districts. Neighborhood commercial districts are designed to be family oriented and are therefore not suitable for adult uses. This should not be interpreted to exclude retail video and bookstores that offer adult material in back rooms that do not exceed the percentage set by the jurisdictions to define what constitutes an adult use.

Neighborhood commercial districts are designed to be family oriented and are therefore not suitable for adult uses.

Intense commercial and some industrial districts are appropriate districts for adult uses. Relatively intensive commercial zones work well for adult media stores and adult entertainment venues if those districts currently permit on-site entertainment. These uses would, of course, be subject to the separation standards established for adult uses from protected uses. Some communities have tried to limit adult businesses entirely to industrial zones. Some adult business owners have expressed interest in highway locations that are located far away from residential areas, and some industrial zones may provide such sites. In general, intensive commercial districts, such as those found along major arterial roads in many communities, are often suitable for these uses. Mixed-use districts that permit residential uses are typically not appropriate for adult uses. "Adult cabarets" or nude dancing establishments often flourish in areas near conventions centers, but community leaders sometimes prefer to discourage such uses near downtown centers.

Uses protected by the First Amendment must be allowed by right somewhere. Allowing sex businesses only as conditional uses violates the fundamental legal principles discussed in Chapter 5. It may be Constitutionally acceptable to allow such uses as conditional uses in some zones, subject to clear standards of review, so long as the uses are also allowed in other zones as uses by right.

STUDIES

Studies provide the findings upon which to base regulations. Findings from local studies are better than studies from other communities, but the Supreme Court has been willing to accept the use of studies from other communities.

Local studies enhance credibility. Undertaking a local study of adult uses and businesses that carry adult materials enhances the jurisdiction's credibility with the operators of these businesses as well as the public's view of the seriousness with which the jurisdiction is approaching the issues. And, as noted above, the courts view specific, local findings to be most valid in judging the appropriateness of regulations for such businesses.

The industry often challenges local regulations on the basis that the regulations are written to control problems that will not occur. A local government can use licensing to allow those businesses that create no problems to continue to operate and to shut down those where problems occur repeatedly.

ZONING AND LICENSING

Zoning is an essential but inadequate tool to regulate sexually oriented businesses. The communities with the most detailed operational controls use business licensing ordinances rather than zoning to implement those controls.

Licensing offers a means of continuing control. The industry often challenges local regulations on the basis that the regulations are written to control problems that will not occur. A local government can use licensing to allow those businesses that create no problems to continue to operate and to shut down those where problems occur repeatedly. Note that licensing is most relevant and most defensible in dealing with businesses that involve on-premises entertainment; it is much less relevant and less defensible in dealing with bookstores and other protected retail uses.

Permitting systems (licensing and conditional use) should have standards. Discretionary permitting systems (including conditional use zoning) run the risk of being found to be prior restraints on speech. Standards should be clear.

Reasonable operating restrictions are acceptable. Standards on lighting, monitoring of booths, control of age of customers, and even on operating hours are generally acceptable. Operating hours are most likely to be troublesome where many other businesses are allowed to operate 24 hours per day but sexually oriented businesses are not. Where operating hours are applied generally to businesses, they are probably a safe approach for dealing with sexually oriented businesses.

Delays in processing applications may also serve to undermine the legitimacy of the community's licensing program overall.

Permitting systems must have time limits on the decision. Simply requiring that the hearing be held within a specified time or that the decision be made within 30 days after completion of all inspections or some other open-ended process is inadequate; there must be a firm deadline within a reasonable period after the submission of a complete application. Holding to such a standard will help keep a community out of court on charges that it is deliberately foot-dragging as a means of prohibiting sexually oriented businesses. Delays in processing applications may also serve to undermine the legitimacy of the community's licensing program overall.

Points system. We recommend using a point system for license suspensions and revocations for several reasons. Most people are familiar with penalty-point systems because most state driver licensing laws use them. A point system provides a measurable and reasonably objective way of tallying the effect of cumulative offenses, some of which may, if considered alone, seem minor. If each assessment of points offers the license holder notice and the opportunity for a hearing, as it should, a final hearing on a license suspension or revocation will be much simpler and will simply focus on the fact that the licensee has accumulated the specified number of points, not on the details of each offense. The local ordinance should be worded so that the assessment of points stands, and the facts behind it are presumed to be true, unless the licensee requests a hearing within a specified time and successfully challenges the points at the hearing; this approach is also similar to state driving laws, most of which allow a traffic offender to pay a ticket and accept the automatic assessment of points or to go to trial and challenge both.

EXISTING NONCONFORMING ESTABLISHMENTS

Specify the validity of an existing nonconforming use and limit that validity to that specific use only. Where an adult use is considered a lawful nonconforming use, the right to continue such nonconforming use should be limited to that specific use and should not be extended so as to allow another adult use in its place.

Accommodate improvements while addressing undesirable operational issues. Allow and encourage exterior and interior maintenance and even aesthetic upgrades at those establishments that have the right to continue to operate as lawful nonconforming uses. Use licensing to deal with undesirable secondary effects of operations involving on-premises entertainment, such as video-viewing booths.

Amortization. A few communities, most notably New York City, have successfully forced the closure of existing sexually oriented businesses. The law of amortizing established land uses varies significantly by state, and it is thus impractical to make a general recommendation on amortization. Note, however, that the licensing technique recommended in this report provides a community with the ability to impose new operating standards on an existing business; through licensing, it may be possible to do such things as moving performers onto a stage (and out of the audience and their laps), removing doors from viewing booths, and requiring improved lighting and public health controls—all without confronting the complex legal issues often involved in amortization.

Through licensing, it may be possible to do such things as moving performers onto a stage (and out of the audience and their laps), removing doors from viewing booths, and requiring improved lighting and public health controls—all without confronting the complex legal issues often involved in amortization.

Relocation or purchase. We recommend that jurisdictions seriously consider the use of negotiated purchase and/or eminent domain to acquire some of these businesses (in states where amortization laws are severely limiting). The cost may not be great, particularly if there are opportunities to relocate the businesses to sites that would preserve much or all of the income of the business—this might include some property trades.

LEGAL CONTEXT

General regulations are the most likely to withstand scrutiny. Banning all public nudity or the showing of any movies in enclosed booths is much safer than regulating a particular class of performance or movies.

Content-neutral regulations are more likely to withstand scrutiny than those that are content oriented. This recommendation is similar in principle to the preceding one. Banning all video-viewing booths is a general regulation; banning all video-viewing booths in sexually oriented businesses (regardless of what videos are actually available in them) is not general but is arguably content-neutral.

Allowing sexually oriented businesses only as conditional uses is probably unconstitutional, although the Supreme Court has not directly addressed the issue. Most conditional use review processes involve the sort of discretionary decisions that the Supreme Court has found to create unconstitutional prior restraints if employed to control the establishment of uses protected by the First Amendment. In states where it is possible to set up firm criteria for conditional use reviews—such as separation requirements specified in feet and other objective standards—it may be possible to use conditional use review. If protected businesses (e.g., movie theaters and media shops) are allowed by right in some areas, conditional use reviews in other areas *may* withstand Constitutional scrutiny. Conditional use reviews are entirely appropriate for uses that do not have First Amendment protection (e.g., sexually oriented massage parlors, other "touching" businesses, encounter businesses, and escort services).

Obscenity and prostitution are not protected by the First Amendment. These concerns ought to be addressed directly through criminal ordinances rather than used as the basis for regulating legitimate adult businesses.

Remember that the First Amendment protects the message and, indirectly, its medium, not the business. With a movie theater, the medium and the business are essentially the same. With books and videos, they are quite different. Stay focused on the message.

Not all sexually oriented businesses are ugly deteriorating operations. The sex businesses that we have visited range from those as sleazy as our worst expectations to some that were, for lack of better terms, classy and glitzy.

SEX MYTHS

The sex business is a marginal business operation. The sex business is a big business. Its volume is currently measured in the billions of dollars, meaning that the demand for its products is broad—cutting across a large part of society—and deep, involving many repeat customers.

All sex businesses are seedy. Not all sexually oriented businesses are ugly deteriorating operations. The sex businesses that we have visited range from those as sleazy as our worst expectations to some that were, for lack of better terms, classy and glitzy.

Sex business employees are mostly transient workers. We have found that many of the employees working in adult businesses are long-time employees. Often the owner is the primary employee.

Only deviants frequent sexually oriented businesses. Each store has its own clientele. The grungy ones tend to attract grungy customers, but the best-maintained and best-merchandised stores clearly attract more upscale clientele and may be frequented by couples.

Appendix A. Bibliography

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A collection of essays tracing the concepts of obscenity and pornography in 300 years of Western culture.

Kelly, Eric Damian, ed. 2000. *Zoning and Land Use Controls.* New York: Matthew Bender.

This 10-volume legal treatise includes comprehensive treatment of legal issues affecting the regulation of the sex industry; Chapter 5 of this report is based on Chapter 11 of the set but represents only a small part of its content. Chapter 11 is available separately from the set at the publisher's Web site, http://www.bender.com

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Kendrick, an English professor, traces the history and the contemporary concept of pornography from the spread of modern printing techniques in the nineteenth century to the evolution of film and video in the last quarter of the twentieth century. This work is much cited by others. The book takes its title from a nineteenth century listing of pornographic books kept in a locked collection.

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